

**HEARING ON WORKER-MANAGEMENT RELATIONS:
EXAMINING THE NEED TO MODERNIZE
FEDERAL LABOR LAW**

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH,
EMPLOYMENT, LABOR, AND PENSIONS

COMMITTEE ON EDUCATION
AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTEENTH CONGRESS

SECOND SESSION

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HEARING ON WORKER-MANAGEMENT RELATIONS: EXAMINING THE NEED TO MODERNIZE FEDERAL LABOR LAW

**Thursday, April 26, 2018
House of Representatives,
Subcommittee on Health, Employment, Labor, and Pensions,
Committee on Education and the Workforce,
Washington, D.C.**

The Subcommittee met, pursuant to notice, at 9:33 a.m. in Room 2175 Rayburn House Office Building, Hon. Tim Walberg [Chairman of the Subcommittee] presiding.

Present: Representatives Walberg, Wilson of South Carolina, Roe, Allen, Lewis, Rooney, Smucker, Foxx; Sablan, Norcross, Shear-Porter, Espallat, Courtney, Bonamici, and Scott.

Staff Present: Courtney Butcher, Director of Member Services and Coalitions; Michael Comer, Press Secretary; Rob Green, Director of Workforce Policy; Callie Harman, Professional Staff Member; Nancy Locke, Chief Clerk; Geoffrey MacLeay, Professional Staff Member; John Martin, Workforce Policy Counsel; Kelley McNabb, Communications Director; James Mullen, Director of Information Technology; Krisann Pearce, General Counsel; Benjamin Ridder, Legislative Assistant; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Olivia Voslow, Legislative Assistant; Joseph Wheeler, Professional Staff Member; Lauren Williams, Professional Staff Member; and Michael Woeste, Deputy Press Secretary; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Kyle deCant, Minority Labor Policy Counsel; Andre Lindsay, Minority Staff Assistant; Kevin McDermott, Minority Senior Labor Policy Advisor; Richard Miller, Minority Director of Labor Policy; Veronique Pluvoise, Minority Staff Director; and Kimberly Toots, Minority Labor Policy Fellow.

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

Good morning, and welcome to today's Subcommittee hearing. I would like to thank our panel of witnesses and our members for joining today's important discussion.

Today, we will examine the need to modernize certain federal workplace laws, including updates to policies within the *National Labor Relations Act* to strengthen the rights of workers to make free and informed decisions about whether they want to join or remain associated with a union.

We will also look at issues surrounding worker centers, and whether they are complying with relevant statutes under the *Labor-Management Reporting and Disclosure Act*, LMRDA, and if not, what updates need to be made in order to ensure transparency and accountability.

Worker centers were designed to be a resource in low-income communities. However, current ambiguities in the law have allowed them to engage in direct negotiations with employers on behalf of employees. The insufficient reporting standards currently in place limit the amount of information available to the Department of Labor and the public on just how many of these organizations currently exist and the types of activities they engage in with employers and employees.

Enacted in 1935—that is before I was born; I want you to know that.

[Laughter.]

Chairman WALBERG. I would ask my colleagues to help me out on that one. Long before, okay.

The NLRA guarantees most private-sector employees the right to organize and bargain collectively with their employers through representatives of their choosing, or to simply refrain from such activities. While this remains the mission of the NLRA, the law is showing its age. Many of the law's key provisions have not been updated since 1947, and it may be time to revisit the law to meet the needs of our 21st century workforce.

Additionally, the National Labor Relations Board, created through the NLRA, was designed to act as a neutral arbitrator to ensure a level playing field between employers and union leaders, but that hasn't been the case in recent years. But more importantly, the NLRA and NLRB were designed to protect the right of workers to make fully informed decisions about whether they want to join a union.

In this hearing we will also explore how union dues are being used for political activities that may not align with the beliefs of its members. We will further examine situations where employees are not afforded the protection of the secret ballot. Congress has an obligation to examine how laws can be modernized in order to restore and uphold the rights of all of its workers.

I look forward to hearing from the witnesses on how we can ensure freedom of choice, restore balance and fairness, and help create an environment where workers and businesses can thrive.

[The statement of Chairman Walberg follows:]

Prepared Statement of Hon. Tim Walberg, Chairman, Subcommittee on Health, Employment, Labor, and Pensions

Good morning, and welcome to today's subcommittee hearing. I would like to thank our panel of witnesses and our members for joining today's important discussion.

Today we will examine the need to modernize certain federal workplace laws, including updates to policies within the National Labor Relations Act (NLRA) to strengthen the rights of workers to make free and informed decisions about whether they want to join or remain associated with a union.

We will also look at issues surrounding worker centers, and whether they are complying with relevant statutes under the Labor-Management Reporting and Disclosure Act (LMRDA) and if not, what updates need to be made in order to ensure transparency and accountability.

Worker centers were designed to be a resource in low-income communities; however, current ambiguities in the law have allowed them to engage in direct negotiations with employers on behalf of employees. The insufficient reporting standards currently in place limit the amount of information available to the Department of Labor and the public on just how many of these organizations currently exist and the types of activities they engage in with employers and employees.

Enacted in 1935, the NLRA guarantees most private sector employees the right to organize and bargain collectively with their employers through representatives of their choosing, or to simply refrain from such activities. While this remains the mission of the NLRA, the law is showing its age. Many of the law's key provisions

have not been updated since 1947, and it may be time to revisit the law to meet the needs of our 21st century workforce.

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In this hearing, we will also explore how union dues are being used for political activities that may not align with the beliefs of its members. We will further examine situations where employees are not afforded the protection of the secret ballot.

Congress has an obligation to examine how laws can be modernized in order to restore and uphold the rights of all workers.

I look forward to hearing from the witnesses on how we can ensure freedom of choice, restore balance and fairness, and help create an environment where workers and businesses can thrive.

Chairman WALBERG. Before I yield to Ranking Member Sablan for his opening remarks, I want to yield first to Chairwoman Foxx.

Mrs. FOXX. Thank you, Chairman Walberg. I want to take just a moment to honor and to thank Molly Salmi during what will be her last hearing here with us at the Education and Workforce Committee.

Molly began her congressional career as a staff assistant on the Committee in the 100th Congress. And for those of you who don't know, we are in the 115th right now. For the past 16 years, she has been deputy director of workforce development. Next week, she will close out nearly three decades of service here.

Eight Committee chairs, Republican and Democrats, have had the benefit of Molly's guidance, direction, and honest feedback. Here at the Committee, as all the members know, our policy staff is split between the education issues and the workforce issues. Molly may be the longest-serving member of the Committee's workforce staff, but she has the heart of an educator.

Many years ago, Molly established herself as mentor to young staff members who have gone on to have some remarkable careers. She took the time to really invest in her colleagues. And those of us sitting here on this dais have been the beneficiaries of that effort.

As an educator myself, I can tell you that Molly makes that kind of one-on-one teaching look easy. It isn't always easy, but she has truly set a standard, and she is leaving a legacy.

Molly, on behalf of all the members of this committee, thank you. Thank you for understanding and demonstrating what servant leadership can look like, and thank you for giving us so many years.

[Applause.]

Mr. SCOTT. Will the gentlelady yield?

Mrs. FOXX. I will yield after I make one more quick comment, and that is we want to wish you a happy birthday on Monday.

I yield.

Mr. SCOTT. Thank you. Thank you very much.

Mr. Chair, I want to recognize the hard work of Molly Salmi, too, for 29 years of dedicated service to the House Committee on Education and the Workforce. As it has been pointed out, she joined us as staff assistant and advanced over the years to serve as deputy director of workforce policy. She has been an informed advisor, a consummate professional, and has earned the trust and respect of all of the members and staff of this committee. That is no small feat in a time when politics in our society has become so polarized.

So, on behalf of the members of the Committee and staff on this side of the aisle, I want to thank her for her public service and wish her the best of luck in her future endeavors, and let her know that she will be missed.

Thank you. And, Madam Chair, I appreciate the birthday greetings. Thank you.

Mrs. FOXX. I yield back, Mr. Chairman.

Chairman WALBERG. I thank the Chairwoman and the Ranking Member. And happy birthday as well.

I first met Molly when I came here as a freshman on this committee back in 2007, and then had the great fortune to have her work me into a subcommittee chairmanship of Workforce Protections. And I have had the privilege since then to work with her in this subcommittee, as well.

I have always, Molly, seen you as one who was a stable force, not ruffled in any way, shape, or form, honest on the issues, and directing us in the best way possible. The only lack of integrity I have seen in you is saying that you have been here 30 years. I can't believe that. You have worn it well. And some of us haven't been so successful in doing that, but you have.

You have been a kind force, you have understood all of the material needed, and you have made it much easier for us in working through difficult issues in the workforce area, and working, in many cases, in a bipartisan fashion to come up with solutions and ways to move forward.

We wish you all the best. We know the reasons that you are leaving are of the highest priorities, and shows your commitment to do what is necessary to complete any task that you are given well. God bless you, and we wish you all the best.

And now I yield to the Ranking Member for his opening remarks for today.

Mr. SABLON. Yes, thank you very much, Mr. Chairman. And I also join you, Chairwoman Foxx and Ranking Member Scott.

Molly, thank you very much for your service. And God bless you and godspeed on your—on wishing you every success in life. Thank you. I know you started here when you were less than 10 years old.

Mr. Chairman, thank you for holding this hearing today. The *National Labor Relations Act* protects, by law, the right of workers to form unions in order to rectify the inequality of bargaining power between employees and employers. However, the NLRA fails to enforce workers' rights with meaningful remedies. There are no civil penalties when employers violate workers' rights under the Act. Employers understand they can retaliate against workers for engaging in union activity with limited consequences. Often times the

sole sanction is that the employer is ordered to post a notice stating it violated the law, or years later award back pay minus any interim earnings.

Lacking a meaningful deterrent, there has been an intensification of aggressive, anti-union campaigns which, in turn, has contributed to the decline of union membership. This has exacerbated incoming inequality and contributed to wage stagnation for those in the middle, while serving as a boon for those in the top 10 percent.

Post chart, please?

[Chart]

Mr. SABLON. Thank you. As you can see from the chart, as union membership has decreased from 27.1 percent to 11.1 percent between 1973 and 2015, the share of income going to the top 10 percent has increased over that same time, from 31.9 percent to 47.8 percent. Over the past four decades, wages for working people have stagnated.

When union memberships hovered around 30 percent between the end of World War II and 1973—that was when Mr. Walberg was born, I think—wages grew over 90 percent. However, as union membership decreased all the way down to 10.7 percent in 2017, wages have only grown by 12.3 percent, adjusting for inflation.

Safeguarding the right to join a union and negotiate for better wages and conditions is critical to reversing income inequality, growing the middle class, and making sure workers receive their fair share of the wealth that they create.

To address the need to modernize labor law, my Democratic colleagues and I have cosponsored legislation that would do exactly that: H.R. 4548, the *WAGE Act*, protects the right to join a union by providing prompt and fair remedies to deter unfair labor practices.

The *WAGE Act* would authorize meaningful sanctions for those who break the law. It prevents workers from being mis-classified and denied their legal recourse. It facilitates disparate resolution procedures to enable employers and unions to conclude a first contract if workers choose to join a union.

I would be remiss if I did not note the mismanagement and conflicts of interest that have affected decision-making at the National Labor Relations Board over the past six months. The board's mission under the NLRA is to protect workers' rights and promote collective bargaining.

For example, prior to serving on the board, member William Emanuel was a law partner at Littler Mendelson, one of the largest management-side firms in the country. The firm represented a party in the *Browning-Ferris* joint employer case, which is currently before the D.C. Circuit.

Member Emanuel voted to overturn *Browning-Ferris* in a case called *Hy-Brand*. Emanuel then voted to direct the general counsel to move the D.C. Circuit to remand *Browning-Ferris* back to the board.

The NLRB's inspector general investigated and concluded that Member Emanuel violated his ethics pledge. The board's ethics official agreed. By voting when he should have recused himself, Eman-

uel undermined the due process rights of workers in both the *Browning-Ferris* and the *Hy-Brand* cases.

Mr. Chairman, I ask unanimous consent to enter into the record the NLRB inspector general's notification of "a serious and flagrant problem and/or deficiency," dated February 9th, and the report dated March 20.

I also ask for unanimous consent to enter into the record an April 18th Politico article titled "Dysfunction and Infighting Cripple Labor Agency."

Chairman WALBERG. Without objection, and hearing none, it will be entered.

[The information follows:]



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

February 15, 2018

The Honorable Lamar Alexander
 Chairman
 Committee on Health, Education, Labor, and
 Pensions
 U.S. Senate
 428 Dirksen Senate Office Building
 Washington, DC 20510

The Honorable Patty Murray
 Ranking Member
 Committee on Health, Education, Labor, and
 Pensions
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 428 Dirksen Senate Office Building
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The Honorable Ron Johnson
 Chairman
 Ranking Member
 Committee on Homeland Security and
 Governmental Affairs
 U.S. Senate
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The Honorable Claire McCaskill
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The Honorable Virginia Foxx
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 Committee on Education and the Workforce
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 2176 Rayburn House Office Building
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The Honorable Robert C. "Bobby" Scott
 Ranking Member
 Committee on Education and the Workforce
 U.S. House of Representatives
 2101 Rayburn House Office Building
 Washington, DC 20515

The Honorable Trey Gowdy
 Chairman
 Committee on Oversight and Government Reform
 U.S. House of Representatives
 2157 Rayburn House Office Building
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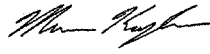
The Honorable Elijah Cummings
 Ranking Member
 Committee on Oversight and Government Reform
 U.S. House of Representatives
 2471 Rayburn House Office Building
 Washington, DC 20515

Dear Members of Congress:

The Board is in receipt of the Inspector General's February 9, 2018, memorandum reporting the existence of "a Serious and Flagrant Problem and/or Deficiency in the Board's Administration of its Deliberative Process and the National Labor Relations Act with Respect to the Deliberation of a Particular Matter." We are evaluating the Inspector General's findings, considering appropriate actions related to Hy-Brand Industrial Contractors, Ltd.,

365 NLRB No. 156 (2017), and reviewing current procedures for highlighting and addressing recusal issues with the assistance of the Board's Designated Agency Ethics Official.

Sincerely,

A handwritten signature in black ink, appearing to read "Marvin E. Kaplan", written in a cursive style.

Marvin E. Kaplan
Chairman

UNITED STATES GOVERNMENT
 National Labor Relations Board
 Office of Inspector General



Memorandum

February 9, 2018

To: Chairman Marvin E. Kaplan
 Member Lauren McFerran
 Member Mark Gaston Pearce

From: David P. Berry *DPB*
 Inspector General

Subject: Notification of a Serious and Flagrant Problem and/or Deficiency in the Board's Administration of its Deliberative Process and the National Labor Relations Act with Respect to the Deliberation of a Particular Matter

I have determined that there is a serious and flagrant problem and/or deficiency in the Board's administration of its deliberative process and the National Labor Relations Act with respect to the deliberation of a particular matter involving specific parties. In accordance with section 5(d) of the Inspector General Act, as amended, I am immediately providing this report to the Board. Section 5(d) requires that within seven calendar days of the date of this report, the Board shall transmit it to National Labor Relations Board's Congressional oversight committees, together with any report by the Board containing any comments that the Board deems appropriate.

Issue

During the course of investigating OIG-I-541, a matter involving the President's ethics pledge found in Executive Order 13770, it was necessary to determine if the Board's decision in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (*Hy-Brand*), is the same "particular matter" as the "particular matter" in *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB No 186 (*Browning-Ferris* or *BFI*). The necessity arises because Leadpoint, a party in *Browning-Ferris*, is represented by Member Emanuel's former law firm.

Executive Order 13770, the President's ethics pledge, prohibits an appointee from participating in a "particular matter involving specific parties" when the appointee's former employer or client is a party or represents a party. The ethics pledge defines "particular matter involving specific parties" as having the same definition found in 5 C.F.R. 2641.201(h)(1). That regulation is part of the regulatory guidance regarding post-employment restrictions found in 18 U.S.C. § 207. The pertinent part of the definition is as follows:

Particular Matter involving a specific party or parties . . . include[s] any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest or judicial or other proceedings, . . . only those particular matters that involve a specific party or parties fall within the prohibition . . . Such a matter typically includes a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case.

The U.S. Office of Government Ethics provided guidance for the determination of whether two proceedings are in fact the same “particular matter.”

The same particular matter may continue in another form or in part. In determining whether two particular matters are the same, the agency should consider the extent to which the matters involve the same basic facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of an important Federal interest.

This guidance is also found in 5 C.F.R. 2641.201(h)(5) and is used by the courts in analyzing facts when determining if 18 U.S.C. § 207 was violated. *See United States v. Montemayor*, 2017 WL 2493906 (U.S. District Court, N.D. Georgia, Atlanta Division).

Analysis

Using the guidance provided by the U.S. Office of Government Ethics and the courts, I determined that, given the totality of the circumstances, the *Hy-Brand* and *Browning-Ferris* matters are the same “particular matter involving specific parties.”

Although the two cases started out as two distinct and separate matters, the manner in which the former Chairman marshaled *Hy-Brand* through the Board’s deliberative process effectively resulted in a consolidation of the two matters into one “particular matter involving specific parties.” In short, the practical effect of the *Hy-Brand* deliberative process was a “do over” for the *Browning-Ferris* parties.

On October 18, 2017, the former Chairman sent an email message with an attached majority decision draft to the Members who joined in the decision stating the following:¹

The attachment is a “heads-up” majority opinion in *Hy-Brand* – the joint-employer case;

When reviewing the draft keep in mind, without focusing on the wording, what the draft accomplishes – restoring the joint-employer law to what existed prior to *Browning-Ferris* – this is not meant to diminish their role in relation to the draft;

¹ The email text is deliberative information. I am including a summarization of the text because I determined that it is essential to show how the consolidation of the deliberative process occurred at the inception of the *Hy-Brand* deliberations and the tone that was set.

The draft mostly includes the “verbatim” language in the joint dissent in *Browning-Ferris*;

There was great difficulty in producing the a consensus draft [dissent], and individual tinkering made it worse;

The attached majority draft – just like the *Browning-Ferris* dissent – is clearly an imperfect compromise;

It may be tempting to suggest a few or massive improvements, but please resist and circulate the draft with very few minor changes; and

If they want to spend more time in the next 30 days considering some adjustments, that could be done after the dissenters respond.

The wholesale incorporation of the dissent in *Browning-Ferris* into the *Hy-Brand* majority decision consolidated the two cases into the same “particular matter involving specific parties.” The dissent in *Browning-Ferris* resulted from the Board’s deliberative process following the adjudication of the facts and determination of law at the Regional level and the submission of briefs by the parties, including Member Emanuel’s former law firm, and amici providing legal arguments for the Board’s consideration. Because of the level of the incorporation of the *Browning-Ferris* dissent into what became the Board’s decision in *Hy-Brand*, it is now impossible to separate the two deliberative processes. Rather, the Board’s deliberation in *Hy-Brand*, for all intents and purposes, was a continuation of the Board’s deliberative process in *Browning-Ferris*.

Because of this level of consolidation and the fact that the *Browning-Ferris* parties were engaged in an enforcement proceeding, the deliberations of the *Hy-Brand* case involved and affected the legal rights of the parties of *Browning-Ferris*. This is illustrated by the majority decision’s factual analysis and application of the law found at pages 18 and 19 of the *Hy-Brand* decision that included the following statements:

The evidence relied on by the *Browning-Ferris* majority amounted to a collection of general contract terms and business practices common to most contracting entities . . . , plus a few actions by BFI that had some routine impact on Leadpoint employees;

Browning-Ferris effected a sweeping change in the law without any substantive discussion of significant adverse consequences raised by the parties and amici in the case;

The *Browning-Ferris* majority nevertheless attempted to distinguish the facts of *Browning-Ferris* based on an “apparent requirement of BFI approval over . . . pay increases” for the supplier employer’s employees;

The expansive nature of the *Browning-Ferris* test was demonstrated by the evidence the *Browning-Ferris* majority relied on to find joint-employer status in that case, which involved a “cost-plus” arrangement common in user-supplier contracts [followed by a list of nine factual statements regarding the *Browning-Ferris* parties]; and

[T]he Regional Director correctly decided under then-extant law that it was not enough to show BFI was the joint employer of Leadpoint's employees.

When analysis at pages 18 and 19 of the *Hy-Brand* decision is paired with the statement “we overrule *Browning-Ferris* and return to the principles governing joint-employer status that existed prior to that decision” at page 2, it is apparent that the majority considered the facts and arguments of the *Browning-Ferris* parties and amici and used those facts and arguments to reissue a *Browning-Ferris* majority decision that stated a new outcome for the parties of *Browning-Ferris* under the re-established principles governing joint-employer status. Additionally, there is no material discussion of the *Hy-Brand* matter in the part of the decision that overrules *Browning-Ferris*. For all intents and purposes, *Hy-Brand* was merely the vehicle to continue the deliberations of *Browning-Ferris*.

After the Board issued the decision, the majority Members immediately directed the General Counsel to request that the circuit court remand the *Browning-Ferris* case. The direction was later rescinded after the Board was informed that the General Counsel had an ethical obligation to notify the court that the *Browning-Ferris* decision was overruled by *Hy-Brand*. Thereafter, the court did in fact remand the case and then denied a motion for reconsideration of the remand. Now that the *Browning-Ferris* matter has been remanded to the Board, there is literally no reason for further deliberations before issuing a decision because the law is settled and a determination of the law to facts for the *Browning-Ferris* parties was established in the *Hy-Brand* decision. Alternatively, if the court had not granted the request for remand, the General Counsel would have been precluded from taking a position before the court in the *Browning-Ferris* enforcement proceeding that was contrary to *Hy-Brand* decision.

The *Hy-Brand* majority decision also acknowledges that the two deliberative processes are consolidated. In response to the dissent's criticism of not seeking amicus briefing, the majority included the following:

Additionally, the issue we decided today was the subject of amicus briefing when the Board decided *Browning-Ferris*.

That sentence was included to specifically address the issue of whether the prior deliberative material was available to the majority Members who were not Members when the *Browning-Ferris* decision was issued. This was necessary because the *Hy-Brand* parties did not seek to overturn *Browning-Ferris*, a further illustration that the Board was in fact not deciding *Hy-Brand* on the merits of that case, but was continuing the deliberative proceedings of the *Browning-Ferris* decision.

Because the *Hy-Brand* deliberation was a continuation of the *Browning-Ferris* deliberative proceedings and involved the application of the *Browning-Ferris* facts to the law for the *Browning-Ferris* parties, Member Emanuel should have been recused from participation in deliberations leading to the decision to overturn *Browning-Ferris*. This determination is limited to very specific facts as to what actually occurred in the deliberative process of *Hy-Brand*, and it is the totality of those specific facts that drives the decision.

Our determination that the *Hy-Brand* and *Browning-Ferris* matters are the same “particular matter involving specific parties” for the purpose of Executive Order 13770 is not a determination that Member Emanuel engaged in misconduct.² The issue of whether misconduct occurred involves a number of considerations, and the resolution of those issues is not appropriate in this type of notification.

Effect

Member Emanuel’s participation in the *Hy-Brand/Browning-Ferris* matter when he otherwise should have been recused exposes a serious and flagrant problem and/or deficiency in the Board’s administration of its deliberative process and the National Labor Relations Act with respect to the deliberation of a particular matter that should be immediately brought to the attention of Congress and addressed by the Board.

In order to maintain industrial peace, the Board’s decisions must be issued in a manner consistent with due process that ensures that those engaged in interstate commerce can rely upon them. In part, that reliance is obtained when the Members perform their duties in a manner that is free of conflicts of interest or the appearance of such, and is accomplished in accordance with all of the Government’s ethics requirements. When the Board falls short of that standard, the whole of the Board’s deliberative process is called into question.

Corrective Action

To remedy the serious and flagrant problem and/or deficiency in the Board’s administration of its deliberative process and the National Labor Relations Act with respect to the deliberation of a particular matter, I recommend the following corrective action:

Member Emanuel’s participation in the *Hy-Brand* decision, when he otherwise should have been recused as outlined above, calls into question the validity of that decision and the confidence that the Board is performing its statutory duties. I recommend that the Board consult with the Designated Agency Ethics Official to determine the appropriate action to take to resolve that issue and restore confidence in the Board’s deliberative process; and

Member Emanuel’s participation in the *Hy-Brand* decision demonstrates that the Board’s current practice of highlighting and addressing recusal issues should be reviewed to determine if it is adequate to protect the Board’s deliberative process from actual conflicts of interest and the appearance of such. I recommend that the Board consult with the Designated Agency Ethics Official to conduct that review and resolve any issues.

² In reaching that determination we have taken into account Member Emanuel’s response to a Congressional inquiry that is related to his participation in the *Hy-Brand* decision and other written matters that he provided to the Office of Inspector General. We have also consulted with the Board’s Designated Agency Ethics Official.

UNITED STATES GOVERNMENT
National Labor Relations Board
Office of Inspector General



Memorandum

March 20, 2018

To: Board

From: David Berry
 Inspector General

DB

Subject: Report of Investigation – OIG-I-541

This memorandum addresses an investigation conducted by the Office of Inspector General (OIG) involving Member William Emanuel (subject). The case was initiated after the OIG received information through its Hotline regarding the subject's participation in the Board's voting on whether to direct the General Counsel to seek remand of *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB No 186 (*Browning-Ferris* or *BFI*) from a circuit court. That information supported an allegation that the subject violated the President's ethics pledge found in Executive Order 13770 in that a *Browning-Ferris* party was represented by the subject's former law firm.

During the course of the investigation, we determined that there were additional issues that warranted our investigative efforts. Those issues included whether the subject's participation in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (*Hy-Brand*) deliberations was in violation of the President's ethics pledge; whether the subject made false statements in response to a Congressional inquiry and in a memorandum to the OIG; and whether the subject violated certain provisions of the *Standards of Ethical Conduct for Employees of the Executive Branch (Standards)*.

Our investigative efforts substantiated that the subject violated the President's ethics pledge. We did not substantiate the allegations that the subject knowingly provided false information in response to the Congressional inquiry or to the OIG or that he violated certain provisions of the *Standards*.

This report, with the attached investigative exhibits (IE), is provided for your review.

FACTS

Background

Normally, cases are assigned to a Member's staff by the Executive Secretary's office. The staff that is assigned to the case is known as the "originating" staff. The staff for the other Members on the panel are known as the "outside" representatives. Following assignment, the case moves to Stage I. During Stage I, the staff holds a "Presub" with the Member. That term is shorthand phrase for a meeting with the Member and the staff to discuss the case and determine the Member's vote. Once a majority is reached, the case is moved to Stage II. In Stage II, the originating staff drafts a decision. When the draft decision is ready to be circulated, the case moves to Stage III. In Stage III, the outside representatives "screen" the draft. The "screen" is the review process by the outside representatives during which the staff makes recommendations to the Member regarding whether to respond to the draft with modifications or edits. Proposed modifications and any dissent are circulated during this stage. The case moves to the issuance stage once a draft decision, including any dissents or separate opinions, is approved or "noted off" by the Members. During the issuance process, the originating staff prepares a "conformed copy" of the draft. The conformed copy is a clean copy that incorporates any modifications and separate opinions. The conformed copy is then approved by a vote of the Member or "noted off" by any Member who did not participate. For the *Hy-Brand* case, all the Members participated.

Hy-Brand, Pledge, and Statements

1. On July 10, 2014, Littler Mendelson, on behalf of its client Leadpoint Business Services (Leadpoint), submitted a reply brief to the Board in 32-RC-109684, arguing that the Regional Director was correct in his conclusion that Leadpoint was the sole employer rather than a joint-employer and that there was no reason to abandon the Board's longstanding joint-employer standards. (IE 1)
2. On August 27, 2015, the Board issued the *Browning-Ferris* decision finding that Leadpoint and BFI Newby Island Recyclery were joint employers and established a new joint employer standard. (IE 2)
3. On February 17, 2016, the NLRB initiated an enforcement proceeding, Court of Appeals Docket number 16-1063, against Leadpoint in the United States Court of Appeals for the District of Columbia. (IE 3)
4. There is no record that Leadpoint made any effort to defend against the enforcement proceeding. (IE 3)
5. On September 26, 2017, the subject was sworn in as a Member. (IE 4)
6. On October 16, 2017, the subject participated in a "Presub" with his staff assigned to the *Hy-Brand* case. (IE 5)

7. On October 18, 2017, the former Chairman sent an email message with a draft majority opinion for the *Hy-Brand* case to the subject, and other individuals, stating the following: (Appendix)

The attachment is a “heads-up” majority opinion in *Hy-Brand* – the joint-employer case;

When reviewing the draft keep in mind, without focusing on the wording, what the draft accomplishes – restoring the joint-employer law to what existed prior to *Browning-Ferris* – this is not meant to diminish their role in relation to the draft;

The draft mostly includes the “verbatim” language in the joint dissent in *Browning-Ferris*;

There was great difficulty in producing a consensus draft [dissent], and individual tinkering made it worse;

The attached majority draft – just like the *Browning-Ferris* dissent – is clearly an imperfect compromise;

It may be tempting to suggest a few or massive improvements, but please resist and circulate the draft with very few minor changes; and

If they want to spend more time in the next 30 days considering some adjustments, that could be done after the dissenters respond.

8. On October 18, 2017, at 3:04 p.m., the subject’s Deputy Chief Counsel sent an email message to the staff attorney and supervisory attorney assigned to the *Hy-Brand* case and copied the subject. The message had an attachment titled “Hy-Brand revised majority draft near-final.docx” and text that read: (IE 6)

Given how short our turnaround time is, there is no need to do a formal (or even informal) screen of this, or to propose any stylistic or “discretionary”-type mods. But please let us know if anything jumps out at you as a problem. Gary, Bill, and I will also be taking a look.

9. On October 18, 2017, at 6:08 p.m., the former Chairman staff circulated an email message to the majority Members, and their staff, with two documents attached. One document was titled “Hy-Brand revised majority draft final to MK and WE (showing changes to near-final draft).docx and the other document “Hy-Brand revised majority draft final to MK and WE (clean).docx.” (IE 7)

10. On October 20, 2017, the draft decision was provided to the minority Members with the subject’s vote “Approved.” (IE 8)

11. On December 1, 2017, the former Chairman’s staff circulated a majority response to the dissent. (IE 9)

12. On December 4, 2017, the subject's staff addressed an issue in a footnote. (IE 10)
13. On December 11, 2017, the subject received an email message with a revised dissent and generally stated that he did not need to do anything. The message also stated that, under the former Chairman's timetable, any further response needed to be circulated by 2:00 p.m. the next day and that the voting needed to be completed by 5:00 p.m. (IE 11)
14. On December 12, 2017, at 1:55 p.m., the subject's Deputy Chief Counsel sent him an email message with an attachment titled "Hy-Brand final majority response to dissent.docx." (IE 12)
15. On December 12, 2017, the Board's case management system recorded the subject's vote as "Approved" in the *Hy-Brand* case for the Majority response. (IE 13)
16. On December 14, 2017, the subject voted to approve the text of the proposal to direct the General Counsel to seek, among other things, the remand of the *Browning-Ferris* case from the circuit court. (IE 14)
17. On December 14, 2017, the Board issued the *Hy-Brand* decision. (IE 15)
18. On December 15, 2017, the Chief Counsel voted "approved" for the subject on the remand direction to the General Counsel. (IE 15)
19. On December 19, 2017, the subject voted to rescind the directive to the General Counsel. (IE 16)
20. On December 19, 2017, the General Counsel filed a motion requesting remand of *Browning Ferris*, including the enforcement application against Leadpoint, Court of Appeals Docket number 16-1063. (IE 18)
21. The General Counsel's motion requesting remand was served on Littler Mendelson as the attorney for Leadpoint. (IE 18)
22. The subject received a letter, dated December 21, 2017, from the Ranking Member and others members of the Committee on Health, Education, Labor, and Pensions and the Committee for Education and the Workforce asking questions related to the *Hy-Brand* decision and the remand of the *Browning-Ferris* case. The questions in the letter state that Littler Mendelson represents Leadpoint in the *Browning-Ferris* matter. (IE 19)
23. In an email message, dated December 22, 2017, to his staff after he received the Congressional inquiry, the subject stated that Littler Mendelson did not represent a party in *Browning-Ferris*. In a response, dated December 28, 2017, the subject was told that Littler Mendelson did in fact represent Leadpoint, a *Browning-Ferris* party. (IE 20)

24. In an email message, dated December 30, 2017, the subject questioned whether Leadpoint was on his recusal list and whether the *Hy-Brand* decision referred to Leadpoint or Littler Mendelson. (IE 20)

25. On January 23, 2018, the subject was notified that he was the subject of an OIG investigation regarding his participation in the *Browning-Ferris* remand matter. (IE 21)

26. On January 26, 2018, the subject provided the following responses to certain questions: (IE 22 exhibit 5)

3. Did you request to participate in *Hy-Brand*?

No. I was automatically assigned to the Hy-Brand case because the case had already been designated as a full Board case prior to my arrival.

13. Please describe in full, and provide any document, including vote sheets, relating to your participation in the Board's decision to move to remand *BFI* to the Board.

On December 15, I voted to direct the General Counsel to seek a remand of several Board decisions pending before the courts of appeals, including BFI. By unanimous vote of the Board members, that directive was rescinded on December 19. . . . At the same time, the Board recognized that the General Counsel, as an officer of the court, has an independent ethical duty to notify the court of recent Board decisions that bear on the cases pending before the courts, including BFI, and stated its expectation that the General Counsel would continue to perform that ethical duty. . . .

At the time of these events, I was unaware that the Littler Mendelson firm represented Leadpoint Business Services, a party in the BFI case, when that case was previously pending before the Board. Littler Mendelson is a huge law firm of more than 1,000 lawyers, and I was involved in only a small fraction of the firm's practice. In any event, under Section 10(e) of the NLRA, the Board no longer had jurisdiction over the case as of the filing of the record in the related D.C. Circuit cases on March 14, 2015 (D.C. Cir. Case Nos. 16-1028, 16-1063, 16-1064). Leadpoint did not contest the Board's BFI decision in these proceedings before the D.C. Circuit, nor did Littler Mendelson enter an appearance with the court.

[Remainder of answer relates to future actions.]

27. On January 29, 2018, the subject submitted a written statement to the OIG that included, in part, the following: (IE 22 exhibit 6)

Because the *Browning Ferris* case was not pending at the Board at the time I was sworn in as a Board member, it did not appear on the Board's comprehensive list of parties as to whose cases I am required to recuse myself; and therefore I was

not informed that my former firm had represented a party in the case several years earlier. Furthermore, I was not independently aware of the historical fact. My former firm is very large with multiple offices and approximately 1,000 lawyers, and I was involved in only a small part of the firm's practice.

28. During the subject's confirmation process, in response to question 18 "Please provide a list of all cases decided by the NLRB and that are currently on appeal in which Littler Mendelson represents a party. . . ." of the Questions for the Record from the Ranking Member, Committee on Health, Education, Labor, and Pensions, the subject provided a list that included on the first of fourteen pages the entry: (IE 22 exhibit 7)

9/25/2015 32-CA-160759 Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery and FPR-II, LLC, d/ DC:DC Circuit

29. In response to question 20 "Please confirm that you intend to recuse yourself for two years from all cases that come before the NLRB in which Littler Mendelson represents a party." of the Questions for the Record from the Ranking Member, Committee on Health, Education, Labor, and Pensions, the subject provided the following response: (IE 22 exhibit 7)

That is my understanding of the requirement. I will do whatever is required by law.

30. In response to question 21 "Leadpoint Services, a party in the Board's *Browning-Ferris* case, is represented by Littler Mendelson. Will you recuse yourself for the required period from any action by the Board that involves Leadpoint Services?" of the Questions for the Record from the Ranking Member, Committee on Health, Education, Labor, and Pensions, the subject provided the following response: (IE 22 exhibit 7)

If recusal questions arise with regard to any particular matter, I will request the advice of the Board's ethics office.

31. After being notified of the discrepancy between his response to the Questions for the Record, the Congressional Inquiry, and the statement provided to the OIG, the subject submitted a letter to the Members of Congress to clarify his earlier response. That clarification stated, in part, that when he initially responded, he did not recall that Littler Mendelson represented Leadpoint; he firmly did not believe that he was required to recuse himself from the vote to direct the General Counsel to seek remand of the *Browning-Ferris* case; and the Designated Agency Ethics Official (DAEO) informed him that he was not obligated to recuse himself. (IE 22 exhibit 12)

32. The following is a summary of the information provided by the subject during an interview: (IE 22)

a. When he responded to the Congressional inquiry questions, some 6 or 7 months after submitting the Questions for the Record, he did not have a recollection of the obscure fact that Littler Mendelson represented Leadpoint in the *Browning-Ferris* matter; (page 35)

b. He did not really answer question 21, indicating that he was not sure about the statement made in the question that Littler Mendelson represented Leadpoint and he did not believe that he was familiar with that fact at that time; (page 35)

c. He avoided the question and simply said that if recusal questions arise with regard to any particular matter, he will request the advice of the Board's ethics office; (page 35)

d. He did not want to go through the effort of tracking down whether the assertion in question 21 that Littler Mendelson represented a party in *Browning-Ferris* was correct; (pages 35-36)

e. He was aware that *Browning-Ferris* was a significant case and one of many reversals of precedent by the Obama Board, but he did not have any joint-employer cases after *Browning-Ferris* was issued; (page 36 & 38)

f. In response to the assertion that a reasonably competent attorney would recall that his firm represented a party in *Browning-Ferris* once that fact was made known to the attorney, he responded that in the confirmation process there are reams and reams of documents; huge forms one after another; and the Questions for the Record were just another form, and he did not focus on it or recall it; (pages 36-37)

g. He has no motive to lie to Congress and he would not do so after leaving his law practice and moving to Washington, D.C., to engage in public service; (pages 39)

h. He did not think of recusing himself from the *Hy-Brand* deliberations; (pages 42)

i. The NLRB has a very elaborate recusal system, and if you are recused they do not assign the case to you; (pages 43)

j. He does not look at every case that comes across his desk and wonder if he has to recuse himself; (page 44)

k. The reason why no one told him that he was recused in *Hy-Brand* was because the *Browning-Ferris* case was before the circuit court and the Board did not have jurisdiction over it; (page 44)

l. There was no reason for him to have a concern that *Hy-Brand* was overturning *Browning-Ferris*; (page 45)

m. That he should be recused in *Hy-Brand* never entered his mind or anyone else's mind at the NLRB; (page 45)

n. It is the Board's responsibility to identify recusal questions. (page 46)

o. He did not agree that Littler Mendelson was representing Leadpoint in the *Browning-Ferris* case because Littler Mendelson had not made an appearance in circuit court litigation and Leadpoint had not participated in the *Browning-Ferris* case in the circuit court; (pages 47-49)

p. Prior to the *Hy-Brand* decision, they had gone through a number of other deliberations with the former Chairman and he did not think that he was going to be able to make a lot of writing style changes to the *Hy-Brand* decision; (page 60)

q. There was some pushback from the career staff about using *Hy-Brand* to overrule *Browning-Ferris*, and he wondered about it but concluded that it was appropriate; (page 61)

r. He did not feel any undue pressure to participate in cases, but he did feel pressure from the time constraints; (page 62)

s. He agreed with the outcome of the *Hy-Brand* decision. (page 62)

t. He did not seek any guidance from the DAEO prior to participating in the *Hy-Brand* decision, before voting in *Hy-Brand*, or when he participated in the direction to the General Counsel regarding the remand of *Browning-Ferris* from the circuit court. (pages 75-79)

u. After he received the Congressional inquiry, he met with the DAEO and during that meeting she told him that she thought that he did not violate the pledge. He requested that determination in writing, but the DAEO did not provide a memorandum to him because she stated that the OIG did not want her to issue or put her determination in writing. (pages 79-80)

ANALYSIS

We determined that the subject did not intentionally provide false information in response to the Congressional oversight committees' request for information or to the OIG. While it is apparent that the subject's statements in response to the Congressional inquiry are inconsistent with the information he provided in response to Questions for the Record question 18 and the fact that the Ranking Member, in question 21, stated that Littler Mendelson represented a party in the *Browning-Ferris* matter, inconsistency alone is not sufficient to show that the subject intentionally lied.

The subject's initial draft response to the Congressional inquiry and his reaction after being informed of the discrepancy supports a finding that more likely than not the subject did not recall that fact when he submitted his response. The subject's email message that he sent after he received the Congressional inquiry shows what appears to be a genuine lack of recall of the fact that Littler Mendelson represented Leadpoint. Additionally, once the subject learns that fact, his reaction appears to be one of trying to determine if he should have known. Had the subject recalled the information regarding Littler Mendelson that he previously provided in his answers to the Questions for the Record, we would expect different responses in the email messages to his staff.

The President's ethics pledge found in Executive Order 13770, January 28, 2017, *Ethics Commitments by Executive Branch Appointees* states:

As a condition, and in consideration, of my employment in the United States Government in an appointee position invested with the public trust, I commit myself to the following obligations, which I understand are binding on me and are enforceable under law: . . .

6. I will not for a period for 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contract.

To “participate” means to participate in a manner that is both personal and substantial. EO 13770, section 2 paragraph (t). Those terms are defined in 5 C.F.R. 2641.201(i):

Participate is to take an action as an employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or other such action, or to purposefully forbear in order to affect the outcome of a matter;

Personally means to participate directly, either as an individual or in combination with other persons; and

Substantial means that the employee’s involvement is of significance to the matter.

A Member’s participation in the Board’s decision making process is participation that is both personal and substantial. As illustrated by the facts outlined above, the subject fully participated in reviewing the draft decision and the drafts of the direction to the General Counsel. The subject then voted “approved” on the decision itself, the direction to the General Counsel to ask that *Browning-Ferris* be remanded, and the Solicitor’s direction that rescinded the direction to the General Counsel.

As stated in our report to Congress, we determined that the *Hy-Brand* and *Browning-Ferris* cases are the same particular matter involving specific parties for the purposes of the President’s ethics pledge found in Executive Order 13770. In reaching that conclusion, we took into account the position of the subject as stated in a letter provided to the OIG by the subject’s attorney. Providing a written position afforded the subject an opportunity to be heard on the issue without having to participate in a voluntary interview that could have been used against the subject in a criminal proceeding. We also considered the position of DAEO. Our report to Congress and the subject’s letter are provided as an appendix to this report.

“Directly and substantially related to my former employer or former clients” is defined, in part, as a matter that the appointee’s former employer represents a party. EO 13770 sec. 2 (d). We disagree with the subject’s argument that the Leadpoint is not a party to the *Browning-Ferris* matter at the circuit court and that Littler Mendelson is not Leadpoint’s representative. Leadpoint is in fact a party in the underlying Board litigation that resulted in the circuit court litigation and remained a “Respondent” in the circuit court litigation. That Leadpoint opted to not appear before the circuit court does not change its status as a party for purposes of the NLRB

charge or the circuit court litigation. Additionally, Littler Mendelson itself, in July 2017, provided a list of cases pending before the circuit courts in which it represented a party. *Browning-Ferris* is on page one of that list. The Agency continued to serve Littler Mendelson throughout the circuit court proceedings. The motion for reconsideration filed by the General Counsel includes Court of Appeals Docket number 16-1063 that lists Leadpoint as the respondent – a party.

The subject did in fact have actual knowledge that Littler Mendelson was a representative of a party in the *Browning-Ferris* case. The subject's assertions that he did not directly answer the questions or that he was not sure that the facts asserted in the question were accurate does not negate the fact that the subject was notified in writing that Littler Mendelson represented Leadpoint in the *Browning-Ferris* case. The subject's statements during the interview regarding his thought process in answering the questions lack a level of credibility. Clearly the subject had to read question 21 because the answer he provided is not random. In other words, although his answer may be evasive it is not nonsensical. Additionally, if the subject was simply inserting a generic response to questions regarding his recusal obligations and future actions, we would expect the answers to questions 20 and 21 to be identical. Given that they are not, it is apparent that the subject read the questions and made some distinction between the two.

The subject also had actual knowledge that the decision in which he was participating was in fact the dissent from the *Browning-Ferris* case that was being reissued as a majority decision in *Hy-Brand*. The subject was provided that information in writing before he received the draft majority decision. Thereafter, the subject chose to participate in the Board's actions to reissue the *Browning-Ferris* dissent as a majority decision.

The pledge obligates the subject to commit himself to not participate in particular matters involving the parties that are represented by Littler Mendelson. Because of that commitment, the subject is not afforded the privilege to ignore or forget in what cases Littler Mendelson represents parties. If the subject had an honest belief that question 21 contained a misstatement of fact, he should have addressed that issue either at the time he answered the questions or before he participated in a decision that overruled *Browning-Ferris* while it was pending an enforcement action in a circuit court. Having done neither, the subject was obligated to seek ethics advice from the DAEO prior to participating in the deliberations that were simply reissuing the *Browning-Ferris* dissent as a majority decision by a new Board.

At various times, the subject has stated that the DAEO stated to him that his participation in the direction to the General Counsel to request remand of *Browning-Ferris* was not a pledge violation. The DAEO may provide advice to an employee who has questions about the application of the *Standards*. 5 C.F.R. 2635.107(b). An employee who then relies upon the DAEO's advice and acts in conformance with it may not be disciplined provided the employee made full disclosure of all of the relevant circumstances. *Id.* It is our understanding that this regulatory provision is applicable to the DAEO's advice regarding the President's pledge. There is no evidence and the subject is not asserting that he sought DAEO advice prior to any of his actions in *Hy-Brand* or the direction to the General Counsel. As such, the "safe harbor" provision is not applicable to the subject.

In performing her duties, the DAEO is required to seek the services of the OIG when appropriate, including the referral of matters to and the acceptance of matters from the OIG. See 5 U.S.C. 2638.203(12). The DAEO has no independent investigative authority. If an OIG investigation substantiates misconduct, the DAEO then ensures that there is prompt and effective action taken to remedy the violation. See 5 U.S.C. 2638.203(9). It is our longstanding practice to request that the DAEO not engage in investigative activity or issue ethics guidance involving past conduct that the OIG is investigating until after we are able to provide the DAEO with factual information based upon our investigative efforts. This practice ensures that the DAEO does not interfere with our investigative efforts and that the DAEO is not inappropriately used by an employee as an advocate or representative. The DAEO is, however, not bound by any determinations that we make regarding the application of the facts to the *Standards* or the President's ethics pledge. It is our understanding that the DAEO is not in disagreement with our determination that a pledge violation occurred when the subject participated in the *Hy-Brand* deliberation that was then followed by the direction to the General Counsel to seek remand of *Browning-Ferris*.

Extenuating or Mitigating Circumstances

The subject was a Board Member for 20 days when he began his participation in the *Hy-Brand* Presub – the first step of the deliberative process. Within 4 days of that meeting, the majority decision was finalized and circulated to the minority Members. Although the subject stated that he agreed with the outcome of each of the decisions, he explained that he felt significant time related pressures to act on the decisions prior to the end of the former Chairman's term. The subject also stated that by the time the majority Members got to the *Hy-Brand* decision, he did not think that he could make significant editorial changes to the decision. While not exculpatory, the circumstances of the subject's failure to recall an important fact and the pressure to issue the cases may provide context in understanding why he acted in the *Hy-Brand* decision and the remand of the *Browning-Ferris* matter without seeking the DAEO advice when others might do otherwise.

Other Matters Involving the Standards of Conduct

During the investigation of the *Hy-Brand/Browning-Ferris* matter, we received a Hotline complaint alleging that Littler Mendelson provided the subject with a list of prior Board decisions that needed to be overturned and that the subject provided the list of cases to his staff. Our review of that complaint found that the subject assembled a list of issues and cases, but that there is no evidence that subject coordinated that list with Littler Mendelson. To the contrary, we determined that the source material for the list was provided to the subject by an NLRB employee who regularly provides research assistance. As such, we determined that the subject did not act in manner that violated the *Standards*.

We also observed that the subject responded to an invitation to attend a conference in a manner that appeared to be a solicitation of a gift related to the reimbursement of travel and conference expense. Prior to the OIG interview, the subject notified the conference organizer that he would not be attending the conference. In light of the fact that Members routinely have their expense paid by the conference organizers and the subject declined the invitation, we

referred this issue to the DAEO to ensure that the subject receives additional ethics briefings regarding accepting invitations and attending conferences.

Dysfunction and infighting cripple labor agency - POLITICO

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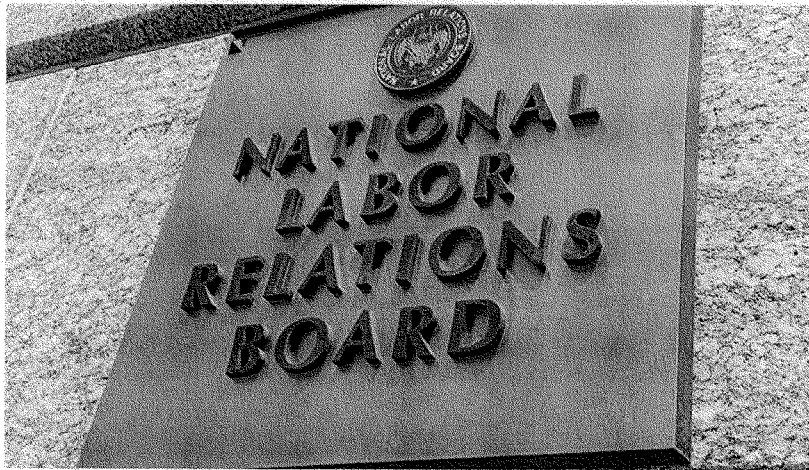
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It's hardly new for politicians to wrangle over the National Labor Relations Board. This time, though, partisan warfare has penetrated the agency itself. | Jon Elswick/AP Photo

EMPLOYMENT & IMMIGRATION

Dysfunction and infighting cripple labor agency

'This is like when Yugoslavia broke up.'

By IAN KULLGREN and ANDREW HANNA | 04/18/2018 05:02 AM EDT

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Dysfunction and infighting cripple labor agency - POLITICO

A federal agency that regulates labor unions is engaged in something close to civil war as political appointees, career bureaucrats and its inspector general battle one another.

The agency is the National Labor Relations Board, created in 1935 to promote collective bargaining and adjudicate disputes between businesses and workers. An independent agency insulated — in theory — from partisan politics, the NLRB under President Donald Trump is consumed to the point of paralysis by fights over personnel policies, ethics rules and legal decisions that stem from ancient political disagreements over the proper balance of power between employers and workers.

Story Continued Below

The in-fighting is bad news for workers who seek the NLRB's help to organize unions and increase corporate accountability for labor law violations — and also, paradoxically, bad news for employers who want to fight unionization and limit corporate liability by reversing pro-labor rulings issued under the Obama NLRB.

"This is like when Yugoslavia broke up," said one employment lobbyist who spoke on the condition of anonymity. "You're fighting over things that happened 10,000 years ago — you killed my ancestor so I'm going to kill you."

At the center of the controversy, which has pitted civil servants against political appointees, conservatives against liberals and, on occasion, conservatives against other conservatives, are Peter Robb, the NLRB's bare-knuckled general counsel, and board member William Emanuel, a controversial Trump appointee with deep ties to business.

Robb outraged the NLRB's career staff in January by proposing a restructuring that would demote regional directors, whom the business lobby considers too pro-union. That prompted revolt from the NLRB's employee unions. "Peter Robb is considering measures to 'streamline' the NLRB that will only make it harder to remedy federal labor law violations," read a flyer that three New York union locals distributed at an event Robb attended in February.

Nearly 400 NLRB employees followed up March 15 in a letter sent to members of Congress that said Robb's changes "strike us as unlikely to generate cost savings for the agency. What they do seem likely to achieve is the frustration of our efforts to provide members of the public with high quality, thorough investigation."

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The second and more elaborate NLRB controversy concerns Emanuel's decision not to recuse himself in December from *Hy-Brand Industrial Contractors*, a pro-business ruling in which the NLRB's inspector general later concluded Emanuel had a conflict of interest. After the inspector general issued his report, the NLRB vacated the ruling.

The two story lines crossed this month when Robb issued a legal opinion that said he “does not agree with the conclusions reached in the IG report,” and accused three NLRB members of breaking the law. Robb faulted the members — including the Republican chairman — for vacating Hy-Brand without consulting Emanuel, and urged the board to reinstate Hy-Brand. It's highly unusual for an NLRB general counsel to criticize the board's judgment so harshly. The White House, signaling apparent agreement with Robb, replaced NLRB Chairman Marvin Kaplan last week with the just-confirmed board member John Ring. (Kaplan will remain as board member.)

Meanwhile, the NLRB's inspector general, David Berry, is investigating a second NLRB member, Mark Pearce, who is one of the board's two Democrats. (By law, two of the NLRB's five board members are chosen by whichever party does not occupy the White House.) Berry is following on a complaint filed by the Competitive Enterprise Institute, a conservative nonprofit, based on a Wall Street Journal editorial that accused Pearce of alerting in advance attendees at an American Bar Association meeting in Puerto Rico that *Hy-Brand* would be vacated. Pearce did not answer a request for comment.

Berry, in turn, stands accused by the National Right To Work Legal Defense Foundation, the legal arm of the anti-union National Right To Work Committee, of disclosing confidential board deliberations improperly in his report on Emanuel, and in a follow-up report issued one month later. The right-to-work group asked an umbrella group, the Council of the Inspectors General on Integrity and Efficiency, to investigate. Berry did not answer a request for comment.

“It's sort of like ‘Game of Thrones,’” said Roger King, a friend of Emanuel's and senior labor and employment counsel for the HR Policy Association.

Or maybe three-dimensional chess. The National Right to Work Committee is a natural ally to Emanuel, but, remarkably, it's come to regard Emanuel as a problem that must not be replicated in future NLRB nominations, lest pro-labor Democrats gain an upper hand through additional recusals.

In its March newsletter, the group revealed that the Trump administration ignored its advice “not to choose ... another management attorney who would have to recuse himself or herself potentially from vast numbers of cases involving clients of the attorney's former employer.” That advice, the newsletter complained, “went

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unheeded” when Trump nominated Ring, a partner at the management-side law firm Morgan, Lewis and Bockius, “whose client list is even longer than Littler Mendelson’s.” The Senate confirmed Ring last week.

“For the next year and a half,” warned National Right To Work Committee vice president Matthew Leen in the newsletter, “two of the three NLRB members who aren’t profoundly biased in favor of forced unionism may have to recuse themselves from multiple cases.”



Trump files for an extension on his taxes

By LOUIS NELSON

In effect, Leen was saying that the Trump administration was so blatantly anti-labor that it may be unable to fulfill its anti-labor objectives.

It’s hardly new for politicians to wrangle over the NLRB. In 2012, the board made headlines when President Barack Obama tested the limits of his executive power by bypassing Congress and granting three recess appointments to the NLRB even though the Senate was technically in session. Obama ended up losing in the Supreme Court.

This time, though, partisan warfare has penetrated the agency itself.

General counsel Robb sent senior agency staffers reeling after he announced in a Jan. 11 conference call that he wanted to consolidate the agency’s 26 field offices into larger “districts” overseen by officials hand-picked by him. Under Robb’s plan, regional directors would lose their classification as members of the Senior Executive Service — the civil service’s highest rank — and be replaced by a new layer of officials who’d be answerable to Robb.

The title “general counsel” makes Robb sound like a lawyer for NLRB management, but in fact it’s arguably the agency’s most powerful position. The NLRB general counsel is the agency’s gatekeeper, a sort of prosecutor who brings cases before the board. The vast majority of NLRB cases are processed at the NLRB’s 26 field offices and never reach the board. The field offices are staffed by career officials who don’t typically agree with the pro-management outlook of Robb, to whom they report.

In a letter to Robb shortly after the January conference call, the regional directors called his proposed changes “very major” and complained that they hadn’t “heard an explanation of the benefits to be gained.” They also warned that enacting such changes might prompt senior directors and managers to retire en masse — a clear shot across the bow.

In reply, another official from the general counsel’s office proposed by email additional restrictions on the decision-making power of regional officials, such as requiring all cases go through headquarters for initial review.

Story Continued Below

Robb declined to comment for this story and, according to a source familiar with his thinking, is upset that the controversy spilled into public view.

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Marshall Babson, a former Democrat appointee to the NLRB, said that Robb's proposed changes risk making the NLRB less efficient. "If you're talking about injecting another level of review, that could slow things down," he said.

Jennifer Abruzzo, who was acting general counsel before Robb, agreed. "I think that's a mistake," she said. "I think the regional directors know what they're doing."

Shifting rationales for the changes have intensified the career staff's suspicions about Robb's motives. At the March ABA meeting in Puerto Rico, Robb's deputy John Kyle said they were intended to bring the agency in line with the White House's proposed 9 percent budget cut for the agency. But the \$1.3 trillion spending bill signed into law last month by President Donald Trump, H.R. 1625 (115), rejected that cut and maintained funding at current levels.

"It certainly undercuts the general counsel's rationale for restructuring," said Karen Cook, president of the NLRB Professional Association. "He will try to move forward with his plan, though, on the basis that he expects a severe cut to the 2019 budget."

The budget picture grew more complex Tuesday when the White House budget office alerted NLRB that the agency should spend only \$264 million of the \$274 million it received in the spending bill, a 3.6 percent reduction. Such a rescission, were it to become permanent, would require congressional approval under the 1974 Congressional Budget and Impoundment Control Act.

"I am unaware of a single instance in the past wherein the White House or OMB subjected the NLRB to the budget rescission process," said Marshall Babson, a former board member.

Fevered though the Robb Revolt is, it hasn't yet engulfed members of the board itself. The same can't be said about the controversy surrounding Emanuel and his participation in the December *Hy-Brand* decision.

Hy-Brand narrowed the circumstances under which a business could be classified a so-called joint employer, jointly liable for labor violations committed by its contractors or franchisees. It reversed an earlier ruling in *Browning-Ferris Industries*, a 2016 decision by the Obama NLRB that broadened the circumstances under which a business could be classified a joint employer. Fast-food chains like McDonald's were outraged by *Browning-Ferris* because it put them on the hook for maltreatment of employees over whom they didn't necessarily maintain direct control.

Hy-Brand was rushed out along with several other pro-management decisions shortly before a Republican NLRB member's term was about to end in December, leaving the board deadlocked, 2-2. The overturning of *Browning-Ferris* took many by surprise, because *Hy-Brand* wasn't a case that had much to do with the joint-employer issue.

"It was a rush to judgment," said Wilma Liebman, a Democratic board member under Presidents Bill Clinton, George W. Bush and Obama.

One week after the *Hy-Brand* ruling, congressional Democrats accused the NLRB of loading the dice by allowing Emanuel to participate. Emanuel's former law firm, Littler Mendelson, had represented a party in *Browning-Ferris*, noted a Dec. 21 letter to Emanuel from Senate HELP Committee ranking member Patty Murray (D-Wash.), House Education and the Workforce Committee ranking member Bobby Scott (D-Va.) and

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others. In the letter, the six Democrats posed several questions to Emanuel about his participation in *Hy-Brand*.

In his response, first reported by ProPublica, Emanuel said he wasn't aware at the time of the ruling that his firm had been involved in *Browning-Ferris*, noting Littler's very long client list. Unfortunately for Emanuel, he'd already noted his firm's participation in *Browning-Ferris* on a questionnaire submitted during his confirmation hearing. Emanuel scrambled to revise his response, but the damage was done, and inspector general Berry opened an investigation. The first report, issued Feb. 9, was scathing, finding "a serious and flagrant problem and/or deficiency in the board's administration of its deliberative process." Emanuel, Berry concluded, should have recused himself from the decision to overturn the Obama-era standard.

The NLRB's other three board members, including Trump-nominated chairman Marvin Kaplan, were persuaded by Berry's reasoning and vacated *Hy-Brand*, waiting to act until after Emanuel departed for the ABA conference in Puerto Rico. Emanuel was stunned when a fellow attendee pulled up the ruling on a cellphone, according to a source who was present at the conference.

"You should have seen the look on his face," this person said. "He had no knowledge of it in advance. He was totally floored."

Emanuel, who declined to comment for this story, hired Zuckerman Spaeder, a prominent white-collar law firm that previously represented former International Monetary Fund Managing Director Dominique Strauss-Kahn.



Ryan vows to do even more fundraising for GOP

By RACHAEL BADE

Emanuel's defenders insist he did nothing wrong because his firm wasn't directly involved in *Hy-Brand*. Zuckerman Spaeder Chairman Dwight Bostwick argued in a letter to Berry that he'd evaluated Emanuel under an unusually strict standard that "has the potential to bedevil and frustrate this agency for years to come" and "weaponize" the ethics rules for purposes of improperly excluding presidential appointees from doing the jobs they were sworn to do."

Bostwick also wrote that one month after the *Hy-Brand* decision, the NLRB's designated ethics official told Emanuel that she didn't believe Emanuel should have been required to recuse himself in that case. According to the letter, Emanuel asked for that opinion in writing, but the request was denied at the OIG's request.

Emanuel's allies have cried foul, noting that former Democratic NLRB member Craig Becker participated in cases involving local chapters of the Service Employees International Union despite having previously been counsel to SEIU. In that instance, Berry raised no red flags. Becker declined to comment on the record.

The conflict-of-interest charge is "based on a house of cards and not a very strong one at that," said King, the attorney with the HR Policy Association. "We see a long-term game plan to destabilize and undermine the NLRB."

In his second inspector general report on Emanuel, issued March 20, Berry concluded that Emanuel violated the Trump administration's ethics pledge, which states: "I will not for a period of two years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially

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related to my former employer or former clients.” But in his letter to Berry, Bostwick said he “respectfully disagree[d] ... with the determination the member Emanuel violated his presidential ethics pledge.”

Berry acquitted Emanuel of the most serious charge: lying to Congress about whether he was aware of a possible conflict of interest. But that did little to cool Congress’ fury. After Berry issued the report, Sen. Elizabeth Warren (D-Mass.) and Rep. Keith Ellison (D-Minn.) called on Emanuel to resign, saying he “no longer has the credibility” to serve.

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CORRECTION: Due to an editing error, an earlier version of this story misstated a proposed reduction to the NLRB budget. Also, an earlier version of this story misstated the new NLRB Chairman’s first name and the name of the HR Policy Association.

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Mr. SABLAN. Thank you. I am also concerned that the majority's legislative proposals will sabotage workers' rights to join together to improve wages and conditions.

One proposal included in H.R. 2723, the misnamed "*Employee Rights Act*," which this subcommittee heard in June, would prevent unions from effectively representing the workers by requiring unnecessary periodic re-certification elections, and would restrict union spending on advocacy and organizing, ignoring the union members already have the absolute right to opt out of allowing their dues to be spent on those purposes.

Today the majority attacks worker centers, which are community-based, non-profit organizations of low-wage workers. They provide direct services and support such as legal assistance, English classes, and leadership development. They do not represent workers for collective bargaining purposes, and are not the exclusive representative of employees like unions are.

Instead of recognizing the work of these not-for-profit organizations for assisting low-wage workers, the majority wants to handcuff this group by imposing burdensome reporting requirements designed for unions under the *Labor Management Reporting and Disclosure Act*. The square peg of the LMRDA does not fit into the round hole of worker centers.

Before I conclude I want to thank each of the witnesses for taking the time to prepare their testimony and appear here today.

I also want to wish a happy birthday to Ranking Member Scott. I was going to sing him a song, but my staff paid me a dollar not to do so.

[Laughter.]

Mr. SABLAN. Thank you, and I yield back.

[The statement of Mr. Sablan follows:]

Prepared Statement of Hon. Gregorio Kilili Camacho Sablan, Ranking Member, Subcommittee on Health, Employment, Labor, and Pensions

Chairman Walberg, thank you for holding this hearing today.

The National Labor Relations Act protects, by law the right of workers to form unions in order to rectify the inequality of bargaining power between employees and employers.

However, the NLRA fails to enforce workers' rights with meaningful remedies. There are no civil penalties when employers violate workers' rights under the Act. Employers understand can retaliate against workers for engaging in union activity with limited consequences—oftentimes the sole sanction is that the employer is ordered to post a notice stating it violated the law or, years later, award backpay minus any interim earnings.

Lacking a meaningful deterrent, there has been an intensification of aggressive anti-union campaigns, which, in turn, has contributed to the decline of union membership. This has exacerbated income inequality and contributed to wage stagnation for those in the middle, while serving as a boon for those in the top 10 percent.

[post chart]

As you can see from the chart, as union membership has decreased from 27.1 percent to 11.1 percent between 1973 and 2015, the share of income going to the top 10 percent has increased over that same time from 31.9 percent to 47.8 percent.

Over the past 4 decades, wages for working people have stagnated. When union membership hovered around 30 percent between the end of World War II and 1973, wages grew over 90 percent. However, as union membership decreased all the way down to 10.7 percent in 2017, wages have only grown by 12.3 percent, adjusting for inflation.

Safeguarding the right to join a union and negotiate for better wages and conditions is critical to reversing income inequality, growing the middle class, and making sure workers receive their fair share of the wealth that they create.

To address the need to modernize labor law, my Democratic colleagues and I have cosponsored legislation that would do exactly that. H.R. 4548, The WAGE Act, protects the right to join a union by providing prompt and fair remedies to deter unfair labor practices.

The WAGE Act would authorize meaningful sanctions for those who break the law. It prevents workers from being misclassified and denied their legal recourse. It facilitates dispute-resolution procedures to enable employers and unions to conclude a first contract, if workers choose to join a union.

I would be remiss if I did not note the mismanagement and conflicts of interest that have infected decision-making at the National Labor Relations Board over the past 6 months. The Board's mission under the NLRA is to protect workers' rights and promote collective bargaining.

For example, prior to serving on the Board, Member William Emanuel was a law partner at Littler Mendelson one of the largest management-side firms in the country. The firm represented a party in the Browning Ferris joint employer case, which is currently before the D.C. Circuit.

Member Emanuel voted to overturn Browning Ferris in a case called Hy-Brand. Emanuel then voted to direct the General Counsel to move the D.C. Circuit to remand Browning Ferris back to the Board.

The NLRB's Inspector General investigated and concluded that Member Emanuel violated his ethics pledge. The Board's ethics official agreed. By voting when he should have recused himself, Emanuel undermined the due process rights of workers in both the Browning Ferris and Hy-Brand cases.

Mr. Chairman, I ask unanimous consent to enter into the record the NLRB Inspector General's notification of "a serious and flagrant problem and/or deficiency" dated February 9, and the report dated March 20. I also ask for unanimous consent to enter into the record an April 18 Politico article titled "Dysfunction and Infighting Cripple Labor Agency".

I am also concerned that the Majority's legislative proposals will sabotage workers' rights to join together to improve wages and conditions.

One proposal, included in H.R. 2723, the misnamed "Employee Rights Act," which this subcommittee heard in June, would prevent unions from effectively representing their workers by requiring unnecessary periodic re-certification elections and would restrict union spending on advocacy and organizing ignoring that union member already have the absolute right to opt out of allowing their dues to be spent on those purposes.

Today, the majority attacks Worker Centers, which are community-based, non-profit, organizations of low-wage workers. They provide direct services and support, such as legal assistance, English classes, and leadership development; they do not represent workers for collective bargaining purposes and are not the exclusive representatives of employees, like unions are.

Instead of recognizing the work of these not-for-profit organizations for assisting low-wage workers, the Majority wants to handcuff these groups by imposing burdensome reporting requirements designed for unions under the Labor Management Reporting and Disclosure Act. The square peg of the LMRDA does not fit into the round hole of worker centers.

Before I conclude, I want to thank each of the witnesses for taking the time to prepare their testimony and appear here today. I also want to wish a happy birthday to Ranking Member Scott.

I yield back.

Mr. SABLAN. Thank you, Mr. Chairman.

Chairman WALBERG. Thank—I thank the gentleman, and I would pay you \$2 to do it.

[Laughter.]

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

And now it is my privilege to introduce the distinguished witnesses who have come to be here this morning.

Mr. Stefan J. Marculewicz—I hope I got that right, or close—is a shareholder at Littler Mendelson, PC in Washington, D.C. Welcome.

Mr. Tommy Jackson is a long-haul auto transport driver. If you came from Hermiston, Oregon, you are a long-haul witness today, as well. Thank you for being here.

Dr. Anne Lofaso is the Arthur B. Hodges professor of law at the West Virginia University College of Law in Morgantown, West Virginia, and not new to this committee and the hearing process. Thank you for being here.

Mr. Terry Bowman is an auto worker from Ypsilanti, Michigan. And Terry, just move a few miles, you could be in my district. Glad to have you here today.

I will now ask our witnesses to raise your right hand to be sworn in.

[Witnesses sworn.]

Chairman WALBERG. Thank you. Let the record reflect the witnesses answered all in the affirmative.

Before I recognize you to provide your testimony, let me just briefly explain our lighting system. It is very simple. Like a traffic light, on green you have four minutes of testimony. When you see it turn yellow, you have another minute to end your statement. And when it is red, it is time to stop. Certainly finish your thought, but we will have opportunity to ask you questions, and we will have five minutes, each of us, to ask you questions, as well. And probably we will cover some of the things that you wanted to say anyway.

We have your written testimony in a fuller format, as well, that will be part of the record.

And so I recognize you now for your five minutes of testimony, Mr. Marculewicz.

**TESTIMONY OF STEFAN J. MARCULEWICZ, SHAREHOLDER,
LITTLER MENDELSON P.C., WASHINGTON, D.C.**

Mr. MARCULEWICZ. Thank you, Chairman Walberg and Ranking Member Sablan, and the members of the Committee. Thank you for the opportunity to offer this testimony here today. My name is Stefan Marculewicz. I am a shareholder at the law firm of Littler Mendelson, here in Washington. I am speaking to you today on my own behalf, not on behalf of my law firm or any of my law firm's clients.

The topic I am going to testify about today is worker centers. Labor unions, the primary advocates for worker rights in the United States, continue to experience a decline in membership. Perhaps, partially in response to that decline, labor unions have sought new ways to effectuate change in the workplace.

One of the most prominent examples of that effort has been the development of organizations known as worker centers. Today, there are hundreds of these organizations. Their structure and composition vary. They go by very many different names. Typically, they are non-profit organizations that receive funding from foundations, grants—including government, membership fees and other donations, and some are funded by other labor organizations.

These groups offer many different services to their members, including education, training, employment services, and legal advice. Increasingly, however, these organizations directly engage employers or groups of employers to effectuate change in the wages, hours, and terms and conditions of workers they claim to represent. When it comes to such direct engagement, these worker centers often act no differently than traditional labor organizations.

In 2012, I conducted research on the subject of worker centers, and published the article “Labor Organizations by Another Name: The Worker Center Movement and its Evolution into Coverage under the NLRA and LMRDA” in *Engage*, the Federalist Society’s law and policy review. In that article, I described the growth of worker centers and their evolution into de facto labor organizations. The premise of my article was that, because of this evolution, worker centers should comply with the laws that regulate labor organizations. These laws include the NLRA and the LMRDA. I asserted that because the benefits of those laws ultimately flow to the workers these organizations claim to represent, there was no viable justification for them not to comply with the laws.

In September 2013, I had the honor of testifying on this subject before this committee. In my testimony, I urged the Committee to have these organizations comply with the laws. Unfortunately, since that time, to my knowledge, worker centers continue to remain largely outside of coverage by these laws.

Instead of conforming their behavior to the existing laws, however, advocates are pursuing what appears to be a parallel track. For example, in at least one jurisdiction, New York City, the city council passed legislation allowing employees to make voluntary contributions to not-for-profit organizations of their choice through payroll deductions. This structure is very similar to the manner in which union dues are withheld from employee paychecks.

In other situations, groups calling themselves global union federations that go by the names IndustriALL, UNI Global Unions, and BWI have become increasingly active in the United States on behalf of their U.S. member unions to further organizing efforts or create added leverage at the bargaining table. However, to my knowledge, none of these global union federations comply with the requirements of the LMRDA.

Compliance with these laws would confer benefits upon the very workers these groups claim to represent. Unfortunately, it appears these groups are reluctant to define themselves as labor organizations because the NLRA and LMRDA are perceived as creating an impediment to worker centers’ activities.

In addition, worker centers have not considered themselves to be limited by the NLRA restrictions on secondary picketing and protracted picketing for recognition. Such conduct is a common tool used by these groups to convey their message, but it would violate the NLRA if they considered themselves labor organizations.

Without coverage under the NLRA and the LMRDA, these organizations can avoid accountability to the workers they claim to represent. Yet the laws that provide protections for workers vis-a-vis labor organizations that represent them were designed precisely to create that accountability.

Moreover, these laws were also intended to protect worker self-choice, and to ensure a balance between labor and management interests, and to ensure the free flow of commerce.

The burden of compliance with those laws is not so significant when considered within the context of the benefits afforded to workers and the economy in general.

The mission of many worker centers is often seen as being an important means of advocating on behalf of under-represented employees who do not have access to or knowledge of the legal mechanisms to protect their rights. However, no organization, no matter how laudable its mission, is above reproach. And through its passage of the laws that regulate labor organizations, Congress established safeguards to give workers a say in and understanding of the operations of the organizations that represent them.

Compliance with the NLRA and the LMRDA serves not only as a protection for workers, but perhaps as a validator of the worker centers that claim to represent them. A goal of many worker centers is to ensure that employers of their members comply with the basic laws that offer protections to workers. It is not unreasonable to expect worker centers to do the same.

Finally, I would like to point out that today, well into the second year of the Trump administration, the administrator position in charge of the Office of Labor Management Standards, or OLMS, which oversees compliance with the LMRDA, remains unfilled. And I would urge this committee to urge the administration to fill that position.

Thank you very much for the opportunity to provide this testimony.

[The testimony of Mr. Marculewicz follows:]

**Testimony of Stefan Marculewicz Before
The United States House of Representatives
Subcommittee on Health, Employment, Labor, and Pensions
April 26, 2018**

Chairman Walberg, ranking member Sablan, and members of the Committee.

Thank you for the opportunity to offer testimony here today. My name is Stefan Marculewicz and I am a Shareholder at the law firm of Littler Mendelson here in Washington, DC. I am speaking to you today on my own behalf and not on behalf of my law firm or any firm client.

The topic I am going to testify about today is worker centers. Labor unions, the primary advocates for workers' rights in the United States continue to experience a decline in membership. Perhaps partially in response to that decline, labor unions have sought new ways to effectuate change in the workplace. One of the most prominent examples of this effort has been the development of organizations known as worker centers.

Today there are hundreds of these organizations. Their structure and composition vary. They go by many different names. Typically, they are non-profit organizations that receive funding from foundations, grants—including from government, membership fees and other donations. Some are funded by other labor organizations.¹

These groups offer many different services to their members, including education, training, employment services and legal advice. Increasingly, however,

¹ The U.S. Chamber of Commerce has published a number of important studies tracing the funding of these organizations.

these organizations directly engage employers or groups of employers to effectuate change in the wages, hours and terms and conditions of workers they claim to represent. When it comes to such direct engagement, these worker centers often act no differently than traditional labor organizations.

In 2012, I conducted research on the subject of worker centers, and published the article *Labor Organizations by Another Name: The Worker Center Movement and its Evolution into Coverage under the NLRA and LMRDA* in *Engage the Federalist* Society's law and policy review. In that article, I described the growth of worker centers, and their evolution into *de facto* labor organizations. The premise of my article was that because of this evolution, worker centers should comply with the laws that regulate labor organizations. These laws include the National Labor Relations Act (the NLRA) and the Labor Management Reporting and Disclosure Act (the LMRDA). I asserted that because the benefits of those laws ultimately flow to the workers these organizations claim to represent, there was no viable justification for them not to comply with the laws.

In September 2013, I had the honor of testifying on this subject before this Committee. In my testimony, I urged the Committee to seek to have these organizations comply with the laws. Unfortunately, since that time, to my knowledge, worker centers continue to remain largely outside of coverage by these laws. In addition, during these years, not only have worker centers continued to evolve, but other organizations have emerged that have similar objectives of effectuating change in the workplace.

Instead of conforming their behavior to the existing laws, however, their advocates are pursuing what appears to be a parallel track. For example, in at least one jurisdiction, New York City, the City Council passed legislation allowing employees to make voluntary contributions to not-for-profit organizations of their choice through payroll deductions. This structure is very similar to the manner in which union dues are withheld from employee paychecks. In other situations, groups calling themselves global union federations that go by the names IndustriALL, UNI Global Unions and BWI, have become increasingly active in the United States and on behalf of their U.S. member unions to further organizing efforts or create added leverage at the bargaining table. However, to my knowledge none of these global union federations comply with the requirements of the LMRDA.

Compliance with these laws would confer benefits upon the very workers these groups claim to represent. Unfortunately, it appears these groups are reluctant to define themselves as labor organizations because the NLRA and the LMRDA are perceived as creating an impediment to worker centers' activities. In addition, worker centers have not considered themselves to be limited by the NLRA restrictions on secondary picketing and protracted picketing for recognition. Such conduct is a common tool used by these groups to convey their message, but it would violate the NLRA if they considered themselves labor organizations.

Without coverage of the NLRA and LMRDA these organizations can avoid accountability to the workers they claim to represent. Yet, the laws that provide protections to workers vis a vis labor organizations that represent them were designed

precisely to create that accountability. Moreover, these laws were also intended to protect worker self-choice, to ensure a balance between labor and management interests, and to ensure the free flow of commerce. The burden of compliance with those laws is not so significant when considered within the context of the benefits afforded to workers and the economy in general.

The mission of many worker centers is often seen as being an important means of advocating on behalf of underrepresented employees who do not have access to or knowledge of the legal mechanisms to protect their rights. However, no organization, no matter how laudable its mission, is above reproach, and through its passage of the laws that regulate labor organizations, Congress established safeguards to give workers a say in and understanding of the operations of the organizations that represent them. Compliance with the NLRA and LMRDA serves not only as a protection for workers, but perhaps as a validator of the worker centers that claim to represent them.

A goal of many worker centers is to ensure that employers of their members comply with the basic laws that offer protections to workers. It is not unreasonable to expect worker centers to do the same. Ultimately, the benefits of the laws that govern labor organizations flow to the workers they represent, and, as such, there simply is no viable justification for worker centers not to comply with them.

Finally, I would like to point out that today, well into the second year of the administration of President Trump, the Administrator position in charge of the Office of Labor Management Standards, or OLMS, which oversees compliance with the LMRDA

remains unfilled. I therefore ask the members of this Committee to urge the administration to fill the position as quickly as possible.

Thank you for your time, and I look forward to answering any questions you may have.

Chairman WALBERG. Thank you for your testimony.

Now, Mr. Jackson, I recognize you for five minutes. And this is a lot less challenging than traffic you deal with the drivers around you in your big rig.

**TESTIMONY OF TOMMY JACKSON, LONG HAUL AUTO-
TRANSPORT DRIVER, HERMISTON, OREGON**

Mr. JACKSON. Chairman Walberg, members of the Committee, thank you for allowing me a few minutes to tell my story, one of which is ongoing. It is my hope this testimony will bring awareness to a flawed system. My story will show the need to change labor laws to benefit employees and not special interests.

Today, we are here to talk about how we can improve our current labor system and ensure unions are accountable to the employees they say they represent. All of you have been voted by your constituents to represent them here. Every two years they decide how you are doing in an election. And if you satisfy them, you get to come back. I am asking that labor unions be held to the same standard by making them have re-certification elections. There should not be this ridiculous process that makes it nearly impossible to bring an election. It should be automatic, just like yours.

It is further my hope that my testimony here today will call attention to the injustice that I and my co-workers are enduring at the hands of the National Labor Relations Board Region 19.

My name is Tommy Jackson, and for 14 years I have been a truck driver for Selland Auto Transport. We specialize in moving new cars from the West Coast ports to market.

On December 20, 2014, by a very narrow margin, the Teamsters were voted in to represent us. After a year-and-a-half, we became disillusioned with Teamsters and began the process to bring forward a decertification election. This is not an easy process, because it is against the law for the company to help us, and the Teamsters say it would be in violation of their constitution.

Remember, as truck drivers, we don't really congregate in any one place, and the National Labor Relations Board requires we have 30 percent minimum of my fellow drivers' signatures as a showing of interest. Even still, we got the required signatures and filed for a decertification election on March 2, 2016. That was more than two years ago.

The reasons for the delay, starting that very same day, March 2, 2016, the Teamsters began filing unfair labor practices, or ULPs, commonly known as blocking charges. By filing these blocking charges, the Teamsters can delay an election indefinitely. This is contrary to a representational election, where the union is trying to represent an employee group. I think they call those ambush elections, as they take place, on average, 24 days after the petition is filed.

It is like the National Labor Relations Board is set up to force unions onto employees, but not let the same employees get the unions out. Case in point, going back to the blocking charges, the National Labor Relations Board Region 19 has jurisdiction of our case. The director of that region, Ronald Hooks, continually allows the union to rehash old blocking charges or file new ones that have

no merit. We have sent the region multiple letters, begging the National Labor Relations Board to give us our election.

Chairman Walberg and Committee, did you know that as Region 19 processes the blocking charges that they hear the union's arguments and they hear from the company, however the region will not hear me, who is the actual petitioner for this de-certification, as the board says I am not a recognized party. Therefore, I have no standing, me the petitioner, the one that took the risk.

Furthermore, these delays are allowing the union to wage a campaign designed to browbeat my company into submission. The Teamsters called a one-day strike on November 21, 2015 that in turn resulted in my company losing its largest contract in California, American Honda. I think it is the Teamsters' goal at this point to put my company out of business.

It is my understanding that this committee is considering legislation that requires unions to have re-certification elections. That would mean the unions would actually have to do their jobs and represent the real employees, instead of looking out for their own interests. And if they didn't, we would simply vote them out.

Considering the runaround my company and colleagues have endured, an automatic election sounds like the American way.

Thank you again, Mr. Chairman, Committee, for inviting me here to tell my story. I look forward to answering your questions.

[The testimony of Mr. Jackson follows:]

Subcommittee on Health, Employment, Labor, and Pensions

“Worker-Management Relations: Examining the Need to Modernize
Federal Labor Law”

April 26, 2018

Testimony of Tommy Jackson

April 26, 2018

Workforce Ed subcommittee HELP Chairman Tim Walberg

Chairman Walberg members of the committee thank you for allowing me a few minutes to tell my story one of which is ongoing, it is my hope this testimony will bring awareness to a flawed system. My story will show the need to change labor laws to benefit employees and not special interests. Today we are here to talk about how we can improve our current labor system and insure union's are accountable to the employees they say they represent. All of you have been voted by your constituents to represent them here. Every two years they decide how you are doing in an election and if you satisfy them you come back. I am asking that labor unions be held to the same standard by making them have recertification elections. There should not be this ridiculous process that make it nearly impossible to bring an election. It should be automatic, like yours. It is further my hope that my testimony here today

will call attention to the injustice that I and my co-workers are enduring at the hands of the National Labor Relations Board Region 19.

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Even still we got the required signatures and filed for a decertification election on March 2, 2016. That was more than two years ago. The reasons for the delay, starting that very same day March 2, 2016 the Teamster's began filing Unfair Labor Practices or ULP commonly known as "Blocking Charges. By filing these blocking charges the Teamster's can

¹ Teamsters Constitution

delay an election indefinitely. Which is contrary to a representational election where a union is trying to represent an employee group. I think they call those Ambush Elections as they take place on average 24 days after the petition is filed. It's like the National Labor Relation Board is set up to force unions onto employees, but not to let the same employees get the unions out.

Case in point going back to the blocking charges the National Labor Relations Board Region 19 has jurisdiction of our case. The Director of that region Ronald Hooks continually allows the union to rehash old blocking charges or file new ones that have no merit. We have sent the region multiple letters begging the National Labor Relations Board to give us our election.²

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² Region 19 Letter

designed to browbeat my company into submission. The Teamsters called a one day strike on November 21, 2016, that in turn resulted in my company losing its largest contract in California, Honda. I think it is the Teamsters goal to put my company out of business.

It is my understanding that this committee is considering legislation that requires unions to have recertification elections. That would mean that unions would actually have to do their jobs and represent the real employees instead of looking out for their own interests. Because if they don't we would simply vote them out. Considering the runaround my company and colleagues have endured an automatic election sounds like the American way to me.

Thank you again to the committee for inviting me here to tell my story. I look forward to answering any questions you may have.

Mrs. FOXX. [Presiding] Thank you very much, Mr. Jackson.
Now, Dr. Lofaso, you are recognized for five minutes.

TESTIMONY OF ANNE M. LOFASO, ARTHUR B. HODGES PROFESSOR OF LAW, WEST VIRGINIA UNIVERSITY COLLEGE OF LAW, MORGANTOWN, WEST VIRGINIA

Dr. LOFASO. Good morning, Chairman Walberg, who I don't see right now, Ranking Member Sablan, and distinguished members of the Subcommittee. My name is Anne Marie Lofaso. I am a law professor at West Virginia University, where I have taught labor and employment law for over 11 years, and serve as the director of the labor and employment law certificate program. I am also a former senior attorney at the National Labor Relations Board, where I served for 10 years in the Appellate and Supreme Court Branch.

Thank you for inviting me to testify regarding worker-management relations, examining the need to modernize federal labor law. I am testifying on behalf of myself, and not as part of these or any other institution with which I have been, may be, or will be affiliated.

The *National Labor Relations Act* has not been meaningfully modernized since just after World War II. The last significant amendments, Taft-Hartley, have the eventual effect of substantially reducing union bargaining power and density, thus resulting in the type of imbalance that precipitated the 74th U.S. Congress to enact the NLRA in the first place.

That congress understood that organized labor was necessary to check the coercive power of organized capital, and believed that protecting the fundamental rights of workers to band together for mutual aid or protection would diminish the causes of labor disputes, burdening or obstructing interstate and foreign commerce.

Taft-Hartley's legacy, then, has been to amplify the imbalance of power between labor and management, augment economic inequality among workers, undermine the American middle class, and to sow the seeds of labor unrest and working class resentment. I therefore agree that the NLRB needs to be modernized.

What is needed is the type of modernization established by the *WAGE Act*. The purpose of the *WAGE Act* is to strengthen unions so that they bolster the middle class, which will facilitate economic growth from the middle outward. The *WAGE Act* purports to do this in the following five ways.

First, the *WAGE Act* requires employers to post notices of workers' NLRA rights. Publishing laws increases transparency, which creates, maintains, and builds the inner morality of the law. Moreover, it helps to educate and create an informed citizenry, a prerequisite for a strong democracy that can withstand foreign challenges to our political system.

Second, the *WAGE Act* strengthens the NLRA's weak enforcement mechanisms by penalizing those who violate federal law.

Third, and relatedly, the *WAGE Act* strengthens remedies for workers who are retaliated against for exercising their Section 7 rights.

Fourth, the *WAGE Act* expands coverage of the NLRA. The bill prevents employers from mis-classifying their employees as super-

visors or independent contractors, and prevents workers from being denied back pay because of their immigration status.

Fifth, the *WAGE Act* streamlines the process for workers to organize a union and negotiate a first contract, a proposal first endorsed by the Republican NLRB general counsel Rom Meisburg.

By contrast, recent legislative proposals such as the inaptly named *Employee Rights Act* are headed in the wrong direction. These legislative measures, introduced in the name of workers' rights, would in reality continue the backward trend of squeezing the middle class. Together and separately, these bills craft eight steps toward destroying workplace democracy.

One, the bills block employee access to information about the benefits of unionization.

Two, they create anti-democratic voting measures cloaked in the language of democracy.

Three, they eliminate the longest-standing and most basic way for workers to form unions by card check, while inventing creative ways for employers to bust unions.

Four, the bills delay union certification.

Five, they gerrymander voting districts by trying to compel the board to add employees who do not wish union representation to petition for bargaining units to create a majority non-union block.

Six, they augment penalties for unions but not employers that violate the NLRA, notwithstanding the fact that unions are much less likely to violate the Act than are employers.

Seven, they drain union treasuries.

Eight, the bill grants non-union members control over unions.

And nine, they create one-sided criminal penalties for unions, but not for managers or replacement workers to engage in or threaten violence.

Finally, attacks on worker centers are erroneous and misplaced. Worker centers are community-based non-profit organizations that provide various services to low-wage workers in the communities they serve. Many but not all of these organizations center around immigrant groups who work in low-wage jobs, thus shaping the types of services offered. Such services include English language classes, job readiness training and occupation safety training to community members, assistance applying for unemployment benefits or filing a claim for unpaid wages, or help opening bank accounts or obtaining loans.

Worker centers are not labor organizations under the NLRA, or the *Labor Management Reporting and Disclosure Act*. Moreover, their growth is a symptom of diminished imbalanced bargaining power possessed by workers.

In conclusion, the NLRA, a federal law that has not been significantly updated in over 70 years, is in desperate need of modernization. Legislative and administrative change is especially pressing because the imbalance of power created by Taft-Hartley has planted the seed that eventually deepened economic inequality, shrunk the middle class, and left many working-class people angry.

As the 74th U.S. Congress well understood, that anger will predictably surface in various forms of labor and political unrest. Witness the swath of teacher strikes that swept our nation in recent months that started in my home state, West Virginia.

I urge members of this Congress to reach across the aisle and work together on our nation's problems. Focus on people, rather than party loyalty. Focus on solutions, rather than ideology. Assume the best in one another, and we will keep our nation great.

Thank you very much for the opportunity to provide this testimony.

[The testimony of Dr. Lofaso follows:]

Written Testimony of
Anne Marie Lofaso
Arthur B. Hodges Professor of Law
West Virginia University College of Law
Before the U.S. House Committee on
Education and the Workforce
Subcommittee on
Health, Education, Labor, and Pensions
Hearing on
Worker-Management Relations:
Examining the Need to Modernize Federal Labor Law
April 26, 2018

Introduction

Good Morning, Chairman Walberg, Ranking Member Sablan, and distinguished members of the Subcommittee. My name is Anne Marie Lofaso. I am the Arthur B. Hodges Professor of Law at West Virginia University College of Law, where I have taught labor and employment law for 11 ½ years and serve as the Director of the Labor and Employment Law Certificate Program. I am also a former Senior Attorney of the National Labor Relations Board (NLRB), where I served for ten years in the Appellate and Supreme Court Branch. Relevant to my testimony, I have a doctorate in jurisprudence and comparative labor law from Oxford, a law degree from the University of Pennsylvania, and a bachelor's degree in modern Anglo-American history and science from Harvard University. Thank you for inviting me to testify regarding *Worker-Management Relations: Examining the Need to Modernize Federal Labor Law*. I am testifying on behalf of myself and not as part of these or any other institution with which I have been, may be, or will be affiliated.

Overview

The National Labor Relations Act (NLRA), the primary U.S. labor law at the federal level to regulate private-sector labor relations, has not been significantly modernized since just after World War II. The last significant amendments, the Labor Management Relations Act of 1947, popularly known as the Taft-Hartley Act,¹ have had the effect of significantly reducing union bargaining power and density, thus resulting in the type of imbalance that precipitated the Seventy-fourth U.S. Congress to enact the NLRA. This effect, in turn, has amplified the imbalance of power between labor and management, augmented economic inequality among workers, and undermined the American middle class. I, therefore, agree that the NLRA needs to be modernized. But recent legislative proposals, such as the inaptly named Employee Rights Act, are headed in the wrong direction. What is needed is the type of modernization established by the Workplace Action for a Growing Economy Act of 2017 (Wage Act). Finally, attacks on Worker Centers are erroneous and misplaced. Worker Centers are not labor organizations under either the NLRA or Labor-Management Reporting and Disclosure Act (LMRDA). Moreover, their growth is a symptom of diminished and imbalanced bargaining power possessed by workers. A diminished middle class is both a symptom and cause of greater economic inequality.

A. Congress Passed the Wagner Act to Equalize the Balance of Power Between Business and Employees by Encouraging the Practice and Procedure of Collective Bargaining

As part of President Franklin D. Roosevelt's New Deal, the Seventy-fourth United States Congress passed the National Labor Relations Act (NLRA)² in 1935, when the United States was amid the Great Depression. It was a time when business had failed us and when government saved us. The purpose of the Wagner Act, as it was popularly known, was to balance the power between workers and business. The great men of the Seventy-fourth U.S. Congress understood that organized labor was necessary to check the coercive power of organized capital. And indeed, it

¹ 29 U.S.C. §§ 141-197, 80 H.R. 3020, Pub. L. 80-101, 61 Stat. 136, enacted June 23, 1947.

² 29 U.S.C. § 151 *et seq.*

was believed that protecting the fundamental right of workers to band together for mutual aid or protection would “diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce.”

In the meantime, the United States and the world faced an even greater existential crisis. Fascist dictatorships, particularly Nazi Germany, sparked a second world war in the span of a generation. Unions were indisputably instrumental in winning that war. As Congress warranted, “by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection,”³ unions advanced industrial peace and domestic peace by extension. Peace in turn promoted commerce by removing labor unrest as both a symptom and cause of economic inequality. Our country banded together in political, economic, social, and military unity to win the single greatest threat to our existence. Unions and their members contributed to this effort on the home front not only by manufacturing weapons and other items needed on the war front,⁴ but also by maintaining and strengthening the domestic and economic peace and resolve through a no-strike pledge by the American Federation of Labor (AFL) and the Congress of Industrial Organizations (CIO). In consideration for that pledge, President Roosevelt, by Executive Order, created the National War Labor Board,⁵ which in turn provided for quasi compulsory arbitration for resolving industrial disputes.

The system worked—well. We mobilized for war, lifted ourselves out of the Great Depression, and created a prosperous middle class, which held all the hopes for our future. That future was built on a solid foundation of good jobs and a college or vocational education for all – not only for those privileged few who could pay for such luxuries. Americans began to view jobs and education together with social security, disability, and health care as necessities – not luxuries.

B. Congress Enacted Taft-Hartley In a Misguided Attempt to Reset the Balance of Power

1. Overview: The Post-War Balance of Power Between Labor and Management

The Eightieth Congress came to elected power at this watershed moment. Rather than understanding that hope remained in that Pandora’s box of technological achievement, members of the Eightieth Congress sought to turn back time as if they could return what they viewed as the excesses of progress, while maintaining what they viewed as progress. For them, progress was measured purely in the growth of bottom-line corporate profits rather than broadly shared social and economic opportunity.

³ 29 U.S.C. § 151.

⁴ The relationship among national security, organized labor, and government regulation of labor relations was reviewed in law journals during World War II. See, e.g., Ralph S. Rice, *The Wagner Act: Its Legislative History and Its Relation to National Defense*, 8 OHIO ST. L. J. 17 (Dec. 1941) (“But the nation is now at war. In preparation for defense efforts during the past months, the impact of employer-employee relationships upon the public welfare has been more and more keenly called to the attention of all the people by recent labor disputes affecting the production of materials vital to the national defense program.”).

⁵ Executive Order 9017—Establishing the National War Labor Board, dated January 12, 1942.

Twelve years after passage of the Wagner Act and a world war later, in 1947, at the commencement of the Cold War, the Eightieth U.S. Congress passed the Taft-Hartley Act. My predecessor, West Virginia University Labor Law Professor, Guy Otto Farmer, writing shortly after Taft-Hartley went into effect but before he was appointed as a Republican Board member under the Eisenhower administration, described the Eightieth Congress's legislative efforts as maintaining "a proper balance of power between conflicting interests." Farmer added:

[D]emocracy consists of the interplay and clash of opposing forces, each attempting to gain dominance on an economic, social or political plane. . . . It is perfectly natural and normal that there should be *differences between capital and labor since the one is interested in high profits and the other in high wages*; but it is dangerously false to assume that their differences are irreconcilable. The area of conflict is in fact small and these two groups have more interests in common than in conflict, the chief one being a mutual interest in maintaining volume production of goods and thus insuring plenty and prosperity for all. . . . Nevertheless, the conflict does exist on a short-run basis and it is wise to recognize it. We have seen it manifested from time to time in strikes and work stoppages and in other kinds of industrial strife. And the conflict is one which the public cannot afford to view with indifference. . . . *In the clash between capital and labor, the public has too much at stake to view the scene as an isolated sports spectacle. We cannot afford to permit either of these powerful opponents to be utterly defeated and carried from the ring. They are the twin economic supports of our democratic society. Without both of them, real democracy cannot exist.*⁶

In this article, Farmer made the following prediction: "[T]he real test of [Taft-Hartley]," that which "will determine whether its enactment was good or bad for our democratic system" is what impact it will have on "the *balance of power* in labor relations."⁷ Building up one, only to destroy the other, was not a productive option. Although the article defends Taft-Hartley as necessary to restoring balance of power to labor-management relations, I submit to you today that, whether the members of the Eightieth U.S. Congress, Guy Farmer, and others correctly believed that reform was needed to tinker with the balance of power between capital and labor, Taft-Hartley and its legislative and adjudicatory progeny ultimately stripped unions of so much power as to marginalize the vital role they played in building a strong middle class necessary for economic growth and prosperity. Taft-Hartley fails Guy Farmer's test.

2. Taft-Hartley Tipped the Balance of Power in Favor of Business Thus Leaving the Middle Class Weak and Angry and Creating Great Inequality That Has the Effect of Destabilizing Our Democracy and Our Economy

Taft-Hartley tipped the balance of power toward business primarily by effectuating three main changes: by narrowing the NLRA's coverage, by narrowing the definition of what conduct constitutes protected concerted activity.⁸ As a threshold matter, Taft-Hartley added two broad

⁶ Guy Farmer, *The Taft-Hartley Act and the Balance of Power in Labor Relations*, 51 W. VA. L. Q. 141, 142-43 (1949).

⁷ Farmer, *supra* n. 6, at 141.

⁸ To be sure, Taft-Hartley made some important improvements: It created the office of the General Counsel, 29 U.S.C. § 153(d); and obliged unions to bargain collectively with management, 29 U.S.C. § 158(b)(3), a duty already imposed on employers via the

exemptions to the definition of employee⁹ – supervisor¹⁰ and independent contractor¹¹ – which significantly narrowed those working-class people who possess labor rights, thereby punching a gaping hole in the NLRA’s protective cover.¹² Taft-Hartley also removed powerful economic weapons from the union’s arsenal. Most prominently, it prohibited secondary activity, making it unlawful for a union that has a primary dispute with a company, Employer P, to pressure a third-party neutral, Employer N, to stop doing business with Employer P.¹³ For example, a newspaper union involved in a labor dispute with a newspaper might find it highly effective to picket a papermill thereby discouraging it from selling raw paper to the newspaper. Stripped of its power to engage in most secondary activity, a union is limited to publicizing its dispute or putting direct pressure on its own employer. Those weapons have proven ineffective in counterbalancing the coercive power of big business. Finally, notwithstanding the proviso to Sections 8(a)(3),¹⁴ which allows union-security agreements, Taft-Hartley added Section 14(b),¹⁵ allowing states to legislate the question whether private-sector employees who are represented by a union, which by law has a duty of fair representation¹⁶ to all whom it represents, may refuse to pay all dues, even those dues that support the union’s representative, grievance-arbitration, and contract administration functions. Those states that opt to regulate that question are called right-to-work states.¹⁷

These and other changes, individually and collectively, have weakened unions. This is true both logically and empirically. First, as a matter of internal logic, these legislative moves would predictably weaken unions as institutional players sufficiently strong to balance the power wielded by business in an advanced capitalist society. If Congress removes a wide band of working class people from the NLRA’s coverage and thus removes those individuals as potential union members,

Wagner Act, 29 U.S.C. § 158(a)(5). But at its core, Taft-Hartley gutted union power to effectuate social change for ordinary working-class people.

⁹ 29 U.S.C. § 152(3).

¹⁰ 29 U.S.C. § 152(11).

¹¹ In recognizing the independent contractor exemption, Taft-Hartley overturned two Supreme Court cases. See *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111 (1944) (holding that newsboys were employees under the NLRA, despite contentions that they are independent contractors and should be excepted); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 487-91 (1947) (holding that minor foremen, who were responsible for quantity and quality production control in a mass-production industry, were employees under the NLRA, notwithstanding contentions that these workers were either employers within the meaning of the NLRA or so closely aligned with the employer’s interests that it was undesirable to consider them statutory employees). The definition of independent contractor under the NLRA is currently synonymous with the Restatement definition.

¹² See generally Anne Marie Lofaso, *The Vanishing Employee*, 5 F.I.U. L. REV. 495 (2010).

¹³ 29 U.S.C. § 158(b)(4).

¹⁴ 29 U.S.C. § 158(a)(3).

¹⁵ 29 U.S.C. § 164(b).

¹⁶ *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) (extending the duty of fair representation to the NLRA, and explaining that the union’s “statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interest of all . . . without hostility to any.”); *accord Vaca v. Sipes*, 386 U.S. 171 (1967) (holding that union conduct that is “arbitrary, discriminatory or in bad faith” violates the duty of fair representation). The duty of fair representation was originally created in the context of the Railway Labor Act (RLA), 45 U.S.C. § 151 et seq. See *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944) (striking down under the RLA a seniority system that discriminated against black workers, explaining that the RLA implicitly “imposes on the bargaining agent . . . the duty to exercise fairly the power conferred upon it on behalf of all those for whom it acts without hostile discrimination against them,” while, at the same time, “the statutory representative . . . is [not] barred from making contracts which may have unfavorable effects on some members of the craft represented”).

¹⁷ A good explanation of these concepts can be found at Ronald Turner, “Membership” Obligations Under NLRA Section 8(a)(3): A Proposal for Statutory Change, 17 HOFSTRA LAB. & EMP. L. J. 323 (2000).

shrinks the conduct that the NLRA protects, and limits the extent to which unions can raise money for even its core purposes – organizing, bargaining, and contract administration – then it stands to reason that unions would fail and the middle class would collapse.

Empirically, union density in the private sector was down to 6.5% as of 2017¹⁸ from a high of about 35% in 1954.¹⁹ Since 1954, shortly after enacting Taft-Hartley, union membership in both absolute terms and by density began to decrease. During this same time, the middle class shrunk, and our manufacturing industry has all but left a complete vacuum in the United States. This vacuum is potentially a national security issue – a question that is not the subject of today's hearing but does warrant future attention.

Moreover, since the 1950s, the United States economy has shifted from an industrial manufacturing economy, to a service-based economy, to a knowledge-based economy. The workplace itself has shifted from the factory to, in many cases, a virtual workplace. The workplace is certainly more fragmented and less hierarchical as well. The economy has shifted from one of relatively high union density, especially in certain industries, to one of single-digit union density in the private sector. The middle class continues to shrink. US test scores continue to shift downward compared with many other advanced capitalist countries.²⁰ Health outcomes are low (and more expensive) when compared with our peer countries²¹ and more tellingly health disparities within the United States continue to widen.²²

C. Any Changes in Labor-Management Relations Law Should Have Two Goals – To Restore the Balance of Power and To Modernize the Law

1. Legal Measures That Achieve These Goals

a. NLRB's Election Rules²³

¹⁸ See BUREAU OF LABOR STATISTICS, UNION MEMBERS 2017, data released January 19, 2018, available at <https://www.bls.gov/news.release/union2.nr0.htm>.

¹⁹ To be more precise, "[a]s a percent of nonagricultural employment, union membership peaked at 35.4% in 1945. As a percent of wage and salary employment and a percent of total employment, union membership peaked in 1954 at 34.8% and 28.3%, respectively." See GERALD MAYER, G. UNION MEMBERSHIP TRENDS IN THE UNITED STATES. WASHINGTON, DC: CONGRESSIONAL RESEARCH SERVICE 12 (2004).

²⁰ See Drew DeSilver, *U.S. Students' Academic Achievement Still Lags that of Their Peers in Many Other Countries*, Feb. 15, 2017, <http://www.pewresearch.org/fact-tank/2017/02/15/u-s-students-internationally-math-science/>.

²¹ See Karen Davis, Kristof Stremikis, David Squires, and Cathy Schoen, *Mirror, Mirror on the Wall, 2014 Update: How the U.S. Healthcare System Compares Internationally*, THE COMMONWEALTH FUND, June 2014, <http://www.commonwealthfund.org/publications/fund-reports/2014/jun/mirror-mirror> (ranking the U.S. last (11th) in healthcare performance as compared with the U.K., Switzerland, Sweden, Australia, Germany, the Netherlands, New Zealand, Norway, France, and Canada, using metrics that included quality of care, access to care, efficiency, equity, and healthy living).

²² See, e.g., Joachim O. Hero, Alan M. Zaslavsky, and Robert J. Blendon, *The United States Leads Other Nations In Differences By Income In Perceptions Of Health And Health Care*, 36 HEALTH AFFAIRS, June 2016, <https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2017.0006>.

²³ These points are nearly verbatim to the points I made at the Public Meeting on Proposed Election Rule Changes, held at the National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C., on July 18, 2011.

The NLRB Election Rules achieve the goal of empowering workers primarily by modernizing the election procedures. They modernize outdated rules and make them more readable; make government run more efficiently by liberalizing information and by addressing the main problem of delay, while still allowing ample time for full debate; and deliver better service to the public. These amendments strengthen the secret-ballot election process, a process that the Chamber of Commerce itself has fought to maintain.

First, these amendments modernize the election rules by permitting the electronic filing and transmission of documents. These changes are consistent with the efforts of other tribunals to modernize their own rules, such as the Electronic Case Filing initiative of the federal courts. The Board's efforts to make the rules more readable are also consistent with the efforts of other tribunals, such as the federal courts' Restyling Project, an effort to rewrite all federal rules in plain English.

Second, these amendments also make government more efficient in two ways. First, they liberalize information available to all parties, thus making government more transparent. The basic requirement for an efficient process is greater initial information. The amendments require parties to release information readily within their control no later than the pre-election hearing. Information such as the names, addresses, telephone numbers, and email addresses of employees is information that is well within an employer's control. This, too, is consistent with the recent developments of mandatory initial disclosure under the federal rules.

Similarly, the amendments require the parties to submit position statements no later than the pre-election hearing. To make it easier for the parties to comply with this requirement, the Board has offered the assistance of its Hearing Officer. This amendment provides a mechanism for quickly identifying the issues. This, too, is consistent with the trend in federal pleading requirements, especially after *Iqbal v. Ashcroft*.²⁴ The purpose of raising issues in the early stages is to resolve issues as quickly as possible so that non-meritorious issues do not go any further, which would result in lost resources. These requirements do not favor either party. Instead, they make the first steps in the process clear and more efficient.

These amendments also make government run more efficiently by streamlining election procedures. The amendments eliminate unnecessary bureaucratic delay, thereby diminishing opportunities for unscrupulous parties to take advantage of systemic delay. By eliminating pre-election voter eligibility challenges that are unlikely to affect the election and pre-election request for review; by giving the Board the discretion to deny post-election rulings thereby allowing the Regional Director to make a prompt final decision; and by consolidating review of the Regional Director's rulings through a single, post-election request, the Board's efforts are, once again, consistent with the federal rules under which litigants get only one pre-answer motion.

Third, these amendments deliver better service to the public, not only by modernizing the system and making it run more efficiently, but also by creating uniformity, which leads to predictability. Predictability is always good for business. Uniform standards also leave less room for unscrupulous parties to game the system.

²⁴ 574 F.3d 820 (2009). See also *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99 (2005).

Opponents of the rule inaccurately contend that the rules cut off debate. These amendments deal only with the time between the election petition and the election itself. Employers and unions have ample time to make their views known during this period as well as prior to the filing of an election petition. Indeed, many employers now show, as part of their first-day orientation, short films claiming that unions are unnecessary. *If some employers are truly concerned with full debate, I suggest that they give unions access to their property and debate the pros and cons of unionization.*

b. The Workplace Action for a Growing Economy Act of 2017 (WAGE Act)

The purpose of the WAGE Act is to strengthen unions so that they bolster the middle class, which will facilitate economic growth from the middle outward. The Wage Act purports to do this in the following five ways.

First, the WAGE Act requires employers to post notices of workers' rights under the NLRA. As I discussed in a previously published White Paper,²⁵ publishing laws increases transparency, which creates, maintains, and builds the "inner morality of the law."²⁶ Moreover, it helps to educate and create an informed citizenry, a prerequisite for a strong democracy that is able to withstand foreign challenges to our political system.²⁷

Second, the WAGE Act strengthens the NLRA's weak enforcement mechanisms by penalizing those who violate federal labor law. The bill guarantees penalties equal to twice the amount of an employee's backpay, plus fines up to \$50,000, for each violation resulting in discharge or serious economic harm.

Third and relatedly, the WAGE Act strengthens remedies for workers who are retaliated against for exercising their NLRA Section 7 rights. The bill compels the Board to petition the district court to grant an injunction for temporary reinstatement while that worker's case is pending. The bill also brings NLRB orders in line with the orders of other federal agencies by making them self-enforcing. And the bill brings the NLRA in line with other civil rights laws by granting workers the right to seek private relief in federal court.

Fourth, the WAGE Act expands coverage of the NLRA. The bill prevents employers from misclassifying their employees as supervisors or independent contractors, and prevents workers from being denied backpay because of their immigration status. The bill also makes the employer

²⁵ See Anne Marie Lofaso, *We Are in This Together: The Rule of Law, the Commerce Clause, and the Enhancement of Liberty Through Mutual Aid*, in AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY, TOWARD A MORE PERFECT UNION: A PROGRESSIVE BLUEPRINT FOR THE SECOND TERM (Jan. 2013), https://www.aeslaw.org/sites/default/files/Lofaso_-_We_Are_in_this_Together.pdf.

²⁶ The idea of the inner morality of law comes from Lon Fuller's eight canons of law – characteristics features of laws developed in a well-functioning democracy. They are: generality, publicity, clarity, consistency, feasibility, constancy, prospectivity, and congruence. See Lofaso, *supra* n. 25, at 12 (citing LON L. FULLER, THE MORALITY OF LAW 33–39 (revised ed. 1964) and David Luban, *The Rule of Law and Human Dignity: Reexamining Fuller's Canons*, 2 HAGUE J. RULE L. 29, 31 (2010)).

²⁷ See *id.*

jointly and severally liable respecting violations affecting temporary or subcontracted employees acting within the employer's usual course of business.

Fifth, the WAGE Act streamlines the process for workers to organize a union and negotiate a first contract – a proposal first endorsed by the Republican NLRB General Counsel Ron Meisburg. The bill authorizes the Board to issue a bargaining order when an employer's unlawful conduct prevents a fair representation election and if a majority of workers have designated the union as their representative in writing.²⁸ For newly certified unions, the bill facilitates mediation and arbitration procedures to help parties reach a first contract.

c. Repeal or the Modify the Supervisory and Independent Contractor Exemptions

As discussed above, the supervisory and independent contractor exemptions have deprived countless working-class men and women of their labor rights. Yet, these worker classifications do not account for the modern workplace. Industrial America was hierarchical. The modern workplace is more diverse. It often has a flatter organizational structure in which workers collaborate in groups rather than taking responsible direction from superiors. This collaborative atmosphere is at the heart of American innovation, creativity, and ingenuity. But that organization, while often deeply egalitarian, does not readily fit into the hierarchical organizational structure assumed by the NLRA. Rather than removing the labor rights of increasingly more workers, which these exemptions do, relaxing these exemptions achieves the twin goals of restoring workers' labor rights and modernization.

d. Apply the NLRA to the Fragmented Workplace

When Congress passed the Wagner Act, the workplace was concrete. It looked like a factory or a plant or a store or a hospital. The modern workplace might still resemble a factor or a store. But it might also resemble a telecommunication work station or a virtual workplace. In many cases, it is unclear who the employer even is. In legal terms, this is a duty-holder problem. Members of Congress state that they want to extend labor rights to workers, but by definition, a right implies a legal duty imposed on a person who owes something— usually protection of that right—to the rights' holder. It is important for policymakers, which include members of Congress and the Board, to think through the nuances of this duty-holder problem rather than throwing up their hands merely because the problem is difficult to untangle. A prime example of this problem can be seen in the joint-employer/franchise context, where some have argued that a franchisor who controls terms and conditions of employment are not employers because the franchisee also controls some of those terms.²⁹

e. Repeal or Modify Section 8(b)(4)

²⁸ This is currently the law as interpreted by the NLRB with the endorsement of the United States Supreme Court. See *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

²⁹ See *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, 365 NLRB No. 156 (2017) (*Hy-Brand I*) (overruling *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery (Browning-Ferris)*, 362 NLRB No. 186 (2015)). But see *Hy-Brand Industrial Contractors, Ltd.*, (vacating *Hy-Brand I* considering the Board's Designated Agency Ethics Official determination that Member Emanuel should have been disqualified from participating in the proceeding) (Feb. 26, 2018).

Section 8(b)(4) severely limits a union's ability to bring so-called neutral employers into the union's labor dispute, thus removing one of the most powerful arrows from the union quiver. But more importantly, Section 8(b)(4) severely restricts employee speech and expressive conduct. Imagine you are a mammal rights activist who is disturbed that tuna fishers' purse-seine bycatch of dolphins has resulted in the deaths of over six million dolphins. Your most effective method of communicating that message is by refusing to purchase tuna caught using the purse-seine method where dolphins and tuna swim together. This is a secondary boycott. Government action meant to outlaw its citizens from engaging in this secondary boycott would have grave first amendment consequences. Yet those very same values are at stake under Section 8(b)(4)'s prohibition of secondary boycotts.³⁰ Congress should be more sensitive to these values and consider relaxing speech restrictions on employees – whether that speech is pro-union, antiunion, probusiness, antibusiness, or whatever the content of that speech.³¹

2. Legislative Attempts That Would Fail To Achieve These Goals

In the recent past, three legislative measures have been introduced in the name of workers' rights but which would, in reality, continue the backward trend of squeezing the middle class.³² Together and separately, these bills craft eight steps toward destroying workplace democracy.³³ *One*, the bills block employee access to information about the benefits of unionization. *Two*, they create anti-democratic voting measures cloaked in the language of democracy. *Three*, they eliminate the longest-standing and most basic way for workers to form unions – by card check – while inventing creative ways for employers to bust unions. *Four*, the bills delay union certification. *Five*, they gerrymander voting districts by trying to compel the Board to add employees, who do not wish union representation, to petitioned-for bargaining units to create a majority non-union block. *Six*, they augment penalties for unions (but not employers) that violate the NLRA, notwithstanding the fact the unions are much less likely to violate the Act than are employers. *Seven*, they drain union treasuries. *Eight*, the bills grant nonunion members control over unions. *Nine*, they create one-sided criminal penalties for unions, but not for managers or replacement workers, to engage in or threaten violence. Below I highlight some of these issues.

a. Employee Rights Act (H.R. 2723)

³⁰ Professor Jack Getman makes the very same point in his article, Julius Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?*, 45 B. C. L. REV. 125, 140 (2003).

³¹ See *Edward DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 576 (1988) (concluding that a union secondary appeals to customers through handbills that “pressed the benefits of unionism to the community and the dangers of inadequate wages to the economy and the standard of living of the populace,” were a type of constitutionally protected political speech).

³² See Legislative Reforms to the National Labor Relations Act: H.R. 2776, “Workforce Democracy and Fairness Act,” H.R. 2775, “Employee Privacy Protection Act,” H.R. 2723, “Employee Rights Act,” 115th Cong., 1st Sess. (Jun. 14, 2017).

³³ For an in-depth analysis of these steps, see Testimony of Guerino J. Calemine, III, General Counsel, Communications Workers of America Before the U.S. House of Representatives Subcommittee on Health, Labor, Employment, and Pensions Legislative Hearing on H.R. 2776, 2775, and 2723, June 14, 2017, testimony available at <http://democrats-edworkforce.house.gov/imo/media/doc/Calemine%20Testimony.pdf>.

H.R. 2723, if passed, would take *four* prominent steps backwards in recent efforts to augment workers' labor rights and efforts to modernize rules governing the workplace. *First*, the bill would interfere with employees' rights of self-determination by restructuring workplace representation procedures making it difficult to secure representation—the hard-in approach—while simultaneously making it easy to destabilize the union-employee relationship. It would prohibit employers from voluntarily recognizing a union based on a majority showing of employee support on properly authenticated authorization cards. This anti-democratic move would thereby reverse the historically grounded and longest-standing practice of employees for determining their representatives by card check. The bill would also modify the way votes are counted in union elections by counting non-voters as “no” votes, contrary to how ballots are typically counted in U.S. elections, in which the majority of those who vote prevails.³⁴ Because failure to vote counts as a no-vote, detractors of this provision call this – stuffing the voting box with no votes. Decertification ballot counts, by contrast, would remain American style. The bill would also require recertification elections under certain circumstances, thereby further destabilizing the representative relationship.

It is worth pausing on the contrasting approaches that the bill takes to certification and decertification procedures. It eliminates card check (and mail ballots) and voluntary recognition. For certification votes, it reverses American-style vote counting for union certification thereby converting a failure to vote into a vote against the union. By contrast, the recertification/decertification vote would require American-style majority of votes cast. While it does not place term limits on unions, it does convert American-style democracy – terms based primarily (though not exclusively) on a contract bar of up to three years – into a parliamentary style vote of no-confidence. The bill would thus require recertification elections every time there is turnover or change affecting more than 50 percent of the bargaining unit, thereby presuming that turnover indicates lack of support. This turnover trigger has no correlation with employee choice – the recertification vote is triggered whether or not a single employee actually wants the vote of no confidence.

Second, H.R. 2723 would abolish the modest steps that the NLRB made toward modernizing its election procedures in ways which obstruct workplace democracy. The bill both reinserts needless delay into the election procedures at several stages and limits contact information to home addresses. If Congress were serious about making government more efficient and modernizing government processes, surely it would not build redundancy into government procedures (which waste taxpayer money and delay the vindication of statutory rights) or interfere with modern forms of communication.

Third, H.R. 2723 would interfere with the union's internal procedures necessary to preserve self-determination primarily by allowing employees who choose not to become union members to vote on collective-bargaining agreements bargained by the union and to vote on strikes called by the union. The government is thus dictating to an organization that it must allow those who choose not to become members and who choose not to pay for that organization's service to have a voice

³⁴ To put into focus the baselessness of the democratic-deficit problem that this measure is supposed to resolve, consider this. Not one member of Congress received the majority of votes of those he or she represents. Indeed, the current U.S. President did not even receive the majority of those who voted in the election. And this problem with the electoral college is neither unique nor rare. If Congress is concerned about democratic deficits, surely it would resolve these significantly more impactful problems.

in how that organization is managed. This would be akin to requiring Republicans to give Democrats a say in the Republican platform, simply because the Republican candidate, if successful, would also represent the Democrats in his or her district.

Fourth, H.R. 2723 would change *Beck*³⁵ objectors from opt-out to opt-in. In a post-*Citizens United*³⁶ world, in which money is speech, this measure is designed to weaken unions as a counterweight to corporate power and speech. If balance is desired, then this measure must be debated in light of *Citizens United* and in light of the question whether shareholders should also be granted opt-out options.

It is worth clarifying some myths that tend to misinform the discussion of *Beck* fees. The law already prohibits compelled union membership and union shops. No one is required to join a union or pay union dues. In right-to-work states, a nonmember bargaining-unit employee does not have to pay any union fees, even though the union must represent that employee under the duty of fair representation doctrine. In all other states (commonly known as fair-share states), a nonmember bargaining-unit employee is required to pay only an agency fee – that portion of the union fee that covers the costs of representing him but has the right to object to any portion of that fee paying for anything not “germane” to the union’s duties as bargaining agent. Under the Employee Rights Act, however, a union member already paying dues would be required to give annual consent – after 35 days written notice each year – for the union to use any portion of that member’s dues for anything other than union organizing, collective bargaining, or contract administration. Accordingly, this provision does not create a “Right Not to Subsidize Union Non-Representational Activities,” as the bill suggests. Moreover, while current law allows agency fee objectors to make a “continuing objection” that does not have to be renewed each year and permanently restricts his fees from being used for anything non-germane to collective bargaining, the ERA bill prohibits the correlative automatic renewal of a member’s consent for the union to use his dues for non-germane activities.³⁷

b. Workplace Democracy and Fairness Act (H.R. 2776)

As with H.R. 2723, the Workplace Democracy and Fairness Act primarily attacks those advances that the Board made to modernize and streamline election procedures vis-à-vis its April 2015 election procedures. H.R. 2276 would impose certain requirements throughout the election process that will unduly complicate and delay the process. For example, the bill requires the NLRB to wait at least two weeks before holding any pre-election hearing.

c. Employee Privacy Protection Act (H.R. 2775)

³⁵ See *Communications Workers of America v. Beck*, 487 U.S. 735 (1988) (holding that, under a union security agreement, unions are authorized by statute to collect from non-members only those fees and dues necessary to perform its duties as a collective bargaining representative).

³⁶ See *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

³⁷ The analysis of *Beck* and related issues summarizes the more sophisticated analysis provided in Testimony of Guerino J. Calamine, III, General Counsel, Communications Workers of America Before the U.S. House of Representatives Subcommittee on Health, Labor, Employment, and Pensions Legislative Hearing on H.R. 2776, 2775, and 2723, June 14, 2017, testimony available at <http://democrats-edworkforce.house.gov/imo/media/doc/Calamine%20Testimony.pdf>.

Once again, H.R. 2775 targets the NLRB's April 2015 election procedures by placing obstacles between workers and union representatives' communications prior to a representation election. In contrast with the Board's current rules, which require employers to provide available telephone numbers and e-mail addresses within two business days, H.R. 2775 would limit and delay that information. It particular, H.R. 2775 would allow employers to provide only one form of employee contact information, and would not require employers to provide this information until seven days after the NLRB rules on the appropriate bargaining unit.

3. The Attack on Worker Centers Is Baseless Because They Are Not Labor Unions and Do Not Engage in Collective Bargaining

Worker Centers are community-based nonprofit organizations that provide various services to low-wage workers in the communities they serve.³⁸ Many, but not all, of these organizations center around immigrant groups who work in low-wage jobs, thus shaping the type of services offered.³⁹ Such services include providing English-language classes, job-readiness training, and occupation-safety training to community members, assistance applying for unemployment benefits or filing a claim for unpaid wages, or help opening bank accounts or obtaining loans. It is universally understood by members of both major political parties and labor law experts that worker centers are not labor unions.⁴⁰

Worker centers are not labor organizations under either the NLRA or Labor-Management Reporting and Disclosure Act (LMRDA). The NLRA defines a "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."⁴¹ The NLRB has clarified that the definition of "labor organization" is not limited to labor unions.⁴² Board cases often turn on whether the organization "deal[s] with employers." The Board has explained that "'dealing' . . . ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management [and] management responds to those proposals by acceptance or rejection. . . . [I]f there are only isolated instances in

³⁸ See generally JANICE FINE, WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM 2 (Economic Policy Institute 2006).

³⁹ Compare Casa Latina, <http://casa-latina.org/about-us>, and Latino Worker Safety Center, <https://www.latinoworker.org/> with The National Black Worker Center Project, <https://nationalblackworkercenters.org/affiliates/>.

⁴⁰ Neither the National Labor Relations Board (NLRB) or the Department of Labor (DOL) has ever found a worker center to be covered by those laws. The question whether worker centers are labor organizations first presented during the Bush Administration. In cases involving the Restaurant Opportunity Center of New York (<http://rocunited.org/>), a worker center that has aggressively advocated for workers in the restaurant industry, shining much light on tip theft, the Bush Administration concluded that ROC was not a labor organization covered by either the NLRA or the LMRDA. See Memorandum from Barry J. Kearney, Associate General Counsel, Division of Advice, NLRB, to Celeste Mattina, Regional Director, Region 2, NLRB, regarding Restaurant Opportunities Center of New York, Case Nos. 2-CP-1067, 2-CB-20643, 2-CP-1071, 2-CB-20705, 2-CB-20787, 2006 WL 5054727, 2006 NLRB GCM LEXIS 52 (Nov. 30, 2006); Chris Opfer and Jasmine Ye Han, *Worker Centers May Get Closer Look Under Trump*, BLOOMBERGNEWS, Jan. 16, 2017, <https://www.bna.com/worker-centers-may-n57982083896/>.

⁴¹ 29 U.S.C. § 152(5).

⁴² See *Electromation, Inc.*, 309 NLRB 990 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994).

which the group makes ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed, the element of dealing is missing.”⁴³

While Board cases discussing the statutory definition of “labor organization” often arise in the context of a Section 8(a)(2)⁴⁴ violation, the NLRB has provided guidance in the worker center context, in a case where the NLRB General Counsel declined to issue a complaint against the Restaurant Opportunities Center of New York (ROC-NY), on the basis that ROC-NY was not a labor organization.⁴⁵ The General Counsel acknowledged that “the parties’ discussions stretched over a period of time,” but ultimately concluded that, “[a]lthough stretching over a period of time, the parties’ dealings were limited to a single context or a single issue – resolving ROCNY’s attempts to enforce employment laws,” so ROC-NY was not a labor organization for purposes of the NLRA.

As relevant for most worker centers, the LMRDA definition of “labor organization” is narrower than the NLRA definition. The LMRDA defines a labor organization as

a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of *dealing with* employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body.⁴⁶

On top of the “dealing with” requirement, the LMRDA includes the additional requirement that the labor organization be “engaged in an industry affecting commerce.” That phrase is separately defined to include, as relevant to worker centers, a labor organization that “is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or [] although not certified, is . . . recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce[.]”⁴⁷ This language indicates that only an organization that acts or seeks to act as a bargaining representative within the meaning of the NLRA or the RLA – i.e., as an exclusive representative – is a labor organization within the meaning of the LMRDA.⁴⁸

⁴³ See *E.I. du Pont de Nemours & Co.*, 311 NLRB 893, 894 (1993).

⁴⁴ 29 U.S.C. § 158(a)(2) (making it unlawful for an employer “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . .”) (emphasis added).

⁴⁵ See *Restaurant Opportunities Center of New York*, *supra* n. 39.

⁴⁶ 29 U.S.C. § 402(i) (emphasis added).

⁴⁷ 29 U.S.C. § 402(j).

⁴⁸ As explained, *supra* n. 39, OLMS has never found a worker center to be a labor organization covered by the LMRDA. During the George W. Bush Administration, OLMS twice concluded that the Restaurant Opportunities Center was not an LMRDA-covered labor organization.

In short, worker centers are not recognized as the exclusive representatives of the people they serve, do not “deal with” or engage in collective bargaining with employers, and do not represent employees on an ongoing basis in relation to their employer and thus are not covered by either the NLRA or the LMRDA.⁴⁹ While worker centers often advocate or assist workers on a variety of issues, some of which include workplace issues, they help with discrete issues with a variety of employers on a variety of topics. That assistance, therefore, never rises to the “pattern or practice” necessary for showing that the Worker Center is “dealing with” the employer within the meaning of the statute.

Conclusion

The NLRA, a federal labor law that has not been significantly updated in over seventy years, is in desperate need of modernization. Legislative and administrative change is especially pressing because the imbalance of power created by Taft-Hartley has served only to deepen economic inequality, shrink the middle class, and leave many working-class people angry. As members of the Seventy-fourth U.S. Congress well understood, that angry will predictably surface in various forms of labor and political unrest. Witness the swath of teachers strikes that have swept our nation in recent months. I urge members of this Congress to reach across the aisle and work together on our nation’s problems. Focus on people rather than party loyalty. Focus on solutions rather than ideology. Assume the best in one another and we will keep our nation great.

⁴⁹ 29 U.S.C. § 159(a); *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944); 29 U.S.C. Section J.

Chairman WALBERG. [Presiding] Thank you, Dr. Lofaso.
And now I recognize Mr. Bowman for your five minutes of testimony.

**TESTIMONY OF TERRY BOWMAN, AUTOWORKER, YPSILANTI,
MICHIGAN**

Mr. BOWMAN. Chairman Walberg, Ranking Member Sablan, and members of this committee, thank you for allowing me to testify today to discuss the plight of individual workers in the U.S. who are represented by a union, both voluntarily and those forced into it.

We are speaking today on an issue that is very close to my heart: common-sense labor reform. My name is Terry Bowman, and I have worked for Ford Motor Company as an hourly employee for over 21 years, 19 of which I was a full, dues-paying UAW member. In 2015, I was able to exercise Michigan's workplace freedom law, and I withdrew my UAW membership. Today, however, I am still forced to accept the UAW representation.

Unfortunately, unions are still stuck in a 1930s business model with compulsion as its core principle. Necessary labor reforms are required to bring unionism into the 21st century.

Unlike many union executives, I believe granting union-represented workers additional rights, freedoms, and protections is always a good thing. And two labor reforms I would like to briefly discuss today are worker political protections and the guarantee to a secret ballot election.

Now, let's look at political protection. Unions represent workers on all sides of the political spectrum. We all know that. However, we also know that the vast majority of political spending by unions benefits one party, causing a forced speech situation. Why should any worker simply wanting to earn a living and provide for their family be forced to fund any political or social speech or activity that they disagree with?

What workers need is to require unions to receive opt-in provisions and permission from each worker before they can use his or her union dues for purposes other than collective bargaining.

Private-sector unions reported on their government LM-2 forms that they spent over \$1.7 billion on politics for the 2016 election cycle. This does not include public-sector unions, so the actual figure is actually much higher.

In addition, unions may spend much more than reported, due to inconsistencies in how they classify political or social activity. Categories such as education or community involvement may hide additional political activity, and of course grants and donations will also reflect political and social spending that may insult many union workers.

Currently, labor law allows unions to deduct money for political spending from an employee's paycheck without obtaining prior approval. Only by initiating an often burdensome procedure or by resigning from a union can employees guarantee that their money will not support political agendas they disagree with. The process tends to be overly complicated, and rife with intimidation and fear: something I know about from personal experience. By simply requiring that union members opt in, rather than having to pursue

a refund of dues or to opt out, employee rights will be better protected.

And let's look at secret ballot elections. The very thought that we, as union workers, have to fight to make an argument for a secret ballot election is both outrageous and embarrassing. How could anyone ever deny a worker their right to privacy? This proposal is crucial to protecting a worker's right to vote their conscience without threatening and intimidating pressure from anyone, either a paid union organizer or an employer.

Currently, unions can bypass secret ballot elections by persuading workers to sign card check agreements authorizing union representation. They then can pressure companies to accept that card check recognition, skipping a secret ballot election all together. Considering many workers may be confused about what those cards really represent, I believe it is time to assure workers forced into any union election that their privacy will be protected by guaranteeing a secret ballot election.

Luckily, H.R. 2723, the *Employee Rights Act*, would address these concerns and more. Among eight pro-worker reforms, the *Employee Rights Act* would require secret ballot union elections, guaranteeing every employee's right to a private vote.

The ERA would also require union officials to obtain opt-in approval from their members before spending their dues money on political advocacy. This would protect workers' paychecks from unapproved political spending. This legislation seems almost written by union workers for the benefit of union workers.

I ask that you stand with me and my fellow union workers and support long-needed labor reform that will ensure our rights, freedoms, and protections, and will grant unions the tools necessary to shed their worn-out business model and meet us all here in the 21st century. Thank you.

[The testimony of Mr. Bowman follows:]

Subcommittee on Health, Employment, Labor and Pensions

Hearing Date: April 26th, 2018

**"Worker-Management Relations: Examining the Need to Modernize
Federal Labor Law"**

Written Testimony

By

Terry Bowman

Ford-UAW Worker from Ypsilanti, Michigan

Summary

The issue discussed today is one of monumental importance for the 7.6 million private-sector workers in the US that are members of unions¹. I am here today because of my desire to do what is best for union workers. I work with them side-by-side every day, and for over 21 years have cared about what happens to them and their families. I am here to testify on behalf of workers; not on behalf of corporate unionism. The two are very different and distinct from each other. Sometimes what benefits a union as a company, does not mean it benefits workers, and frequently can come at the detriment of worker freedoms and rights.

I will make the case why labor reforms are needed, and recommend how members of both parties can comfortably pass common-sense legislation that could have been written by union workers for union workers. A bill called the Employee Rights Act (HR 2723).

I was raised in a blue-collar, union household. My father grew up in LaFayette, Tennessee, and after a stint in the US Army, migrated to Michigan in the 50's. With only an 8th grade education, he worked hard at menial jobs until finally landing a job with Ford Motor Company. His sister and brother both worked for Ford in different plants, and he retired in the early 90's.

Why his story matters is that he never had an opportunity to vote if he wanted to join a union. My father as well as his siblings were forced, as a condition of their employment, to accept the UAW as their collective bargaining agent. This was well over 50 years ago.

When I hired into Ford in 1996 and continuing to this day, I also have never been offered the opportunity to vote if I wanted union representation or not. I am forced to accept it. Even though Michigan is a Right to Work state, and I exercised those rights, freedoms, and protections in 2015, I remain forced to accept union representation from a corporation – the United Auto Workers – that I detest. If I want to continue an employee/employer relationship with Ford Motor Company, I must give up my 1st amendment right of Freedom of Association (or conversely, to NOT associate). I am a 2nd generation union auto worker forced to accept a union I never wanted. Periodic recertification elections would allow all union workers the ability to vote on their own representation.

So in 2009, I decided that millions of union workers like me needed someone to stand up and speak for them – even in the face of a hostile and threatening union atmosphere. I am pro-union; but in the context of what unions were created to do, not what they have become. Unions today are so closely tied to a political party that they have lost all sense of what they are supposed to be, and instead have become the funding and grassroots arm of their favorite political party. Protections are needed to ensure workers are not funding speech they disagree with.

My fight for worker rights started almost a decade ago when my union incorrectly used a theological argument to make a political statement against the Republican Party. The article in our union newsletter claimed that Jesus was basically a socialist, and that he would approve of

¹ <https://www.bls.gov/news.release/union2.loc.htm>

what is now known as Obamacare. The article was critical of Republicans as if the party was on the wrong side of God.

I was attending a Christian College and Seminary at the time and knew the theological argument was wrong – hurtful, insensitive, and insultingly wrong. I knew at that time that I had to start defending workers against the abuses of the very unions that claim to have their best interest at heart. In most circumstances, unions are entrenched for generations without fear, concern, or pressure to do a good job for the workers. This entrenchment also means that unions can spend dues money however they feel necessary, and support both political and social agendas with a workers dues money without getting prior approval.

Congress has granted Labor Unions extraordinary powers over individual worker rights, allowing them to become entrenched in companies without ever giving the workers a chance to vote if they want representation. That fact negatively affects union responsiveness to member concerns, and allows absolute power over workers in a collective bargaining unit (cba).

Lord Acton once said:

“Power tends to corrupt and absolute power corrupts absolutely”

In comparison, consider this: The members of this committee are representatives of your respective districts, but your citizens are granted the ability to vote every 2 years whether they want you to represent them. Perhaps as elected officials, you would enjoy not ever having to run for re-election. But I believe you would all agree that periodic elections are necessary to establish the wishes of your constituency.

Workers should be able to expect no less. Union workers, simply wanting to pursue their happiness by getting a job, do not have that ability. They are forced, as a condition of employment, to accept union representation. Common sense labor reform can grant voting rights to workers while giving unions tools necessary to move into the 21st century.

For the sake of union survivability, I ask that you consider common-sense labor reform. HR 2723 includes eight key provisions that benefit workers. Three of which (Secret Ballot Elections, Political Protection, and Recertification Elections) are discussed in this testimony.

Unlike what some may say, updating labor law to reflect the 21st century is not anti-union. Granting workers additional rights, freedoms and protections is always first and foremost, pro-worker. If any reform is beneficial to workers but is disliked by union executives, you must question the sincerity of those officials. Periodic recertification elections are crucial to regaining the trust between workers and their union leadership. Political Protection for workers removes potential violations of the 1st amendment, and Secret Ballot Elections ensures workers are voting their true intentions.

Recent union corruption cases in the national media, and big losses in organizing drives show that trust between many workers and union officials are at an all-time low.

If you are pro-union, you must be willing to consider necessary steps to ensure unions grow and succeed in the 21st century. Union officials are either unable or unwilling to do it themselves. Whether it is engaging in and spending dues on partisan politics, pushing a divisive social agenda, wanting to avoid a secret ballot election, or changing their business plan to succeed, union executives remain stalwart against modern, necessary change.

Simply put, unions exist in a 1930's business model and show no signs of shifting to protect their longevity. When entrenched in a business model that has force and compulsion at its core, union officials unfortunately will fight to keep their absolute power instead of competing in a modern organizing model.

That decision will spell the doom of the US Labor movement.

The latest data from the Bureau of Labor Statistics shows that the private sector 2017 Union Membership Rate of 6.5% continues in historically low territory². Obviously to any non-biased observer, change is necessary for unionism in America. Union officials do not want to see change. After all; they currently have a pretty easy deal. Workers, however, are different, and they want their unions held accountable. Strengthening unions for the 21st century will take some work - but easy decisions when you have the facts before you.

The Problem

Let's take a look at three issues that desperately need labor reform in order to protect the rights, freedoms, and protections of union workers across the country: Secret Ballot Elections, Recertification Elections, and Union political spending.

Issue #1 - Secret Ballot Elections v Card Check

Current NLRB procedure allows for union officials to organize a "Card Check" campaign, where they physically walk up to a worker and ask that worker to sign a card affirming that they want union representation. If the organizers are successful at getting 50% +1 of the bargaining unit to sign a card, they can then go to the employer and skip a secret ballot election.

Union organizers will claim that an NLRB sanctioned election may be "coercive" and only having the ability to sign a card in front of a union organizer does the worker have the ability to choose freely.³

This whole notion of Card Check is frightening for workers in a collective bargaining unit that is being organized. Outside of the "insiders" who are actively working with union organizers, Card Check is daunting and intimidating, leading to fearful confrontations between a worker and an organizer. Most workers simply want to do their job and go home to their families. Card check throws an unwanted physical confrontation into their work day that can cause unwanted stress.

As a worker surrounded by a union atmosphere, I can testify that the idea of a card check campaign would leave even me with worry and fright. Just imagine a union organizer approaching you at work, as you walk out the door to the parking lot, or even knocking at the door at your home. Even if the organizer does not use coercive speech or intimidation tactics, the psychological pressure on a worker is enough to force a rash and/or an ill-informed decision.

Only the sanctioned and peaceful privacy of an NLRB secret ballot election can ensure that the voter is voting his/her conscience.

² <https://www.bls.gov/news.release/union2.nr0.htm>

³ <https://www.heritage.org/jobs-and-labor/report/how-union-card-checks-block-workers-free-choice>

NLRB rules allow many more privileges to union organizers, and many more restrictions on employers during a union election. Union organizers are not held to the same restrictions that employers must follow when speaking to workers. In fact, union organizers can literally promise the moon to workers without any fear of reprisal from the NLRB. The union has a strong, financial desire for an outcome that favors the union's bottom-line. Thus enormous pressure is applied for the union to win that election, and that pressure trickles-down to organizers who are the "boots on the ground."

Stories abound in the media of both intimidation and false statements by union organizers of what authorization cards really are and what they represent.⁴

But even former union organizers testifying in front of this very committee have admitted the same. Jen Jason, a former Unite-here union organizer testified in front of this very committee on February 8, 2007⁵ and said:

"We rarely showed workers what an actual union contract looked like because we knew that it wouldn't necessarily reflect what a worker would want to see. We were trained to avoid topics such as dues increases, strike histories, etc. and to constantly move the worker back to what the organizer identified as his or her "issues" during the first part of the house call."

Clearly, Card Check can negatively influence, subvert, and circumvent a workers true voting wishes.

But we have an answer. A solution that is so obvious that this argument should never be necessary. Any organizing drive should be required to have a secret ballot election. Workers will feel no intimidation, no fear for voting against the union, or conversely; no fear for voting for the union. By communicating to workers beforehand that no one will ever know how they voted, workers will be free to express their will – and not the will of a towering presence in front of them holding forth a card.

Issue#2 – Union Recertification Elections

In my summary testimony, I told my family history in Southeast Michigan and our migration from the Tennessee area during the 1950's. My father, along with 2 of his siblings moved to Michigan because of the promise of a better life. While my father ultimately landed a job at Ford Motor Company at the plant in Monroe, Mi., his sister ended up at the Ford Rawsonville Plant (which happens to be where I currently work) in Ypsilanti, Mi., and his brother at the Ford plant in Sandusky, Oh. In addition I have another uncle who worked for Ford at the Dearborn Rouge facility.

My family has a long and loyal history with Ford Motor Company. We have all benefited greatly and have raised our families for four generations now in Southeast Michigan.

None of us however have ever once been afforded the opportunity to vote if we wanted to be unionized. We were all forced to accept a grandfathered union that has been entrenched in the auto industry since most of us were even born.

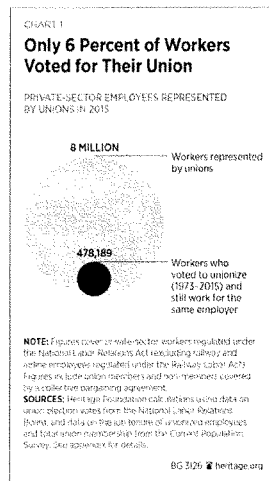
⁴ <https://www.redstate.com/diary/laborunionreport/2012/02/24/seiu-organizing-tactics-include-intimidation-and-lying-to-workers-company-alleges/>

⁵ <https://www.heritage.org/jobs-and-labor/report/how-union-card-checks-block-workers-free-choice>

But it's not just my family that can make that claim. Millions of union workers can claim that they also never had the opportunity to vote in a union election. Like us, they were forced to accept union representation as a condition of employment, even when many of them have moral objections against it.

Shockingly, a 2016 study shows just how widespread this is.⁶ 94% of union workers in the country never had an opportunity to vote for a union. In the study, James Sherk from the Heritage Foundation points out that: "The preamble to the NLRA declares its goal as "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." Yet most union workers never designated a representative of their own choosing since the union already existed long before they were hired.

The chart⁷ below shows the study's findings:



Unions are existing based on votes from people who lived generations ago, not based on the current workforce.

Unions will claim that workers **should** be forced to pay for their services, because they benefit from their hard work – but it is work that is forced upon the workers in the first place. Even in Right to Work states where workers can withdraw their union membership and stop paying dues, they are still forced to accept union representation because of the union voluntarily negotiating to be the exclusive representation agent of all workers in a bargaining unit.

⁶ <https://www.heritage.org/jobs-and-labor/report/unelected-representatives-94-percent-union-members-never-voted-union>

⁷ Ibid.

While union officials will shamefully call any worker withdrawing their membership a "free-rider" or even "free-loader," the conveniently forget to admit that they force those workers to accept their representation, thus the worker has no other option if they want to stay employed and provide for their family. They are actually a "forced-rider."

Outside of the UAW, other unions have also been rooted in their individual industries as long or even longer. Generations of American families are born, live, and die as the entrenched union continues collecting dues. Millions of workers are forced into union representation based on the votes of people they have never known.

In addition to their dependent nature, there are additional problems with unions never having to fear being removed. One of which is the fact that without competition, or the worry of being removed, unions have no incentive to work hard and do a good job for their workers.

Politicians rely on the votes from their constituents, which encourages them to do a good job. Regular elections help keep politicians honest and answerable to the ones they represent. Unions on the other hand have no worries, no concern that there are any consequences to doing a poor job.

Critics will argue that there are steps in place for workers to remove an unsatisfactory union. While legally true, the reality is that it is extraordinarily difficult to remove a union from a workplace. Worker's interested in starting a decertification drive will face threats, intimidation by union officials as well as other workers, and have his/her own dues money used to fight against it.

Considering unions collect billions of dollars every year in union dues, spending millions of workers dues money to squash any uprising is a small investment for a union.

Because of a union's absolute power and entrenchment in a workplace, union workers are simply at an extreme disadvantage to ever getting rid of a non-performing union. It is almost as if the National Labor Relations Act was written in 1935 to strip all rights from individual workers in favor of privileges granted to the union itself.

Once again, the answer to this issue should be self-explanatory. Since unions never have to justify their existence to the workforce, a regular recertification is critical to protecting worker rights. This action would serve to:

1. Hold union executives answerable and accountable to the membership
2. Guarantee a responsible and engaged union
3. Empower workers to choose other options
4. Inject free-market principles into a 1930's compulsory business model
5. Increase trust between workers and union officials
6. Allow the possibility of an outside, more worker-centric union to make their "pitch."
7. Secret ballot recertification elections will help ease anxiety, stress, and ensure that a worker's true feelings on any union representation is protected

In the end, union recertification is one of the most worker-friendly labor reforms that I or any other union represented worker could ask for. An argument against recertification is an argument against worker rights in favor of union privilege.

Issue #3 – Using dues for Political Spending/Opt-out

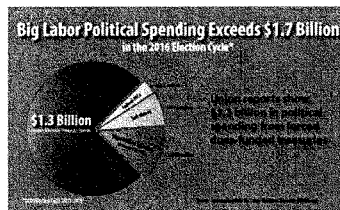
Unions spend money on politics. All the time. Most of that spending that is collected from workers is spent on an agenda that many of those workers either find disagreeable, insulting, and in many cases, abhorrent.

Unions will claim it is against the law for them to use union dues on politics, but that is a misinterpretation at best. While true that unions cannot take union dues and give directly to a candidate's campaign funds, union still engage in political and social activity daily.

Currently, labor law allows unions to deduct money for supporting political campaigns from an employee's paycheck without obtaining prior approval. Only by following the often onerous procedure to demand a refund of partial dues or by resigning from a union can employees guarantee that their money will not support candidates or a political party. The process is often overly complicated and rife with intimidation. By requiring that union members opt-in rather than having to pursue a refund of dues, employee rights will be better protected.⁸

Let's first look at the staggering amounts that unions claim they spend on politics, and then look at the real story.

The National Institute for Labor Relations Research (NILRR) reports that for the 2016 Election Cycle, unions stated on their federal LM-2 reports that they spent over \$1.7 billion in politics.⁹



The figures above (as noted by the NILRR), do not reflect spending by unions that exclusively "represent" state and local government employees which are not covered by United States Department of Labor (USDOL) disclosures reports. Therefore these numbers exclude most of the state and municipal employee unions.¹⁰

But it doesn't just stop at a union's self-policing and reporting on political spending. Much of a union's political activity is not reported because union executives will call that activity something ambiguous or classify it something else entirely. "Education" or "organizing activity" have been used in the past, as well as "gifts, grants, or donations," which will include donations to flagrantly progressive, left-wing organizations that many workers would find extremely offensive (Planned Parenthood, for example).

⁸ <http://employeeightsact.com/>

⁹ <http://www.nilrr.org/2017/04/17/2016-election-cycle-big-labor-exceeds-1-7-billion-political-spending/>

¹⁰ *ibid.*

Most union workers would have no problem paying for quality representation and for collective bargaining services. However unions spend, donate, and gift such large payments to advocacy groups that many workers would be shocked to discover what their money is used for. With the rise of common internet access many workers are now able to find the truth.

But it doesn't end there.

All across America, union halls become political billboards with campaign signs, and yet none of the expenses of those union halls (taxes, utilities, salaries of workers) are ever considered of a "political" nature. Anytime a union hall places a campaign sign in their yard, the property and building become a political tool. None of those expenses are ever recorded as political.

Many newsletters to workers include stories that demonize the Republican Party and praise the Democrat Party. However if the newsletter is not printed for the sole-purpose of a political mailing, the expenses are rarely – if ever – recorded as political. They may be deemed "educational."

Many unions may encourage voter registration, but not publicly disclose any preference for candidates so the entire activity will be considered "community involvement." However most – if not all – of that activity only takes place in heavily Democrat areas.

Many unions are involved in "Worker Centers" and supporting non-unionized workers to fight politicians for political issues. Much of that activity is not recorded as political, but as ambiguous "organizing expenses."

In 2018, the question no longer is if unions spend a lot of money on politics – both reported and unreported. Yes; of course they do, we all know it. The real question is if workers who disagree with a unions political and social activity are being protected from forced speech? Are their 1st amendment rights to not associate with a group being protected?

That, is where we must focus on, and that is what we must attain in any civilized society.

A critical way to protect workers from forced political contributions is to simply ask them first if they would like their money involved, before they are forced to fund it.

The default position for any worker in a union shop should be that they do not have to fund any ideological, political, or social activity the union engages in. Unions should be required to receive an "Opt-in" for the political spending, as opposed to the current, and burdensome "Opt-out" that unions require.

Knox v. SEIU

In 2012, the US Supreme Court heard a case entitled *Knox v. SEIU*. The case stemmed from a California case where the public-sector SEIU was charging non-members an additional fee than their agency fees already proposed by a previous Hudson Notice (the required document informing non-members how much the union anticipated on non-essential spending (politics)). Knox claimed that the SEIU could not force any agency-fee payer to pay additional fees based on an anticipated increase in political spending. Ultimately, the Supreme Court found in favor of Knox.

While the case is based on public-sector unions, the Majority Opinion written by Supreme Court Justice Alito bears significant study for our hearing.

On page 9 of the majority opinion, Justice Alito builds his opinion by stating:¹¹

The First Amendment protects “the decision of both what to say and what not to say” (emphasis deleted)). And the ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed. See Roberts v. United States Jaycees, 468 U. S. 609, 623 (1984) (“Freedom of association . . . plainly presupposes a freedom not to associate”).

Justice Alito makes the clear claim that just because someone is forced as a condition of employment to join a union, they are not forced to associate with the speech of the group.

On page 11 of the opinion, Alito continues to make his argument that forcing an employee to “Opt-out” of political spending creates a “boon” for the union, and one that places a “burden” on the union represented worker:

Similarly, requiring objecting nonmembers to opt out of paying the nonchargeable portion of union dues—as opposed to exempting them from making such payments unless they opt in—represents a remarkable boon for unions. Courts “do not presume acquiescence in the loss of fundamental rights.” College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U. S. 666, 682 (1999) (internal quotation marks omitted). Once it is recognized, as our cases have, that a nonmember cannot be forced to fund a union’s political or ideological activities, what is the justification for putting the burden on the nonmember to opt out of making such a payment?

Once again, Alito clearly differentiates the Opt-in versus the Opt-out scenario, and seems to be leaning in favor of an Opt-in program for unions.

On page 13, Alito refers to a previous case, making the claim that constitutional rights in these matters lie not with unions, and instead their power to collect fees is authorized by “legislative grace.”

As we noted in Davenport, “unions have no constitutional entitlement to the fees of nonmember-employees.” 551 U. S., at 185. A union’s “collection of fees from nonmembers is authorized by an act of legislative grace.”

On page 20, Alito acknowledges that what the union calls “chargeable expenses” is so “expansive” that you can’t rely on it:

First, the SEIU’s understanding of the breadth of chargeable expenses is so expansive that it is hard to place much reliance on its statistics. In its brief, the SEIU argues broadly that all funds spent on “lobbying . . . the electorate” are chargeable. See id., at 51. But “lobbying . . . the electorate” is nothing but another term for supporting political causes and candidates, and we have never held that the First Amendment permits a union to compel nonmembers to support such political activities.

In the above scenario, the union did not believe that lobbying was considered political, and hence not a reportable expense. This is why workers can never be assured that the dues they are paying are not political.

On page 21, Alito explains that unions have no constitutional rights:

Thus, if unconsenting nonmembers pay too much, their First Amendment rights are infringed. On the other hand, if unconsenting nonmembers pay less than their proportionate share, no constitutional right of the union is violated because the union has no constitutional right to receive any payment from these employees.

Again, I must make it clear that we are talking about the public-sector and about agency-fee members, but Alito’s words give us a clear direction of how to proceed.

¹¹ <https://www.supremecourt.gov/opinions/11pdf/10-1121c4d6.pdf>

On page 21 & 22, Alito gets to the heart of the matter:

As we have noted, by allowing unions to collect any fees from nonmembers and by permitting unions to use opt-out rather than opt-in schemes when annual dues are billed, our cases have substantially impinged upon the First Amendment rights of nonmembers.

When taking the entire majority opinion of *Knox v. SEIU* and applying the same principles discussed here, it is clear that:

1. Workers have the Freedom of Association – and the Freedom to Not Associate
2. A unions ability to collect dues is not a right, but granted through “legislative grace,” while a worker’s 1st amendment rights can be impinged in an “Opt out” situation
3. Unions employing an “Opt-out” procedure for their reported political spending (which does not cover all political spending) is a boon for the union and a burden for the worker
4. Even the Supreme Court realized that union officials were not reporting all political activity as such
5. Opt-out programs rather than Opt-in for political spending creates a substantial impingement upon the 1st amendment rights of workers.

The Solution

As someone who has traveled around the country speaking and fighting for 21st century labor reforms, I became aware in 2013 of a proposed piece of legislation that has grabbed hold of both my heart and my mind. It is called the Employee Rights Act (HR 2723).

The ERA fixes the issues above and helps bring unions closer to the 21st century. It empowers workers with additional rights, freedoms, and protections that can never be logically claimed as “anti-union.” The passage of this piece of legislation will return some of a union worker’s power that a labor union has fed from since the day they hired in. The passage of this piece of legislation will give both workers and unions the tools necessary for a mutually trustworthy and lengthy relationship into the future.

Common sense labor reform guaranteeing Secret Ballot elections, periodic recertification elections, and political protection from forced speech will always be a positive, necessary step to achieving labor peace between the rank-and-file, and union officials.

Conclusion

Since the passage of the National Labor Relations Act in 1935, unions were given broad powers that stripped individual workers of their rights in favor of union privilege (or as Justice Alito called it, “Legislative Grace”). Some corrections have been made in decades past, but additional labor reforms are needed to protect workers and ensure union longevity and success in the 21st century.

Unions have changed in the wrong direction – not updated correctly with the times. I consider myself to be pro-union, but in the context of what unions were created to do, not what they have become. Many unions today seem to be more interested in furthering their political and social causes than in their created purpose of representing workers.

For a long time, union workers like me have looked for protections from the abuses of the very unions pledged to protect us. We know and understand that the unions unwilling to change into a 21st century business model will fade away over the next few decades. They cannot continue their archaic operations based in compulsion and force. Workers are wise and more media savvy than ever before, and able to find out the truth of union intolerance.

Passage of common sense labor reform goes a long way to protecting workers while also providing the tools necessary for unions to continue far into the future.

As a union worker who will be affected by this legislation, I ask you to consider labor reform legislation like the Employee Rights Act whether you are a Republican or Democrat.

Thank you for hearing my testimony today.

Terry Bowman

April 26th, 2018

Chairman WALBERG. Thank you, Mr. Bowman, and thanks to each of the panel for your testimony and spending time with us. And now I recognize the chairwoman of the full Committee, Dr. Foxx from North Carolina.

Mrs. FOXX. Thank you again, Chairman Walberg.

Mr. MARCULEWICZ. the *Labor Management Reporting and Disclosure Act*, or LMRDA, requires labor unions to disclose certain financial information. Often unionized workers are unaware of the financial dealings of their union without the important disclosures required under the LMRDA.

If organizations known as worker centers are allowed to ignore the requirements of the LMRDA, could this create a situation where worker centers take advantage of workers?

Mr. MARCULEWICZ. Thank you, Chairwoman Foxx, for that very interesting question. I think it is—the LMRDA offers organizational accountability for members of labor organizations. Organizational accountability comes in the form of the worker bill of rights, which gives workers the right to—certain rights vis-a-vis the labor organizations that represent them.

It also gives workers the right to have access to financial information related to how the labor organization is spending its money. And I think, as commented by Mr. Bowman in his testimony, political contributions and things of that nature are certainly of interest to some members, including Mr. Bowman, and I think that is a very critical thing for—that the LMRDA offers.

I also would submit that there is organizational accountability. And I think when you come to the concept of worker centers, if a worker center is going to evolve into a role where it in fact seeks to engage an employer over wages, hours, and terms and conditions of employment, then those workers, those members, should have some say in that. And that is the democratic principle—those are the democratic principles that were established by the LMRDA, meaning that labor organizations must have elected officials, just as the *National Labor Relations Act* offers a democratic institution to enable workers to decide, by majority vote, whether or not they wish to have a labor organization serve as their exclusive representative.

So it is beyond the financial accountability. I think it is—a critical component of this is if a worker center is going to engage an employer and serve in a role as an advocate for workers in a workplace as it relates to a particular employer, then that organizational accountability is critical.

Mrs. FOXX. Thank you very much.

Mr. Jackson, thank you for telling us your story. As you explained, when the two parties involved arguing before the NLRB are the employer and the union, you and your fellow employees are not even considered a party. Do you believe the *National Labor Relations Act* gives employees enough of a voice in this process? And in your experience, are most employees aware of their right to decertify under the *National Labor Relations Act*?

Mr. JACKSON. Thank you, Chairman Foxx, or Committee Member Foxx, I am sorry—a little nervous.

The NLRA, I don't believe, is—it is—in our workplace it is more geared towards unionization, or becoming union members, or union

protectionism, not so much my choice for—not having to join, not having to support or removing myself as a union member.

So no, I think it needs to go farther, it needs to be more clear, it needs to be more balanced.

Mrs. FOXX. Thank you very much. And please don't be nervous with us.

Mr. Bowman, you spoke about the importance of having secret ballot elections for union recognition, instead of a card check campaign. It is my understanding card check campaigns can only be carried out if an employer agrees to it. Do you think this creates an incentive where an employer and union can decide to agree to a deal over card check recognition at the expense of employees?

Mr. BOWMAN. Well, that is interesting, isn't it? Because I—as workers, we would never know the actual case of what goes on behind closed doors. And, in my opinion, I think it is an example of why there should never be a case in a union organizing election why workers do not have a secret ballot election. We don't know. Perhaps it is honest, perhaps it is dishonest. We will never have any idea, one way or the other.

What I do know is, in my 21 years, I have never had the opportunity to vote in a union election, and so I don't have that personal experience. But having the ability regardless of the situation to always have a secret ballot election almost seems germane to humanity. It seems a right that every worker should have, no matter the situation involved.

Mrs. FOXX. Thank you, Mr. Chairman. I yield back.

Chairman WALBERG. I thank the gentlelady, and now I recognize the gentleman from Virginia, the ranking member of the full Committee, Mr. Scott.

Mr. SCOTT. Thank you. Thank you, Mr. Chairman. Mr. Chairman, there is an important issue that is not being addressed at this hearing today, and that is the conflict of interest of the National Labor Relations Board. It is not on the agenda today, although I have asked for a hearing.

On February the 15th, the inspector general for the NLRB issued a seven-day letter which reported a serious and flagrant problem and/or deficiency in the board's administration of its deliberative process in the *National Labor Relations Act* with respect to deliberations of a particular matter. That matter was NLRB board member William Emanuel's participation in the *Hy-Brand* decision, which overruled the board's joint employment decision in *Browning-Ferris*.

Mr. Emanuel's former law firm represented one of the parties in *Browning-Ferris*, and the IG's letter concluded that the *Hy-Brand* and *Browning-Ferris* are the same "particular matter involving specific parties," which implicated a conflict of interest.

On February 21st an NLRB ethics official also agreed with the IG's opinion in these two matters, and in that memo she wrote, "Pages 21–48 from the dissent in *Browning-Ferris* are reproduced almost word-for-word on pages 3–30 of the *Hy-Brand* majority decision. Thus, 27 of the 35 pages that constitute the decision of *Hy-Brand* majority were essentially lifted, with little or no modification, directly from the *Browning-Ferris* dissent."

This cut-and-paste job was an effort to use an unrelated matter to overturn a joint employer precedent, was rushed, it appears, because the former chairman's term was expired—was expiring, and he wanted to ensure his earlier dissent became the majority opinion.

Mr. Chairman, I wrote the Chair requesting a hearing with the inspector general and board members to explore what went wrong and how to correct it. I have received no reply. So, Mr. Chairman, I would ask whether you would commit to holding a hearing on this matter in the foreseeable future, and I will yield.

Chairman WALBERG. I appreciate the request, and we will take it under advisement and consider that and get back with you.

Mr. SCOTT. Mr. Chairman, I ask unanimous consent to insert my letter of February 23rd to the Chair and the NLRB's ethics official's memos of February 21st and March 27th of this year into the record.

Chairman WALBERG. Without objection, and hearing none, it will be inserted.

[The information follows:]

MAJORITY MEMBERS:

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 JOE WILSON, SOUTH CAROLINA
 DUNCAN HUNTER, CALIFORNIA
 DAVID P. ROE, TENNESSEE
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February 23, 2018

The Honorable Virginia Foxx
 Chairwoman
 Committee on Education and the Workforce
 2176 Rayburn House Office Building
 Washington, D.C. 20515

Dear Chairwoman Foxx:

I write to request a hearing before the House Education and the Workforce Committee regarding the National Labor Relations Board's (NLRB) Inspector General's seven-day letter sent to the Committee leadership notifying us of "a serious and flagrant problem and/or deficiency in the Board's administration of its deliberative process and the National Labor Relations Act with respect to the deliberation of a particular matter."¹ The Inspector General's seven-day letter concerns whether Board Member William Emanuel should have recused himself from participating in *Hy-Brand Industrial Contractors* ("*Hy-Brand*"),² which overruled the Board's previous decision in *Browning Ferris Industries* ("*BFI*").³ The *BFI* decision concerned the question of whether Browning Ferris Industries, which operated a municipal recycling facility, was a joint employer of the employees it hired through the subcontractor Leadpoint Business Services. Member Emanuel's former law firm, Littler Mendelson P.C., represents Leadpoint Business Services, one of the parties in the *BFI* case.

As you know, per House Rule X, our Committee has jurisdiction over "labor generally"⁴ and Rule 2 of the Committee on Education and the Workforce specifically outlines our jurisdiction over "[a]ll matters dealing with relationships between employers and employees, including but not limited to the National Labor Relations Act."⁵ Furthermore, the Committee's adopted

¹ Section 5(d) of the Inspector General Act provides: "Each Inspector General shall report immediately to the head of the establishment involved whenever the Inspector General becomes aware of particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations of such establishment. The head of the establishment shall transmit any such report to the appropriate committees or subcommittees of Congress within seven calendar days, together with a report by the head of the establishment containing any comments such head deems appropriate."

² 365 NLRB No. 156 (2017).

³ 362 NLRB No. 186 (2015).

⁴ Rules of the House of Representatives for the 115th Congress,
<https://rules.house.gov/sites/republicans.rules.house.gov/files/115/PDF/House-Rules-115.pdf>

⁵ Rules of the Committee on Education and the Workforce for the 115th Congress,
<https://www.gpo.gov/fdsys/pkg/CPRT-115HPRT24581/pdf/CPRT-115HPRT24581.pdf>

The Honorable Virginia Foxx
February 23, 2018
Page 2

oversight and investigative plan for the 115th Congress explicitly states that we will “conduct oversight and investigations, as appropriate, to ensure employee and employer rights under the National Labor Relations Act (NLRA) are protected and applied consistently and without bias.”⁶ In the description of its oversight plan, the Committee states it will provide “particular scrutiny to the Board’s ... decisions affecting joint-employer standards ... under the NLRA.”⁷

In his letter to the oversight committees, the Inspector General found the deliberations in *Hy-Brand* to be so intertwined with those of *BFI* that they constituted the same proceeding.⁸ Member Emanuel’s participation was therefore subject to the President’s ethics pledge in Executive Order 13770, which prevents him from participating in a case where Littler Mendelson represents a party. Because *Hy-Brand* and *BFI* are now tainted by Member Emanuel’s conflict of interest, the Inspector General found that “the whole of the Board’s deliberative process is called into question” and that Member Emanuel’s participation in *Hy-Brand* “calls into question the validity of that decision.”

The Inspector General’s findings to date are especially disturbing for an agency designed to be a neutral adjudicator. Committee Democrats have inquired into the basis for Member Emanuel’s participation in *Hy-Brand*, but responses to date have been unsatisfactory. To that end, I respectfully ask that you schedule a hearing to secure answers and steps the NLRB has taken in light of the Inspector General’s findings of this “serious and flagrant problem and/or deficiency,” and what steps the Board will take to restore the public’s confidence.

Madame Chair, it is extremely rare for an Inspector General to issue a seven-day letter. The last time the NLRB’s Inspector General issued one was in 1999, and few have been issued by other agencies’ Inspectors General. A Committee hearing with the Inspector General and Members of the Board is necessary for Congress to explore what has gone wrong and how to correct it.

Sincerely,



ROBERT C. “BOBBY” SCOTT
Ranking Member

⁶ Oversight and Investigation Plan of the Committee on Education and the Workforce, adopted January 24, 2017, transmitted to the Committee on Oversight and Government Reform, https://edworkforce.house.gov/uploadedfiles/115th_cw_oversight_plan.pdf
⁷ *Id.*

⁸ Citing Executive Order 13770, the Inspector General concluded that *Hy-Brand* and *BFI* constitute the “same ‘particular matter involving specific parties.’” In supporting this finding, the Inspector General detailed how the consolidation of *Hy-Brand* into *BFI* “occurred at the inception of the *Hy-Brand* deliberations,” how the *Hy-Brand* decision extensively relied on the facts in *BFI* that were not before the Board in *Hy-Brand*, and how the *Hy-Brand* even “acknowledge[d] that the two deliberative processes are consolidated.”

UNITED STATES GOVERNMENT

National Labor Relations Board

Memorandum



TO: Chairman Kaplan
Member Pearce
Member McFerran

FROM: Lori Ketcham
Associate General Counsel, Ethics
Designated Agency Ethics Official

Jamal M. Allen
Special Ethics Counsel
Alternate Designated Agency Ethics Official

SUBJECT: Recommended Action Plan Respecting the Board's Adjudication of Hy-Brand Industrial Contractors, Ltd., 365 NLRB No. 156 (2017)

DATE: February 21, 2018

Overview

This memo is in response to the Inspector General's (IG) recommendation for corrective action with respect to the issues raised in the IG Report dated February 9, 2018 regarding alleged deficiencies in the Board's administration of its deliberative process in a particular matter.¹ The IG found that, due to the manner in which the Board majority adjudicated Hy-Brand Industrial Contractors, Ltd., 365 NLRB No. 156 (2017), it had effectively become the same "particular matter involving specific parties" as Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery, 362 NLRB No. 186 (2015). Based on the totality of the specific facts described in his report, the IG determined that Member Emanuel violated Par. 6 of the Trump Ethics Pledge (Ethics Pledge) which prohibits him from participating in any "particular matter involving specific parties that is directly and substantially related to my former employer or former clients," because his former law firm, Littler Mendelson, P.C., represents a party in Browning-Ferris. Thus, the IG concluded that Member Emanuel "should have been recused

¹ The subject line of the IG Report is as follows: "Notification of a Serious and Flagrant Problem and/or Deficiency in the Board's Administration of its Deliberative Process and the National Labor Relations Act with Respect to the Deliberation of a Particular Matter." On February 15, 2018, the Board forwarded a copy of the IG Report to Congress with a cover letter stating that it is "evaluating the Inspector General's findings, considering appropriate actions related to Hy-Brand Industrial Contractors, Ltd., 365 NLRB No. 156 (2017), and reviewing current procedures for highlighting and addressing recusal issues with the assistance of the Board's Designated Agency Ethics Official."

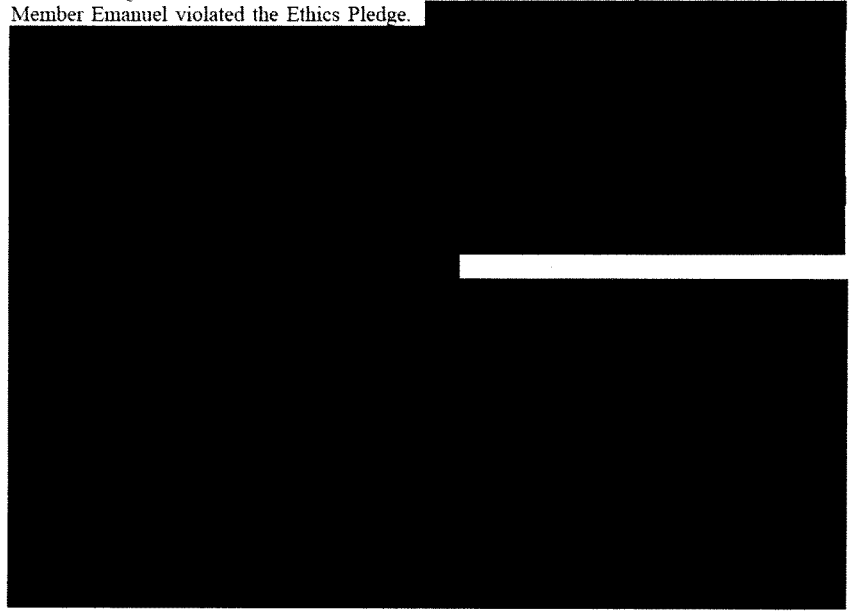
from participation in deliberations leading to the decision to overturn *Browning-Ferris*." (IG at 4).

To address this problem, the IG recommended the following corrective action:

Member Emanuel's participation in the *Hy-Brand* decision, when he otherwise should have been recused as outlined above, calls into question the validity of that decision and the confidence that the Board is performing its statutory duties. I recommend that the Board consult with the Designated Agency Ethics Official to determine the appropriate action to take to resolve that issue and restore confidence in the Board's deliberative process; and

Member Emanuel's participation in the *Hy-Brand* decision demonstrates that the Board's current practice of highlighting and addressing recusal issues should be reviewed to determine if it is adequate to protect the Board's deliberative process from actual conflicts of interest and the appearance of such. I recommend that the Board consult with the Designated Agency Ethics Official to conduct that review and resolve any issues. (IG at 5).

We agree with the IG's determination that, under the totality of the circumstances, Member Emanuel violated the Ethics Pledge.



[REDACTED]

Facts

Procedural History of Browning Ferris

The case originated with the Board's processing of a representation petition filed in Region 32 by the Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters (the Union) seeking to represent a unit of approximately 120 workers at a recycling facility operated by Browning-Ferris Industries of California (BFI).⁴ The petitioned-for employees were provided by Leadpoint Business Services (Leadpoint), a supplier employer, to BFI, the user employer. The Union alleged that BFI and Leadpoint were joint employers for the petitioned-for employees. Both Leadpoint and BFI argued that Leadpoint was the sole employer. Relevant here, Leadpoint was represented by Littler Mendelson, Member Emanuel's former firm.

[REDACTED]

⁴ Case No. 32-RC-109684 was filed on July 22, 2013.

The Region issued a Decision and Direction of Election (DDE) on August 16, 2013 finding that “Leadpoint [is] the sole employer of the employees in question at BFI’s Facility and that [the Union’s] arguments for joint employer status between BFI and Leadpoint are unconvincing.” *Id.* at pg. 19. Subsequently, on September 3, 2013, the Union filed a Request for Review of the DDE alleging that the Region misapplied the existing Board precedent, and in the alternative, that the Board should reconsider the standard for determining joint employer status. Littler, on behalf of Leadpoint, filed an Opposition to the Request for Review on September 10, 2013 stating that the DDE correctly concluded that Leadpoint was the sole employer. On April 30, 2014, the Board granted the Union’s Request for Review.⁵ Thereafter, on May 12, 2014, the Board issued a Notice and Invitation to File Briefs soliciting comments from the parties, and interested amici, respecting the following: (1) “whether under the Board’s current joint-employer standard” Leadpoint was the “sole employer of the petitioned-for employees” in the unit; (2) whether the “Board [should] adhere to its existing joint-employer standard or adopt a new standard” and; (3) “if the Board adopts a new standard for determining joint-employer status, what should that standard be.”

Numerous parties filed amici briefs in response to the Board’s invitation. Littler filed briefs on June 26 and July 10, 2014 arguing that Leadpoint alone was the employer of the employees and that the Board did not need to revisit its formula for determining joint employer status. The Board issued its Decision and Order in Browning-Ferris on August 27, 2015, in which it held that Leadpoint and BFI were joint employers under the Act. In reaching this decision, the Board majority in Browning-Ferris adopted a new joint employer standard that no longer required a showing that a putative joint employer actually exercised direct and immediate control over workers’ terms and conditions of employment, but that the mere existence of reserved joint control would suffice. Then-Member Miscimarra and then-Member Johnson authored a 29-page dissent to the majority opinion. Consistent with the position advocated in the briefs filed by Littler, the Browning-Ferris dissent argued that BFI and Leadpoint are not joint employers and that the Board should not have altered its joint employer standard. [REDACTED]

A Board-conducted election was held on September 4, 2015 and a majority of the employees voted in favor of unionization. As a result, on September 14, 2015, the Union was certified as the exclusive collective-bargaining representative of the employees.⁶ After the issuance of the certification, BFI and Leadpoint refused to recognize the Union. Based on their refusal to bargain, the Union filed an unfair labor practice charge, and Region 32 subsequently issued a Complaint and Notice of Hearing alleging that BFI and Leadpoint violated Section

⁵ In granting the Union’s Request for Review, the Board provided notice of its intent to “issue a subsequent notice establishing a schedule for the filing of briefs on review and inviting amicus briefs, to afford the parties and interested amici the opportunity to address issues raised in this case.”


⁶ The certificate of representation that issued in this case certified the Union as the exclusive-collective bargaining representative of the following unit of employees: “All full time and regular part-time employees employed by FRP-II, LLC, d/b/a/ Leadpoint Business Services and Browning-Ferris Industries of California, Inc., d/b/a Newby Island Recyclery, joint employers, at the facility located at 1601 Dixon Landing Rd., Milpitas California: excluding employees currently covered by collective bargaining agreements, office clerical employees, guards, and supervisors as defined in the Act.”

8(a)(5). Upon the filing of BFI's Answer admitting its refusal to bargain, and claiming the Board improperly certified the Union, the General Counsel moved for summary judgment consistent with the processing of a standard test of certification case. Following BFI's and Leadpoint's respective responses to an order to show cause, the Board granted summary judgment and found BFI and Leadpoint violated section 8(a)(5) of the Act by refusing to recognize and bargain with the Union.⁷ On January 20, 2016, BFI, through its legal representatives at the law firm of Seyfarth Shaw LLP, petitioned the D.C. Circuit Court of Appeals to review the Board's Order. Immediately thereafter the Board filed a cross-application for enforcement of its Decision and Order.⁸ The case remained pending before the D.C. Circuit until late December of last year when it was remanded to the Board immediately following the Board's decision in Hy-Brand (see discussion below).

Procedural History of Hy-Brand

In Hy-Brand, Administrative Law Judge (ALJ) Robert Ringler found that Respondents Hy-Brand Industrial Contractors, LTD and Brandt Construction, Co. violated Section 8(a)(1), as single employers and joint employers, by unlawfully discharging seven employees because they engaged in protected concerted activity.⁹ On January 9, 2017, the Respondents filed exceptions to the ALJD. Relevant here, one of the exceptions filed by the Respondents alleged that the ALJ erred in concluding that the Respondents "are single and joint employers, and are jointly and severally liable for the discharges." On January 23, 2017, the General Counsel filed cross-exceptions to the ALJD. Neither the Respondents, nor the General Counsel, requested in their respective exceptions and supporting briefs that the Board re-consider its standard for determining joint employer status.

As detailed in the IG Report, on October 18, 2017, then-Chairman Miscimarra, who was approaching the end of his term of office on December 16, 2017, sent an email message to then-Member Kaplan and Member Emanuel respecting Hy-Brand. The IG's summary of the correspondence states that Miscimarra's email included an attached proposed majority decision for Hy-Brand.



⁷ The Board's decision in the test of certification case is reported at 363 NLRB No. 95 (2016).

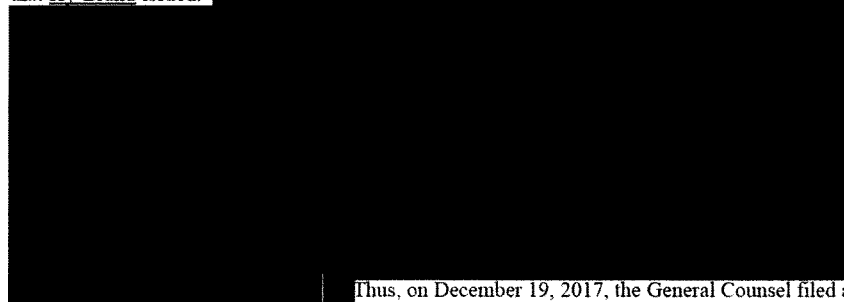
⁸ Leadpoint did not answer the Board's application for enforcement and no attorney filed a notice of appearance on Leadpoint's behalf. Consequently, Littler did not make an appearance on behalf of Leadpoint in the proceedings before the D.C. Circuit.

⁹ Specifically, the ALJ found that the employees had engaged in a concerted work stoppage that constituted protected, concerted activity under Section 7 of the Act.

The Board ultimately issued a 3-2 Decision and Order in Hy-Brand on December 14, 2017. Then-Chairman Miscimarra, then-Member Kaplan and Member Emanuel, the Hy-Brand majority, concluded that the parties were in fact joint-employers; however, the decision went further and overruled the joint employer standard in Browning-Ferris.¹⁰ A simple review of the Board's respective decisions in Browning-Ferris and Hy-Brand illustrates the conclusion in the IG Report that the Board majority simply made a "wholesale incorporation of the dissent in Browning-Ferris into the Hy-Brand majority decision." Id. at pg. 3. Specifically, the dissent in Browning-Ferris appears on pages 21-50 of that Board decision. The majority decision in Hy-Brand is on pages 1-35 of that case. Pages 21-48 from the dissent in Browning-Ferris are reproduced, almost word-for-word, with minor non-substantive modifications, on pages 3-30 of the Hy-Brand majority decision. Thus, 27 out of the 35 pages that constitute the decision of the Hy-Brand majority were essentially lifted, with little or no modification, directly from Browning-Ferris. To illustrate the commonality between the Browning-Ferris dissent and the Hy-Brand majority opinion, we have included with this report a series of attachments. Attachment "A" consists of the heart of the Browning-Ferris dissent authored by then-Member Miscimarra and then-Member Johnson. Attachment "B" consists of the majority decision in Hy-Brand authored by then-Chairman Miscimarra, then-Member Kaplan and Member Emanuel. Finally, Attachment "C" is the Hy-Brand majority's analysis of the specific facts and issues in Hy-Brand. A simple side-by-side comparison of Attachment "A" to Attachment "B" reveals that, other than inserting a few nonsubstantive revisions, the substantive analysis and arguments are exactly same. While the Hy-Brand majority incorporated 27 pages from the Browning-Ferris dissent, which was focused on the facts presented and issues raised in that case, the majority devoted only two paragraphs of its analysis to the specific facts and legal issues presented in Hy-Brand, as evidenced by Attachment "C."

Board Votes to Remand Browning-Ferris to the NLRB

Also relevant to the unique fact pattern here, Browning-Ferris, the lead case on the joint employer standard, was still a "live case" that was pending before the D.C. Circuit at the time that Hy-Brand issued.



Thus, on December 19, 2017, the General Counsel filed a motion in the D.C. Circuit requesting that the court remand Browning-Ferris back to the Board. In support of remanding the case, the General Counsel noted that as a result of Hy-Brand, the

¹⁰ "[W]e overrule Browning-Ferris." Hy-Brand, 365 NLRB No. 156, pg. 2 (2017).

Board has “overruled its *Browning-Ferris* decision” and thus the remand of *Browning-Ferris* was warranted “so that the Board may reconsider the case in light of its current precedent established in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017).” By an order dated December 22, 2017, the D.C. Circuit granted the Agency’s request.¹¹

Charging Parties in Hy-Brand File a Motion with the Board for Reconsideration, Recusal, and to Strike

On January 11, 2018, the Charging Parties in *Hy-Brand* filed a Motion for Reconsideration with the Board. In addition to making substantive arguments about the standard for joint employer status, the Charging Parties set forth their objections to “the Board’s use of the Respondent’s affirmed unfair labor practice as a vehicle to overturn *Browning-Ferris*.” (p. 1). The Charging Parties contend that if the Board had made the parties and the public aware that it was considering reversing significant precedent, it would have had the opportunity to move to recuse Member Emanuel due to his “clear conflict of interest in *BFI*.” (p. 2). Specifically, the Charging Parties assert that the decision in *Hy-Brand* “is no different than if Member Emanuel had directly participated in *BFI* where his former firm represents a party,” and therefore, the government ethics rules bar him from participating in *Hy-Brand*’s purported overruling of *BFI* as well as in any reconsideration of the case. (p. 12). According to the Charging Parties, *Hy-Brand* is “not a case where the Board simply disagrees with the legal standard applied in an earlier case” because the *Hy-Brand* decision “extensively discusses the facts in *BYI* and applies the law to those facts.” (p. 13). The Motion requests that the Board reconsider the case; Member Emanuel recuse himself from participating in the reconsideration; the Board affirm the ALJ’s decision on single-employer grounds; and the Board strike the reference to an analysis of joint employer status “as improper due to Member Emanuel’s participation and as unnecessary *dicta*.”

Analysis

The Ethics Pledge

Executive Order 13770 requires any “covered appointee” to sign an Ethics Pledge that contains several commitments. An appointee who signs the Pledge can only participate in a matter that falls within the Pledge’s restrictions by seeking a waiver from the President. Pursuant to Paragraph 6 of the Pledge, Member Emanuel has agreed that he “will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.” This paragraph, read together with the definitions of “former employer,” “former client,” and “directly and substantially related” set forth in Executive Order 13770, prohibits his participation in a “particular matter involving specific

¹¹ Specifically, the D.C. Circuit’s order states the following: “Upon consideration of the motion of the National Labor Relations Board for remand of the case to the Board for reconsideration in light of new Board precedent, it is ORDERED that the motion be granted and the case be remanded to the Board for further consideration in light of the Board’s recent decision in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017).” On January 4, 2018, the Teamsters Union filed an Intervenor’s Motion for Reconsideration of Order Remanding Case to National Labor Relations Board requesting that the D.C. Circuit reconsider remanding the case. On February 2, 2018, the D.C. Circuit denied the Intervenor’s motion.

parties” in which his former employer or his own former clients are a party or the representative of a party.

[REDACTED] Guidance issued by OGE explains that the prohibition on participation in matters involving former employers and former clients is intended to address those situations where a federal employee’s “lingering affinity and mixed loyalties” could compromise his or her impartiality. See OGE, DO-09-011, pg. 5 (March 26, 2009).¹² The specific concern captured by the Pledge is that a reasonable person with knowledge of the relevant facts would be likely to question an appointee’s impartiality in cases involving their former employer and/or their former clients upon leaving private practice and entering government service. In other words, a reasonable person would question the integrity of an agency’s programs and operations if an appointee were to participate in matters encompassed by Par. 6 of the Pledge. For these reasons, the Pledge creates a “cooling off period” during which an appointee agrees to not participate in matters involving a former employer and/or former clients [REDACTED]. The provision has some overlap with the impartiality regulations in 5 C.F.R. Sec. 2635.502 of the Standards of Conduct that identify conflicts that arise when a person with whom an employee has a “covered relationship” is or represents a party to a matter. The Pledge extends the one-year recusal period in the Standards of Conduct to two years when the covered relationship involves a former employer or a former client.

Although the above-cited definitions from the Executive Order appear to narrow the scope of Paragraph 6 and create a bright-line rule, we have learned in conversations with the Office of Government Ethics (OGE) that this provision in fact leaves room for interpretation by an individual agency, and that a violation may occur in a less straightforward scenario when the policies that underlie the provision have been implicated.¹³

Under the Ethics Pledge, Member Emanuel may not participate in Browning-Ferris, because Littler represents Leadpoint and there is an appearance concern that he cannot be a neutral adjudicator because of loyalty to his former employer. However, the decision that he adopted in Hy-Brand was taken wholesale from the dissenting opinion in Browning-Ferris, and is thus based on internal Board deliberations in a case where Littler represented a party and submitted briefs. Further, because of the wholesale adoption of that opinion, Member Emanuel not only changed the joint employer standard to that which had been advanced by Littler, but included text from the pre-existing opinion applying that standard to the facts of Browning-Ferris. Further, he then participated in a vote to ask the court to remand Browning-Ferris to the Board.¹⁴ It is reasonable to conclude that by using Hy-Brand as a vehicle to affect a case from

¹² This guidance was issued to assist in interpreting the corresponding provision of the Obama Ethics Pledge, and states on its face that it is applicable to the Trump Ethics Pledge as well.

[REDACTED]

¹⁴ We recognize that Littler did not file a notice of appearance before the D.C. Circuit, and that the Board’s vote to instruct the General Counsel to move the court to remand the case ultimately became “harmless error” because of the way the events unfolded. However, we rely on this conduct as part of the series of events that determines the context for the events at issue here.

which he was recused (Browning-Ferris), the concerns that underlie the Pledge were implicated as Member Emanuel was evaluating and incorporating, to a large degree, deliberative information from a case in which he was recused.

We have looked to the APA and due process cases concerning the appearance of bias to support our recommended case-related remedy.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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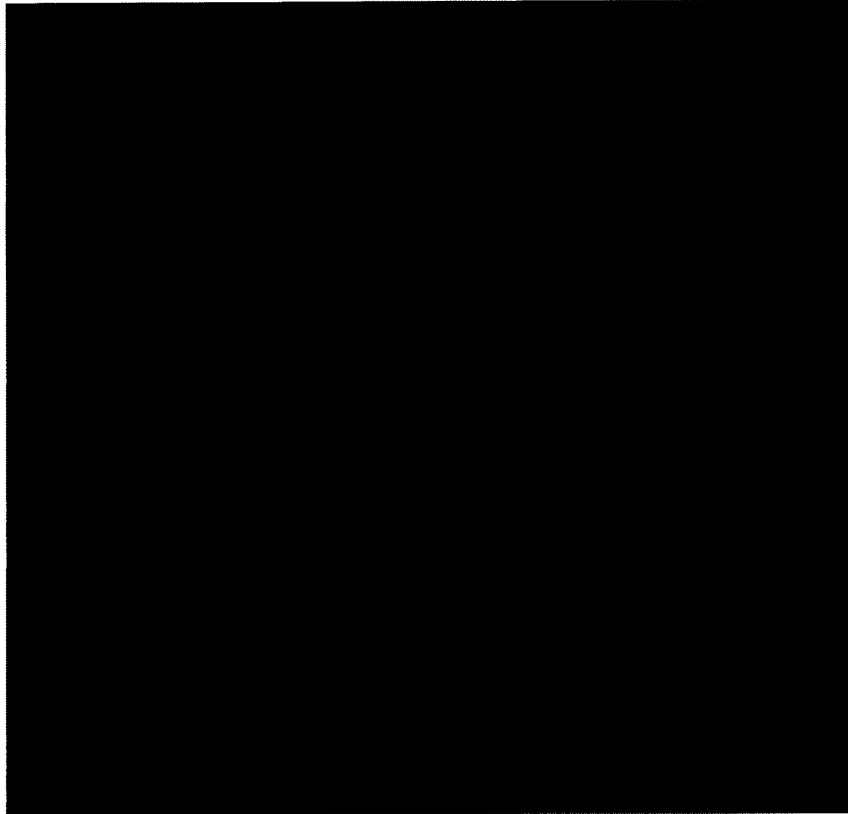
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] the regulations at 5 C.F.R. § 2635.502(c) give the Agency's Designated Agency Ethics Official authority to "make an independent determination as to whether a reasonable person with knowledge of the relevant facts would be likely to question the employee's impartiality in the matter."

[REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

■



UNITED STATES GOVERNMENT

National Labor Relations Board

Memorandum



TO: Dwight Bostwick, Zuckerman Spaeder LLP
Attorney for Board Member Bill Emanuel

FROM: Lori Ketcham
Associate General Counsel, Ethics
Designated Agency Ethics Official

SUBJECT: Finding of Trump Ethics Pledge Violation Respecting the Board's Adjudication of Hy-Brand Industrial Contractors, Ltd., 365 NLRB No. 156 (2017)

DATE: March 27, 2018

Overview

This memo explains my determination, consistent with that of the NLRB's Inspector General (IG), that Board member Bill Emanuel's participation in the manner in which the Board majority adjudicated Hy-Brand Industrial Contractors, Ltd., 365 NLRB No. 156 (2017), violated Paragraph 6 of the Trump Ethics Pledge (Ethics Pledge).¹ My determination in this matter is based on the totality of the circumstances presented, including that the majority decision in Hy-Brand is based on a wholesale incorporation of the dissenting opinion in Browning-Ferris, which resulted from the Board's deliberations in a case in which Member Emanuel's former firm represented a party and filed briefs on the issue of the joint employer standard. In order to illustrate that the ethics concerns here are based on the totality of the unique facts presented, I will start by examining in depth the procedural history of both Browning-Ferris and Hy-Brand.

¹The IG issued a report on February 9, 2018 titled "Notification of a Serious and Flagrant Problem and/or Deficiency in the Board's Administration of its Deliberative Process and the National Labor Relations Act with Respect to the Deliberation of a Particular Matter." The IG found that, due to the manner in which the Board majority adjudicated Hy-Brand, it had effectively become the same "particular matter involving specific parties" as Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery, 362 NLRB No. 186 (2015). On February 15, 2018, the Board forwarded a copy of the IG Report to Congress with a cover letter stating that it is "evaluating the Inspector General's findings, considering appropriate actions related to Hy-Brand Industrial Contractors, Ltd., 365 NLRB No. 156 (2017), and reviewing current procedures for highlighting and addressing recusal issues with the assistance of the Board's Designated Agency Ethics Official."

Relevant Facts

1. Procedural History of Browning-Ferris

Browning-Ferris originated with the Board's processing of a representation petition filed in Region 32 by the Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters (the Union) seeking to represent a unit of approximately 120 workers at a recycling facility operated by Browning-Ferris Industries of California (BFI).² The petitioned-for employees were provided by Leadpoint Business Services (Leadpoint), a supplier employer, to BFI, the user employer. The Union alleged that BFI and Leadpoint were joint employers for the petitioned-for employees. Both Leadpoint and BFI argued that Leadpoint was the sole employer of those employees. Relevant here, Leadpoint was represented by the law firm Littler Mendelson (Littler), Member Emanuel's former employer, in the representation proceedings in Region 32 and in subsequent proceedings before the Board.

The Region issued a Decision and Direction of Election (DDE) on August 16, 2013, finding that "Leadpoint [is] the sole employer of the employees in question at BFI's Facility and that [the Union's] arguments for joint employer status between BFI and Leadpoint are unconvincing." *Id.* at pg. 19. Subsequently, on September 3, 2013, the Union filed a Request for Review of the DDE alleging that the Region misapplied the existing Board precedent, and in the alternative, that the Board should reconsider the standard for determining joint employer status. Littler, on behalf of Leadpoint, filed an Opposition to the Request for Review on September 10, 2013, stating that the DDE correctly concluded that Leadpoint was the sole employer. On April 30, 2014, the Board granted the Union's Request for Review.³ Thereafter, on May 12, 2014, the Board issued a Notice and Invitation to File Briefs soliciting comments from the parties, and interested amici, respecting the following: (1) "whether under the Board's current joint-employer standard" Leadpoint was the "sole employer of the petitioned-for employees" in the unit; (2) whether the "Board [should] adhere to its existing joint-employer standard or adopt a new standard" and; (3) "if the Board adopts a new standard for determining joint-employer status, what should that standard be."

Numerous parties filed amici briefs in response to the Board's invitation. Littler filed its briefs as Leadpoint's counsel on June 26 and July 10, 2014, arguing that Leadpoint alone was the employer of the employees and that the Board did not need to revisit its formula for determining joint employer status. The Board issued its Decision on Review and Direction in Browning-Ferris on August 27, 2015, in which it held that Leadpoint and BFI were joint employers under the Act. In reaching this decision, the Board majority in Browning-Ferris adopted a new joint employer standard that no longer required a showing that a putative joint employer actually exercised direct and immediate control over workers' terms and conditions of employment, but that the mere existence of reserved joint control would suffice. Then-Member Miscimarra and

² Case No. 32-RC-109684 was filed on July 22, 2013.

³ In granting the Union's Request for Review, the Board provided notice of its intent to "issue a subsequent notice establishing a schedule for the filing of briefs on review and inviting amicus briefs, to afford the parties and interested amici the opportunity to address issues raised in this case."

then-Member Johnson authored a 29-page dissent to the majority opinion. Consistent with the position advocated in the briefs filed by Littler, the Browning-Ferris dissent argued that BFI and Leadpoint are not joint employers and that the Board should not have altered its joint employer standard.

A Board-conducted election was held on September 4, 2015, and a majority of the employees voted in favor of unionization. As a result, on September 14, 2015, the Union was certified as the exclusive collective-bargaining representative of the employees.⁴ After the issuance of the certification, BFI and Leadpoint refused to recognize the Union. Based on their refusal to bargain, the Union filed an unfair labor practice charge, and Region 32 subsequently issued a Complaint and Notice of Hearing alleging that BFI and Leadpoint had violated Section 8(a)(5) of the National Labor Relations Act (NLRA). Upon the filing of BFI's Answer admitting its refusal to bargain and claiming the Board improperly certified the Union, the General Counsel moved for summary judgment consistent with the processing of a standard test of certification case. Following BFI's and Leadpoint's respective responses to an order to show cause, the Board issued a Decision and Order granting summary judgment and found BFI and Leadpoint had violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union.⁵ On January 20, 2016, BFI, through its legal representatives at the law firm of Seyfarth Shaw LLP, petitioned the D.C. Circuit Court of Appeals to review the Board's Decision and Order, and immediately thereafter the Board filed a cross-application for enforcement.⁶ The test of certification case remained pending before the D.C. Circuit until late December 2017, when it was remanded to the Board immediately following the Board's issuance of its decision in Hy-Brand (see discussion below).

2. Procedural History of Hy-Brand

In Hy-Brand, the Administrative Law Judge (ALJ) found that Respondents Hy-Brand Industrial Contractors, LTD and Brandt Construction, Co. (Respondents) violated Section 8(a)(1) of the NLRA, as single employers and joint employers, by unlawfully discharging seven employees because they engaged in protected concerted activity. The Respondents filed exceptions to the ALJ Decision (ALJD). One of the exceptions alleged that the ALJ erred in concluding that the Respondents "are single and joint employers, and are jointly and severally liable for the discharges." On January 23, 2017, the General Counsel filed cross-exceptions to the ALJD. Neither the Respondents, nor the General Counsel, requested in their respective exceptions and supporting briefs that the Board re-consider its standard for determining joint employer status.

⁴ The certificate of representation that issued in this case certified the Union as the exclusive collective-bargaining representative of the following unit of employees: "All full time and regular part-time employees employed by FRP-II, LLC, d/b/a/ Leadpoint Business Services and Browning-Ferris Industries of California, Inc., d/b/a Newby Island Recyclery, joint employers, at the facility located at 1601 Dixon Landing Rd., Milpitas California; excluding employees currently covered by collective bargaining agreements, office clerical employees, guards, and supervisors as defined in the Act."

⁵ The Board's decision in the test of certification case is reported at 363 NLRB No. 95 (2016).

⁶ Leadpoint did not answer the Board's application for enforcement and no attorney filed a notice of appearance on Leadpoint's behalf. Consequently, Littler did not make an appearance on behalf of Leadpoint in the proceedings before the D.C. Circuit.

As detailed in the IG Report, on October 18, 2017, as the end of his term approached, then-Chairman Miscimarra sent an email message to Member Emanuel and then-Member Kaplan respecting Hy-Brand, but discussing information pertaining to the Board's internal deliberations in the adjudication of Browning-Ferris.

On December 14, 2017, the Board issued a 3-2 Decision and Order in Hy-Brand, finding that the parties were joint employers. In addition, the Hy-Brand majority, which consisted of Member Emanuel, then-Chairman Miscimarra, and then-Member Kaplan, overruled the joint employer standard that had been established in Browning-Ferris, returning to the pre-existing standard advocated by Littler and by the dissenting opinion in Browning-Ferris.⁷ The Board in Hy-Brand had not solicited amici briefs on the issue. However, the Hy-Brand majority indicated that its decision was in fact responsive to the briefing, including amici briefing, associated with Browning-Ferris. Thus, the Hy-Brand majority wrote, "Additionally, the issue we decide today was the subject of amicus briefing when the Board decided Browning-Ferris." 365 NLRB No. 156, slip op. at 33.

Further, a review of the Board's respective decisions in Browning-Ferris and Hy-Brand demonstrates that the Browning-Ferris dissent was used by the Board majority in its Hy-Brand decision. Specifically, the dissent in Browning-Ferris appears on pages 21-50 of that Board decision. Pages 21-48 from the dissent in Browning-Ferris are reproduced, almost word-for-word, on pages 3-30 of the Hy-Brand majority decision. Thus, 27 out of the 35 pages that constitute the decision of the Hy-Brand majority were essentially lifted, with little or no modification, directly from the Browning-Ferris dissent. The majority opinion in Hy-Brand contains an analysis of the relevant facts in Browning-Ferris concerning the joint employer status of Leadpoint and BFI, and in this analysis, the Hy-Brand majority utilizes the pre-Browning-Ferris standard that it reinstated in Hy-Brand. 365 NLRB No. 156, slip op. at 18-19. Specifically, the Board majority in Hy-Brand reached the following conclusion based on language that it incorporated from the Browning-Ferris dissent: "That is all there was, and the Regional Director correctly decided under then-extant law that it was not enough to show BFI was the joint employer of Leadpoint's employees." 365 NLRB No. 156, slip op. at 19. The Hy-Brand majority devoted two paragraphs of its analysis to analyzing the alleged joint-employer status of Hy-Brand Industrial Contractors, LTD and Brandt Construction, Co., the Respondents in the Hy-Brand case. 365 NLRB No. 156, slip op. at 30-31.

3. Browning-Ferris is Remanded to the NLRB

Also relevant to the unique fact pattern here, when Hy-Brand issued, Browning-Ferris, which had been the Board's lead case on the joint employer standard, was still a "live case" that was pending before the D.C. Circuit. After voting with the Hy-Brand majority to overrule the joint employer standard set forth in Browning-Ferris, Member Emanuel then participated in an effort to direct the General Counsel to seek remand of several Board decisions pending in federal courts, including Browning-Ferris.⁸

⁷ "[W]e overrule Browning-Ferris." Hy-Brand, 365 NLRB No. 156, slip op. at 2.

⁸ After further consideration of the issue, the Board unanimously agreed to rescind its directive to the General Counsel. Thereafter, on December 19, 2017, the General Counsel filed a motion in the D.C. Circuit requesting that the court remand Browning-Ferris back to the Board. By an order dated December 22, 2017, the D.C. Circuit

4. Charging Parties in Hy-Brand File a Motion with the Board for Reconsideration, Recusal, and to Strike

On January 11, 2018, the Charging Parties in Hy-Brand filed a Motion for Reconsideration with the Board. In addition to making substantive arguments about the standard for joint employer status, the Charging Parties set forth their objections to “the Board’s use of the Respondent’s affirmed unfair labor practice as a vehicle to overturn *Browning-Ferris*.” Mot. For Recons., p. 1. The Charging Parties contend that if the Board had made the parties and the public aware that it was considering reversing significant precedent, it would have had the opportunity to move to recuse Member Emanuel due to his “clear conflict of interest in *BFI*.” *Id.* at 2. Specifically, the Charging Parties assert that the decision in Hy-Brand “is no different than if Member Emanuel had directly participated in *BFI* where his former firm represents a party,” and therefore, the government ethics rules bar him from participating in *Hy-Brand*’s purported overruling of *BFI* as well as in any reconsideration of the case. *Id.* at 12. According to the Charging Parties, Hy-Brand is “not a case where the Board simply disagrees with the legal standard applied in an earlier case” because the Hy-Brand decision “extensively discusses the facts in *BFI* and applies the law to those facts.” *Id.* at 13. The Motion requests that the Board reconsider the case; Member Emanuel recuse himself from participating in the reconsideration; the Board affirm the ALJ’s Decision on single-employer grounds; and the Board strike the reference to an analysis of joint employer status “as improper due to Member Emanuel’s participation and as unnecessary *dicta*.”⁹

On January 25, 2018, the Respondents filed an Opposition to Charging Parties’ Motion for Reconsideration, Recusal, and to Strike the Board’s Decision (Opposition). In its Opposition, the Respondents contend that the Charging Parties’ Motion fails to meet the requirements of § 102.48(d)(1)¹⁰ because the “Charging Parties have made no showing of either extraordinary circumstances or material error requiring reconsideration.” Opp’n to Mot. For Recons., 2. Moreover, the Respondents assert that because “*BFI* was cited by the ALJ as the basis for his decision on the joint employer issue”...“it was entirely proper for the Board to return to the well-

granted the Agency’s request. Specifically, the D.C. Circuit’s order states the following: “Upon consideration of the motion of the National Labor Relations Board for remand of the case to the Board for reconsideration in light of new Board precedent, it is ORDERED that the motion be granted and the case be remanded to the Board for further consideration in light of the Board’s recent decision in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017).” On January 4, 2018, the Teamsters Union filed an Intervenor’s Motion for Reconsideration of Order Remanding Case to National Labor Relations Board requesting that the D.C. Circuit reconsider its decision remanding the case. On February 2, 2018, the D.C. Circuit denied the Intervenor’s motion.

⁹ On January 25, the NLRB’s General Counsel filed a response taking no position on the Charging Parties’ motion.

¹⁰ Section 102.48(d)(1) of the Board’s Rules and Regulations states the following: “A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing de novo and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.”

know[n] standard” in Hy-Brand, Id. at 3. The Opposition also asserts that Member Emanuel “had no duty to recuse himself” as he never “represented the Charging Parties or Respondents.” Id. at 4. In support, Respondents contend that the Charging Parties are stating a higher recusal standard than that applied by former Member Becker in addressing various recusal motions in SEIU, Local 122RN, 355 NLRB 234, 246 (2010). Specifically, Respondents note that “Member Becker’s determination to recuse himself was based on his work for particular clients” and “Member Becker’s interpretation of judicial standards and ethical rules equally apply to Member Emanuel.” Opp’n to Mot. For Recons., Id. at 5. The Respondents also maintain that the Motion for Reconsideration should be denied because the Charging Parties are simply using it as a “vehicle to procure a second bite at the apple with the undisguised desire that the former Chairman’s departure from the Board will now allow the dissent to become the majority opinion.” Id. at 1.

Analysis under the Ethics Pledge

Executive Order 13770 (Executive Order) requires any “covered appointee” to sign an Ethics Pledge (Pledge) that contains several commitments. An appointee who signs the Pledge can only participate in a matter that falls within the Pledge’s restrictions by seeking a waiver from the President. Pursuant to Paragraph 6 of the Pledge, Member Emanuel has agreed that he “will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.” This paragraph, read together with the definitions of “former employer,” “former client,” and “directly and substantially related” set forth in Executive Order 13770, prohibits his participation in a “particular matter involving specific parties” in which his former employer or his own former clients are a party or the representative of a party.

Guidance issued by the Office of Government Ethics (OGE) explains that the prohibition in Paragraph 6 is intended to address those situations where a federal employee’s “lingering affinity and mixed loyalties” to a former employer and/or former clients could compromise his or her impartiality. See OGE, DO-09-011, pg. 5 (Ethics Pledge: Revolving Door Ban -- All Appointees Entering Government) (March 26, 2009).¹¹ The specific concern captured by the Pledge is that a reasonable person with knowledge of the relevant facts would be likely to question an appointee’s impartiality, upon leaving private practice and entering government service, in cases in which their former employers or former clients are parties or the representatives of parties. In other words, a reasonable person would question the integrity of an agency’s programs and operations if an appointee were to participate in matters encompassed by Paragraph 6 of the Pledge. For these reasons, the Pledge creates a two-year “cooling off period” during which an appointee agrees to not participate in matters in which a former employer and/or former clients are parties or representatives. The provision has some overlap with the impartiality regulations in 5 C.F.R. § 2635.502 of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Ethical Conduct) that identify conflicts which arise when a person with whom an employee has a “covered relationship” is or represents a party

¹¹ DO-09-11 was issued to assist in interpreting the corresponding provision of the Obama Ethics Pledge (Par. 2), and states on its face that its substantive legal interpretations pertaining to that provision are applicable to the Trump Ethics Pledge as well. Accord LA-17-03 (Guidance on Executive Order 13770) (March 20, 2017).

to a matter. The Pledge extends the one-year recusal period in the Standards of Ethical Conduct to two years when the covered relationship involves a former employer or a former client.¹² See DO-09-011, pp. 5-6, which explains the relationship between the Pledge provision and the impartiality provisions in the Standards of Ethical Conduct.

Although the above-cited definitions from the Executive Order appear to create a bright-line rule in Paragraph 6, I have learned in conversations with OGE that this provision in fact leaves room for interpretation by an individual agency. Thus, the policies that underlie the provision may come into play when the totality of the circumstances demonstrate participation in a matter involving a representation by a former employer, even if this representation is not readily apparent. In this case, the initial assignment of Hy-Brand to Member Emanuel did not cause concern under relevant ethics rules or statutes. As to the Pledge, Member Emanuel's own former clients were not parties, and Littler did not represent a party to the matter. However, as the case progressed, the adjudication of Hy-Brand became intertwined with the adjudication of Browning-Ferris, a live case in which Littler represents Leadpoint. Under the totality of the unique circumstances that were present, for purposes of the Pledge, Member Emanuel participated in a case that essentially involved the representation of a party by Littler. For this reason, I have concluded that his conduct constituted a Pledge violation.¹³

Under Paragraph 6 of the Ethics Pledge, Member Emanuel is recused from participating in Browning-Ferris because Littler represents Leadpoint; this prohibition reflects an appearance concern that for two years from the date of his appointment, he cannot be a neutral adjudicator in cases in which Littler represents a party because of his loyalty to his former employer. The ethics concern arises because Member Emanuel, as a member of the Hy-Brand majority, overturned the Browning-Ferris standard in a majority decision that incorporated, wholesale, the dissent in Browning-Ferris. The dissent in Browning-Ferris was based on the Board's deliberations in a case where Littler represented a party and submitted briefs to the Board, on behalf of that party, regarding the joint employer issue.¹⁴ Specifically, as explained earlier in this memo, a significant portion of the Hy-Brand majority opinion consists of 27 pages from the Browning-Ferris dissent, which goes far beyond simply commenting upon, describing, or addressing relevant Board precedent. Thus, Member Emanuel effectively stepped in the shoes of the Browning-Ferris dissenting Members. Moreover, because the majority transported the entire substantive analysis from the dissent in Browning-Ferris into the Hy-Brand majority decision, the resulting majority decision discusses the facts of Browning-Ferris and even incorporates preexisting text that applies the reinstated standard to those facts. This commonality is significant, and stands in contrast to the fact that the Hy-Brand majority devoted only two paragraphs of its analysis to determining whether Hy-Brand Industrial Contractors and Brandt Construction are joint employers. It is reasonable to conclude that the concerns that underlie the Pledge were implicated as Member Emanuel was evaluating and incorporating, to a large degree,

¹² 5 CFR § 2635.502(b)(4) states that an employee has a covered relationship with "[a]ny person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee."

¹³ My determination is based on the authority given to me as the NLRB's DAEO at 5 C.F.R. § 2635.502(a) and (c).

¹⁴ Further, then-Chairman Miscimarra disclosed to Member Emanuel internal deliberative information regarding the adjudication of Browning-Ferris.

a dissenting opinion that was based on deliberations in a case in which Littler represented a party and filed briefs, and from which he was ethically recused. Further, the dissenting opinion in Browning-Ferris, which became the majority opinion in Hy-Brand, was consistent with the position advanced by Littler. This conduct could be perceived by a reasonable person as inconsistent with the Supreme Court's instruction that NLRB adjudications should be based on a "thoughtful and discriminating evaluation of the facts." N.L.R.B. v. Pittsburgh S.S. Co., 337 U.S. 656, 660 (1949).

In assessing the relevant facts, I also note that none of the parties in Hy-Brand requested that the Board reconsider the joint employer standard. Nor did the Board solicit amici briefs on that issue as it had done in Browning-Ferris. However, the Hy-Brand majority indicated that the decision was in fact responsive to the briefing, including amici briefing, associated with Browning-Ferris when it wrote the following: "Additionally, the issue we decide today was the subject of briefing when the Board decided Browning-Ferris." 365 NLRB No. 156, slip op. at 33. This fact underscores the commonality and overlap in the way that the two cases were adjudicated. Finally, after Hy-Brand issued, Member Emanuel participated in an effort to remand the open Browning-Ferris test of certification case back to the Board to be adjudicated under the new joint employer standard, which was consistent with the position advocated by his former firm, Littler, in Browning-Ferris.¹⁵

I want to emphasize that I have not concluded that Member Emanuel acted in bad faith in the adjudication of Hy-Brand. Rather, under the totality of the circumstances, he participated in the adjudication of a case in a manner which incorporated the adjudication of Browning-Ferris a case in which his former employer represented a party. This conduct, under the Pledge, would cause a reasonable person with knowledge of the relevant facts to question his impartiality because of concerns about "lingering affinity and mixed loyalties" to Littler that would make him predisposed to accept and adopt a position consistent with that of his former employer (OGE, DO-09-011, p. 5). Cf. Amos Treat & Co. v. Sec. & Exch. Comm'n, 306 F.2d 260, 263 (D.C. Cir. 1962) ("As the Supreme Court has said in other contexts: 'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.'") For these reasons, I believe that Member Emanuel's participation in the adjudication of Hy-Brand, including the wholesale incorporation of the dissenting opinion in Browning-Ferris, which resulted from the Board's deliberations in a still pending case in which Littler represented a party and took the same position on the issue of the joint employer standard that Member Emanuel ultimately endorsed, violated the Ethics Pledge.

¹⁵ I recognize that Littler did not file a notice of appearance before the D.C. Circuit, and that the Board's vote to instruct the General Counsel to move the court to remand the case ultimately was rescinded. However, I rely on this conduct as part of the series of events that determines the context for the events at issue here.

Mr. SCOTT. Thank you.

Professor Lofaso, in your testimony, you state that in a post-Citizens United world, money is speech and legislation affirming—requiring affirmative annual authorization for the use of union dues for non-representative activities is designed to weaken unions.

Could you state whether or not the—we should—whether or not corporate shareholders should have a comparable right to opt out of their dividends and profits being spent on politics supporting views and candidates that a shareholder may disagree with?

Dr. LOFASO. Yes, thank you. I agree with that statement. I think that what is important here is, as I always talk to my—tell my students, there are many coercive sources of power in our country. And the most coercive, of course, is the government. And business is the second-most. Unions are way down. They are—obviously, all institutions have some sort of coercive power.

So if we are—if we agree that businesses have enormous influence over—and coercion over employees in that they can obviously take away your job, et cetera, then it seems to me that, if we are going to have this discussion, it is important to have the discussion in light of both corporations and unions. And so I feel that there must be a different motivation by just focusing on unions.

So I would urge this committee to actually—if they are going to do legislation on this—to think about legislation in terms of many different types of institutions, but most importantly corporations, which are the single most coercive source of power outside the government.

Mr. SCOTT. Thank you. Mr. Bowman, do you agree with that?

Mr. BOWMAN. Actually, I am very interested in hearing—

Chairman WALBERG. Your microphone. Your microphone, please. Thank you.

Mr. BOWMAN. I am very interested in hearing Dr. Lofaso admit that unions are coercive sources of power. It is—I am glad—

Mr. SCOTT. Well, so are corporations and—

Mr. BOWMAN. But corporations offer products that people can purchase or not purchase. So I—

Mr. SCOTT. So a shareholder who disagrees with the political views of the corporation can have their profits diverted to the opponent, to people that are actually opposed.

Let me ask you another question. Do you get to vote on union leadership, as a union member?

Mr. BOWMAN. I am—withdrew my union membership.

Mr. SCOTT. As a—

Mr. BOWMAN. I am not offered any—I cannot vote on any representation.

Mr. SCOTT. Do union members vote on union officers?

Mr. BOWMAN. Local offices, not national offices, no. Not on our UAW president, no. But on a local level, yes.

Mr. SCOTT. So you get—

Chairman WALBERG. The gentleman's time is expired. I now recognize myself for my five minutes of questioning.

Mr. Marculewicz, the U.S. Chamber of Commerce just released a very thorough report on worker centers. It notes that under previous administrations the Labor Department's Office of Labor Management Standards has been hesitant to regulate certain worker

centers because of outdated guidance on the definition of a labor organization under LMRDA. Specifically referenced are guidance letters from 2008 and 2013.

Do you have any thoughts on how the current administration should address the matter?

Mr. MARCULEWICZ. Thank you, Chairman. I want to reference some of the remarks of Ranking Member Sablan about these worker centers and sort of the definition of these worker centers. They have historically been organizations that promoted education, engaged with workers on a wide variety of different things, but rarely ever engaged directly with employers.

Back 10 years ago, perhaps, when the Department of Labor issued the letter, the 2008 letter, that may have been a set of circumstances that existed at the time. But those organizations have evolved dramatically in the last 10 years. We have seen lots of activity by different types of organizations. They have re-emerged. So I would submit, first and foremost, that those worker centers have evolved from the historic sort of traditional model that was described by Ranking Member Sablan into more activist organizations that pursue direct engagement with employers.

Number two, looking at both of those interpretations, they were exceedingly narrow readings of the statute, number one. And they were also inconsistent with the OLMS guidance that had been previously published related to that. And I would submit that the OLMS today—assuming we get an administrator to implement policy—the OLMS today should take a look at this, take a look at these organizations within the context of today and the way they have acted over the course of the last several years, and make their determination based upon that.

Chairman WALBERG. Thank you.

Mr. Bowman, you spoke about unions using member dues for political purposes or other expenditures not related to collective bargaining. In your experience, are most workers aware of their right to opt out and exercise what is known as their Beck rights?

Is there something that workers have a straightforward way of finding out about this in the workplace?

Mr. BOWMAN. I would say, unfortunately, no, that is not the case. I worked for the UAW for 13 years until I did my own research and found out that there is such a thing as Beck rights, that there is an ability for me to be what would be called an agency fee payer.

The problem is you have to resign your union membership first, in order to pay agency fees. And that process can become very intimidating and full of fear for general workers.

The UAW used to have a solidarity magazine which was sent to everybody's home that, by the way, was cover-to-cover political propaganda. But once a year, they would put a little box way down in the corner that may have mentioned the fact that you can resign your union membership and exercise your Beck rights.

Since Michigan became a right-to-work state, that magazine no longer comes to our home. It is just offered online. So I do not believe that members have much ability at all to know what their rights are, as far as the Beck decision goes.

Chairman WALBERG. Okay, thank you.

Mr. Jackson, since you and your fellow employees began the certification effort, has the union made a compelling case to employees as to why it should be kept in place, or is the union simply hiding behind procedural delays?

Mr. JACKSON. The union at this point has not sent us any correspondence, other than to try to compel us to believe our management are dictators, trying to, I believe, draw an emotional response so we would continue to support the union. But at this point, no, it has been four years since they started this process.

Chairman WALBERG. Delay upon delay?

Mr. JACKSON. Delay upon delay. And I believe their goal now is to just kill our company because of the timeframe.

Chairman WALBERG. Thank you for your testimony.

I yield back and now recognize the ranking member, my friend, Mr. Sablan.

Mr. SABLON. Thank you very much, Mr. Chairman.

Mr. MARCULEWICZ. sir, I am not going to argue with you, because I will probably find—you represent management side clients, and I have never been a member of a union myself, but I have spoken to and seen the good that is done for workers. So we will agree to disagree.

But Professor Lofaso, if I may ask, what are the penalties for unfair labor practices under the *National Labor Relations Act*? And are they adequate to deter non-compliance? Could you please provide some examples?

Dr. LOFASO. So the remedies for unfair labor practices under the *National Labor Relations Act* are twofold. There are cease-and-desist orders, and also any kind of affirmative order. So you would get remedies to cease and desist from your—whatever action you took, and then the—whatever the affirmative order is, depending on which violation it is.

So, if you are under 8(a), which are the employer unfair labor practices—and there is five of them—it would be different types of things. Like an 8(a)1 might be a notice posting. For an 8(a)3 you might get back pay. For an 8(a)5 you might get a bargaining order.

So the problem is that they are very ineffective. And so, many times an employer would make the business judgement that it makes more sense to violate the law, in terms of its bottom line, than to comply with the law. And so you see that we don't have a very good enforcement mechanism. We see this often in international law, where you have no teeth. And so the—where there is right there needs to be a remedy.

So it is the policy and practice of—it is the policy in the United States Congress—it is the policy of the United States to encourage the practice and procedure of collective bargaining, which means—and it has been called a fundamental right by the United States Supreme Court. Therefore, it should have remedies that would—

Mr. SABLON. Do you have an—

Dr. LOFASO.—enforce—that are powerful.

Mr. SABLON. Do you have any examples?

Dr. LOFASO. Yes.

Mr. SABLON. Could you share—

Dr. LOFASO. Yes—

Mr. SABLON.—one or two—

Dr. LOFASO. I think that you could have—you could do, like treble damages for, if someone is discriminated against, for their back pay. Injunctions. Right now the injunctions are mandatory for when a union does something, but they are not—they are permissive for when an employer does it.

Mr. SABLAN. All right.

Dr. LOFASO. So things like that.

Mr. SABLAN. Okay. So should you—should worker centers be classified as labor organizations? And if not, why not?

Dr. LOFASO. Well, no, because they don't meet the definition of a labor organization. The board is fully equipped to look at—and is an expert in this, and can actually look and see whether they—if there is dealing with—the most important part of that definition is whether or not there is a bilateral mechanism, whether there is actual dealing with.

What I heard today is some people complaining that some of these so-called worker centers are actually engaging one-on-one with employers. Well, if there—where there is actual dealing with, that would be a labor organization. Yet every single time this has come up, Republican or Democrat, experts have said these are not. So that is not really the issue.

I think what is important is that these are actually—without using government funds, are actually helping low-income workers, and we should be grateful for that.

Mr. SABLAN. Thank you. And so your testimony, Dr. Lofaso, also critiques a number of provisions of H.R. 2723, the so-called *Employee Rights Act*, such as eliminating voluntary recognition, requiring workers to affirmatively opt in to support union activities, and granting rights to non-members to vote in matters involving the internal governance of a union.

What is the net effect of these proposals? And you have 45 minutes—seconds.

Dr. LOFASO. The net effect is to weaken unions. And we don't want to weaken unions. Unions are already weak. And we can see—it was your graph, but there is many, many other studies that show that, as we strengthen unions, we are strengthening the middle class.

That is not to say that there aren't certain—when there is an abuse, we can get rid of that abuse. And of course, there is going to be some—you know, there is stories, but there's individual stories that they—people feel upset about their union. Of course that is going to happen. But we don't make legislation just because—on the worst case scenario.

I would say that what we need to do is strengthen our middle class. We need to strengthen the middle class. And one way to do that is we can strengthen unions, strengthen a voice of employees, which is another theme I am hearing today, and we can do that in many, many different ways. And I urge the—you guys to work together to figure out a solution that is non-ideological.

Mr. SABLAN. Thank you, thank you.

Chairman WALBERG. I thank the gentleman. Now I recognize the gentleman from South Carolina, Mr. Wilson.

Mr. WILSON of South Carolina. Thank you, Mr. Chairman. I appreciate Congressman Walberg and Congressman Sablan for their

working together in a bipartisan manner to address the issues of worker-management relations. And we want to thank all of our witnesses here today.

I am very grateful that in South Carolina we are a right-to-work state, leading to South Carolina being the nation's leading exporter of cars: BMW, Mercedes, and soon, Volvo. South Carolina is also the leading manufacturer and exporter of tires in America, with Michelin of France, Bridgestone of Japan, Continental of Germany, GT of Singapore, and soon Wanli of China.

Additionally, South Carolina knows the importance of free and fair representation elections, with the workers in Charleston at Boeing, ably led by manager Joan Robinson-Berry, rejecting unionization by a 73–27 vote last year. So we know how important the elections are, but the benefits of having real representation, and not forced.

And that is why, Mr. Bowman, your presentation has been so meaningful.

Last year, Congressman Francis Rooney, Congressman Bradley Byrne, and myself introduced H.R. 4327, the *Current Employee Representation Act*, which would allow workers to petition for union certification election when fewer than 50 percent of current employees were members of—during the last election. We note that businesses flourish and the economy grows when employees are empowered and unions are accountable for those who join the workforce.

The union in your workplace has been there for many years, and very few current workers had the opportunity to vote for or against the union. Do you view the union as your representative, or is it more just another layer of bureaucracy in a big corporation?

Mr. BOWMAN. It is very interesting. My father migrated to Michigan from LaFollette, Tennessee back in the fifties. So did his sister and brother. They all ended up working at Ford plants, and all forced UAW members. None of them ever had the opportunity to vote in a union election. In fact, most of the unions were in place, as Chairman Walberg mentioned earlier, before they were even born.

It is very interesting that—why I cannot, in my 21 years, be able to vote for a union and be forced under union representation, not to be able to represent myself, is a union, in my opinion, trying to keep control over the entire collective bargaining unit.

Unions can, under NLRB rules, under former Supreme Court cases, choose to do something called a members-only contract. But they choose to negotiate to be the exclusive representation agent. So yes, unions do that in order to keep the power all to themselves, and won't allow me to represent myself, even though I have exercised my right-to-work law.

They will call me names such as “freerider,” or “freeloader.” But the—since I am forced to still accept that union representation, I, in fact, am a forced rider for the union. So absolutely, I agree with your comment.

Mr. WILSON of South Carolina. Well, and your real-life experience means a lot, and is so helpful. So thank you for being here.

Mr. BOWMAN. Yes.

Mr. WILSON of South Carolina. Additionally, Mr. Jackson, your testimony, you state that labor unions should be held to the same standard as elected officials, and should conduct re-certification elections. You mention the tedious process that you go through to bring about a de-certification. Even though you collected the required signatures and filed for de-certification more than two years ago, there has been no vote.

Is there any sort of deadline as to when you and your employees will—fellow employees will have the ability to vote on the de-certification effort? Also, do you have an idea on how long this entire process will potentially take?

Mr. JACKSON. The time period we were told—all the unfair labor practice acts that were filed would have to be gone or ruled upon before we would be allowed to vote. And that, every time we get close, the union either files new ones, repeats as appeals—it is just ongoing at this point, it never ends every time we get close.

Mr. WILSON of South Carolina. And additionally, you discussed the blocking charges filed by NLRB by the union against your employer, in your case, and how is this being addressed? And what is the time period, again, that you anticipate?

Mr. JACKSON. I don't believe we have a time period. My company is to the point where they will not fight them. It costs them money. So they are waiting. They are simply waiting for a ruling from the NLRB. And those are not forthcoming, either. It is just—the NLRB, I believe, is coddling the union, at least our Region 19 is coddling the union. It is—

Mr. WILSON of South Carolina. Best wishes on your continued success creating jobs. Thank you.

Chairman WALBERG. I thank the gentleman. I recognize the gentlelady from Oregon, Ms. Bonamici.

Ms. BONAMICI. Thank you very much, Mr. Chairman and Ranking Member. Thank you to our witnesses for being here.

Mr. Jackson, I too am from Oregon. However, I grew up in Michigan. My grandfather spent many years working at Ford Motor Company, both before and after the UAW. And I assure you he—my grandfather has long passed away—but I assure you the working conditions were much better after the UAW came to Ford Motor Company.

My home state of Oregon has actually been a leader in addressing a lot of barriers faced by working families. In fact, just recently workers at a Burgerville restaurant in Portland voted to unionize, and they established one of the first formally-recognized fast food unions in the country, and this was done in an election overseen by the NLRB. In fact, after the election the company issued a statement saying that the employees voted to unionize in the fair and free election overseen by the NLRB.

And strengthening their collective voice and the rights of workers, especially in industries like fast food work, we know that many full-time workers still struggle to make ends meet. Their union advocacy is going to be an important voice and a way to help them through advocating for better working conditions, fairer wages, and good benefits.

And I would hope that our Committee would be focused on growing the middle class, as we saw from Mr. Sablan's information in

the opening statement, and that includes making sure that workers' voices are protected and preserved in our evolving, changing workforce.

But instead, we are discussing efforts that seem to reduce the collective power of workers and limit their ability to have a voice on the job. I wish we could go back to the drawing board and talk about how we can increase workers' voices.

And although many of the workers today would join a union if given the choice, many fear retaliation for supporting or engaging in organizing efforts. And according to a study from the Economic Policy Institute, companies threaten to close shop in 57 percent of union elections. They fire workers who are organizing in 34 percent of elections. They threaten to cut wages for workers in 47 percent of elections. And they use one-on-one supervisory meetings to intimidate and threaten workers in 54 percent of elections.

Our state of Oregon has passed legislation banning the—those forced meetings. But—nationally. So Ms.—or, excuse me, Dr. Lofaso, given the staggering data, are there adequate protections in place to deter employees—employers from discriminating against or taking retaliatory action against employees for engaging in protected activities under the NLRB? Because I noted that in Oregon the company said this was a fair and free election. What are the most important reforms we need to modernize the labor laws to protect those workers who do engage in protected activity?

Dr. LOFASO. Well, the—you are right. The stats are staggering, and I would really love to get—that is—I would love to get the information on that.

We know that, given that—you said 50 percent of companies will threaten to close plant. This is actually extremely intimidating. You think—you heard some of the witnesses say they were—they are afraid of certain things, they are afraid to say that they are—that they want to leave the union. But think about it. Losing your job is much more coercive. And that—the reason is because the remedies are bad.

And so there is no real teeth. And so what we need to do is, for these types of—I call it—they are called—I don't call them this, but everyone—most people in the business call them TIPS. So threats, coercive interrogations, promises that are to—basically bribes, solicitation, other things—surveillance—what you need to do is really focus on those and say, okay, we are going to make these a priority and we are going to have them have more teeth, better remedies for these particular things. And I would definitely focus on those TIPS.

Ms. BONAMICI. Thank you. And as Ranking Member Sablan noted, upholding the right of workers to form a union and—as I mentioned, we want there to be fair and free elections—is an important way to reduce income inequality. We know there are still a lot of working families who need help getting ahead. Unionized workers have had better access to paid holidays, paid sick leave, and retirement benefits. And additionally, the presence of a unionized workforce really helps raise the standards for wages and working conditions for all workers.

So we shouldn't have unnecessary delays for workers to join or form a union. So Dr. Lofaso, your testimony mentioned how the

NLRB's 2014 election rule removed many of the unnecessary delays that deprive workers of their rights under the *National Labor Relations Act*. And last week I joined many members of this committee in submitting a comment to the NLRB making a similar argument.

Can you discuss the implications of long election delays for workers who are seeking union representation, and the importance of the 2014 rule?

Dr. LOFASO. Well, I think we heard that, actually, even in the testimony today. And indeed, under the new election rules, they actually drop blocking charges. So if we were to get rid of that, the election rules, it would actually—Mr. Jackson's problem would be worse.

So we want—we don't want to have those delays. It is really important that—justice delayed is justice denied. So—and I have quoted the Magna Carta twice today, but justice delayed is justice denied.

I will say one more thing, is that I would say that it is more forced democracy is what we are really doing here, is not—and that if there were—I would agree with the secret ballot election, if it were against Union A versus Union B. But if the choice is between a union and no union—and as you said, when there is a union, the working conditions are better.

Ms. BONAMICI. Thank you. I yield back.

Chairman WALBERG. I thank the gentlelady, and I recognize the gentleman from the beautiful mountains of Tennessee, Dr. Roe.

Mr. ROE. Thank you, Mr. Chairman. And Molly, thank you for the nine-and-a-half years you worked with me on this committee. I appreciate all the help you have done, and your service to this committee.

And just—the ranking member made a statement about political money being spent by corporations. If you are a shareholder, that is a simple solution; just sell the stock, and you get rid of it, or you don't buy the product. And I am sure Mr. Jackson would love to have that same option, since he is two-plus years into trying to get a vote.

Mr. Chairman, thanks for holding this meeting today, and—on our nation's out-of-date labor laws, and the need to advance common-sense reforms to empower American workers.

As the son of a union member, I am proud to be part of the discussion that is empowering employee protections and choice. As recently as 2009 data, the Bureau of Labor Statistics and the National Labor Relations Board indicates about seven percent of unionized employees have ever voted for the union in their workplace.

They deserve more—employees deserve more of a voice in their representation, and the ability to hold their leaders accountable. We should be advancing legislation such as H.R. 2723, *Employee Rights Act*, which contains common-sense protections, including secret ballot elections, giving the employees a voice on their union dues if they are used for political spending, and the ability to decide representation, free from threats.

I put on a uniform and left this country over 40-something years ago in Southeast Asia to give every single person in this country the right to a secret ballot. Every member up here was elected by

a secret ballot. And to show you how secret it is, my wife claims she votes for me, but I don't know that for a fact, because it is a secret ballot.

And I find it offensive when someone will stand up and say that these members right here, these men right here—and women -- don't have a right to vote in a secret ballot. That is so American, it is what separates us from every other second-rate country in the world, is a secret ballot. And I think that is sacrosanct.

And Mr. Bowman, I will start with you. Full disclosure, I own a Ford pickup. So the—it is a bedrock, and I would just like to have you comment again on that.

Mr. BOWMAN. Well, I also own a Ford F150. And as I said, my father came from LaFollette, Tennessee, so I love your state.

What specifically—subject do you want me to speak on?

Mr. ROE. Just the secret ballot protections that you—

Mr. BOWMAN. Again, I think it is interesting. It is outrageous and embarrassing that any worker has to fight for a secret-ballot election.

As you had said in your comments, the *Employee Rights Act* would guarantee that for all workers. There is no situation that I can think of where a secret ballot election should be removed from any worker in any situation in any union organizing drive, period.

There can be intimidation on both sides. There can be intimidation on the union-paid—on the paid union organizers side, there can be intimidation on the employer side. Nobody wants to go into a voting booth and have somebody know how they voted. That is an anathema to being an American.

I think workers being told right from the beginning that you are going to have a secret ballot election, nobody is going to know how you vote—in fact, you can walk out of there and tell one person you voted one way, tell another person you voted another way. It doesn't matter because your vote, your secret ballot vote, is what actually matters and what ultimately counts on that union organizing drive.

So that is why I definitely support the *Employee Rights Act*.

Mr. ROE. I agree with you. The last time—first time I got elected I found that at the election 100 percent of the people in my district voted for me—at least they—what they said, everybody did.

[Laughter.]

Mr. BOWMAN. Sure.

Mr. ROE. Would you agree, Mr. Bowman, that if a union brings value to the workplace, that they have nothing to fear from an election?

Mr. BOWMAN. They have nothing to fear. And personally, myself, I am pro-union, but in the context of what unions were created to do—unfortunately, not what they have become.

So I don't think there is anybody in this table—and I certainly don't want to speak for anyone—that wants to ban unions. We just believe that unions need reform to bring them into the 21st century. And compulsion at its core, and forcing members in a card check campaign is definitely not something that I believe belongs in the 21st century.

Mr. ROE. Mr. Jackson, very quickly. And Chairwoman Foxx scares me too, so you are okay with your—

[Laughter.]

Mr. ROE. You mentioned that you and your employees are rarely in the same place, and was it difficult for you to collect the signatures for your de-certification process (sic). And I know you have mentioned several times about why you think it has taken so long, but, if you could, just hit that point quickly.

Mr. JACKSON. Yes. Thank you for your service, Mr. Roe.

For us, hand-carrying the de-certification petition with us everywhere we go is extremely tedious, very time-consuming. Given that, once it is filed, why has that taken so long? Why are they allowed to hold this up?

You know, when we voted for the union, that election happened like that. To undo that, we are still waiting. How come?

Mr. ROE. I yield back, Mr. Chairman. Thank you.

Chairman WALBERG. I thank the gentleman. And I was just notified by Chairwoman Foxx that she would like me to disassociate myself from your comments.

[Laughter.]

Chairman WALBERG. I now recognize the gentleman from New Jersey, Harley rider and good guy, Mr. Norcross.

Mr. NORCROSS. Thank you, Chairman. And I thank the Ranking Member for putting this Committee today.

And I have to agree with Dr. Roe. The mountains of Tennessee really are beautiful, and they produce many, many good people, including himself and my mother.

So Mr. Bowman, you said that you were employed by the UAW for 13 years. When did they hire you?

Mr. BOWMAN. I am not employed by the UAW. I am employed—

Mr. NORCROSS. No, you said—

Mr. BOWMAN.—by Ford Motor Company.

Mr. NORCROSS. Well, that is—wait. So you did not work at all or ever for the UAW.

Mr. BOWMAN. No, I never have.

Mr. NORCROSS. Okay, thank you. Have you ever run for public office?

Mr. BOWMAN. I did in 2014.

Mr. NORCROSS. Oh, so you know what it is like to win or lose an election.

Mr. BOWMAN. Based on secret ballot elections, yes.

Mr. NORCROSS. So you know how and whether it is like to win an election or lose. What—did you win or lose? Just—

Mr. BOWMAN. I lost the election.

Mr. NORCROSS. Okay, sorry to hear that. Did you disclose all the money that was contributed to you?

Mr. BOWMAN. Yes, you have to. I—

Mr. NORCROSS. Oh, but the dark money, or what they are referring to by third parties, did you disclose that?

Mr. BOWMAN. Well, since I ran—

Mr. NORCROSS. Did you disclose that?

Mr. BOWMAN. Absolutely. Since I ran in—

Mr. NORCROSS. Hang on, I am asking a question.

Mr. BOWMAN. Okay, okay.

Mr. NORCROSS. Did you disclose money that was used on behalf of your campaign, all that money? Yes or no.

Mr. BOWMAN. Yes.

Mr. NORCROSS. Did your opponent?

Mr. BOWMAN. That I have no idea.

Mr. NORCROSS. You don't know if he filed any of the disclosures?

Mr. BOWMAN. No. My opponent is in this House—

Mr. NORCROSS. Well, thank you. I appreciate it. Please.

So both sides, by law, are supposed to disclose. Correct?

Mr. BOWMAN. True.

Mr. NORCROSS. So let me switch just a little bit.

Dr. Lofaso, when there is a campaign going on, the union obviously files their LM reports and many others they have to disclose. Is the same true for the employer side, that they have to disclose everything they use in fighting the election?

Mr. BOWMAN. I—

Dr. LOFASO. No.

Mr. NORCROSS. I am asking her.

Mr. BOWMAN. Oh, you are asking her.

Mr. NORCROSS. So when you run for public office, you have to disclose both sides, but if it is a union election, only one side has to disclose. Is that accurate?

Dr. LOFASO. Correct.

Mr. NORCROSS. So, when there is a vacancy in the U.S. Senate, is there an appointment or an election that takes place, do you know?

Dr. LOFASO. I believe it is usually an appointment, and then later on an election.

Mr. NORCROSS. Oh. So they can be appointed without any election?

Dr. LOFASO. Correct.

Mr. NORCROSS. Okay, just wondering. That seems to happen a couple times.

Mr.—hopefully I get this right—Marculewicz, if there is a language interpreter that is used by an employee who doesn't speak English with their employer, are they considered part of a union?

Mr. MARCULEWICZ. If there is a language interpreter?

Mr. NORCROSS. Yes.

Mr. MARCULEWICZ. That is used—

Mr. NORCROSS. By an employee to speak to their employer.

Mr. MARCULEWICZ.—by an employee to speak with their employer?

Mr. NORCROSS. Are they covered? Is that—an interpreter?

Mr. MARCULEWICZ. Covered by what?

Mr. NORCROSS. The NLRA.

Mr. MARCULEWICZ. I—if they are an employee they would be, yes.

Mr. NORCROSS. No. If an employee uses a language interpreter that might come from a worker center to help them communicate with their employer.

Mr. MARCULEWICZ. If they—if the—I am still not quite following your question.

Mr. NORCROSS. If an employee who does not speak English wants to speak to their employer and uses a language interpreter that happened to come from a worker center, would they be covered under the NLRB?

Mr. MARCULEWICZ. Well, under certain circumstances, they might. But if they were just in their capacity as an interpreter, they wouldn't serve as a labor organization.

Mr. NORCROSS. If they came from a worker center?

Mr. MARCULEWICZ. Including if they came from a worker center, Congressman.

Mr. NORCROSS. Okay. So if there is a language interpreter that works in the court system for the same reason, would they be covered under the NLRB?

Mr. MARCULEWICZ. In the court system?

Mr. NORCROSS. Yes, criminal justice system.

Mr. MARCULEWICZ. Actually—

Mr. NORCROSS. It happens—

Mr. MARCULEWICZ. Yes, they would be covered. If they were private-sector employees, they would be covered under the *National Labor Relations Act*, because they could organize and form a union.

Mr. NORCROSS. I am not asking that. If they are working as a language interpreter for a person who does not speak English in our court system, and they came from a worker center, should they be covered by the NLRB?

Mr. MARCULEWICZ. They would not be acting as a labor organization in that capacity.

Mr. NORCROSS. So is that answer yes or no?

Mr. MARCULEWICZ. The question doesn't lend itself to a yes-or-no answer, because an interpreter who is in the private sector could be covered—working for a worker center, that interpreter and other interpreters could form their own union as employees of that worker center. And they are covered under the—

Mr. NORCROSS. Because they are working in their capacity as an interpreter for an individual, does that automatically qualify? I think your answer was no, because—

Mr. MARCULEWICZ. I don't think it would, correct.

Mr. NORCROSS. Okay. We are in the same place. So why should, in the event that they came from a worker center, all of a sudden, that switch their capacity? Because many of these worker centers, they use language interpreters each and every day.

So I see my time has expired. I yield back. Thank you.

Chairman WALBERG. I thank the gentleman. I recognize the gentleman and a master from Florida, Mr. Rooney.

Mr. ROONEY. Thank you, Mr. Chairman. I would like to have the U.S. Chamber's report on worker centers submitted into the record, if I might.

Chairman WALBERG. Without objection, hearing none, it will be. [The information follows:]

Worker Centers

Union Front Groups and the Law



U.S. CHAMBER OF COMMERCE
Employment Policy Division

Worker Centers
Union Front Groups and the Law

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Worker Centers *Union Front Groups and the Law*

Introduction:

The Office of Labor-Management Standards (OLMS) in the U.S. Department of Labor is the federal agency responsible for administering and enforcing most provisions of the Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA). The LMRDA was enacted by Congress to ensure basic standards of democracy and financial integrity in labor organizations representing, or purportedly representing, employees in private industry. The LMRDA promotes labor organization and labor-management transparency through reporting and disclosure requirements for labor organizations and their officials, employers, labor relations consultants, and surety companies.

In recent years, groups representing workers and their interests have evolved into organizations known as "worker centers." Worker centers have historically been non-profit organizations that offer services to their members, including education, training, and advocacy for worker rights through research, communication, lobbying and organizing. Increasingly, however, worker centers have sought to directly engage specific employers or groups of employers to effectuate change in the workplace on behalf of workers they claim to represent. When it comes to such direct engagement and dealing with employers, many worker centers act no differently than traditional labor organizations.

As worker centers have evolved over the years, many have assumed roles akin to those of a traditional labor organization, and as such should be accountable to the workers they claim to represent under the laws Congress passed to establish such accountability.

The LMRDA was enacted, in part, to ensure protection of certain minimum rights of employees *vis-à-vis* the labor organizations that represent them. The LMRDA contains significant protections for employees with respect to promotion of the principles of organizational democracy, access to basic information, and promotion of a duty of fair representation. As worker centers have evolved over the years, many have assumed roles akin to those of a traditional labor organization, and as such should be accountable to the workers they claim to represent under the laws Congress passed to establish such accountability. However, few appear to have embraced the obligations of the LMRDA.

Background of the Labor-Management Reporting and Disclosure Act:

In 1935, Congress passed the Wagner Act, also known as the National Labor Relations Act (NLRA).¹ The purpose of the statute was to promote freedom of association and collective bargaining. It did not regulate labor organizations. The absence of such regulation subjected the law to criticism, arising out of corruption and undemocratic actions exhibited by some labor organizations of the time.

¹ Pub. L. No. 74-198, 49 Stat. 449-50 (1935).

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Concern about the power of labor organizations contributed to the introduction of the Taft-Hartley Act, which created a series of unfair labor practices and other requirements designed to protect employees from the labor organizations that represented them. A goal of the legislation was to provide workers the same protections from labor organizations that the Wagner Act offered workers from employers.² "[T]he freedom of the individual workman should be protected from duress by the union as well as from duress by the employer."³ The House echoed this sentiment. "[T]he American workingman had been deprived of his dignity as an individual... cajoled, coerced, and intimidated... in the name of the splendid aims set forth in Section 1 of the National Labor Relations Act. His whole economic life has been subject to unregulated monopolists."⁴

Following passage of the Taft-Hartley Act, there remained public concern over the lack of oversight of labor organizations, which prompted the Senate Select Committee on Improper Activities in the Labor or Management Field, known as the McClellan Committee, to conduct hearings on the matter.⁵ The inquiry and subsequent hearings revealed corruption, fraud and other inappropriate behavior by leaders of labor organizations at the expense of their membership.⁶ The McClellan Committee concluded that there was a need to require democratic procedures to hold leaders of labor organizations accountable to their members.⁷ This debate eventually resulted in passage of the Landrum-Griffin Act, more formally known as the Labor-Management Reporting and Disclosure Act of 1959.⁸

The LMRDA provides significant protections for the rights of employees with respect to the labor organizations that purport to represent them.

² Senate Report No. 106 on S. 1120, Supplemental Views, reprinted in 1 Legislative History of the Labor Management Relations Act of 1947 at 456.

³ *Id.*

⁴ House Report No. 245 on H.R. 3010 as reprinted in 1 Legislative History of the Labor Management Relations Act of 1947 at 295.

⁵ *The Labor Reform Law*, Bureau of National Affairs: Washington, D.C. (1959).

⁶ *Id.*

⁷ Leslie Marshall, *The Right to Democratic Participation in Labor Unions and the Use of the Hobbs Act to Combat Organized Crime*, 17 Fordham Urb. L.J. 183, 196 (1989); S. REP. No. 187, 86th Cong., 1st Sess. 5 reprinted in 1 NLRB Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 at 397.

⁸ 29 USC §§ 141-144, 167, 172-187.

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The Legal Framework of the LMRDA:

The LMRDA provides significant protections for the rights of employees with respect to the labor organizations that purport to represent them. The following is a summary of such protections:

Title I of the LMRDA, referred to as the Worker Bill of Rights, addresses issues of organizational democracy and basic protections for workers. These include the following: equal rights and privileges for all union members to nominate and elect leadership of their choosing, to attend meetings, and to participate in deliberations of the labor organization; the freedom of members to assemble and to express their views, arguments, or opinions to other members and during meetings of the labor organization; protection of members from increases in dues or initiation fees without majority approval; and the provision of due process protections for members in disciplinary matters.⁹ Title I further requires labor organizations to retain copies of all collective bargaining agreements to which they are a party, and to make them available for review by any member or by any employee whose rights are affected by such agreements.¹⁰ Finally, the Bill of Rights gives members of labor organizations the right to pursue civil enforcement of the statute's protections in federal court.¹¹

Title II of the LMRDA requires labor organizations to disclose financial information about the organization, its officials, and employees.¹² Title II also requires labor organizations to have a constitution and by-laws containing requirements for membership, regular meetings, censure and removal of officers, and provisions for how the organization's funds may be spent.¹³ These provisions not only promote transparency to protect workers' rights to fair elections of officials, they also serve as a deterrent on misuse of an organization's funds.¹⁴ This, in turn, promotes memberships' knowledge of a labor organization's affairs so that they may exercise their voting and free speech rights.¹⁵

These provisions not only promote transparency to protect workers' rights to fair elections of officials, they also serve as a deterrent on misuse of an organization's funds. This, in turn, promotes memberships' knowledge of a labor organization's affairs so that they may exercise their voting and free speech rights.

Title II also requires labor organizations to report this information to the Department of Labor through the submission of documents and completed disclosure forms, including the LM-1

⁹ 29 U.S.C. § 411(a)(1)-(5).

¹⁰ 29 U.S.C. § 412.

¹¹ 29 U.S.C. § 414.

¹² 29 USC §§ 431-432.

¹³ 29 USC § 431.

¹⁴ Nelson, *Slowing Union Corruption*, 8 Geo. Mason L. Rev. 527, 551 (2000).

¹⁵ Marshall, *The Right to Democratic Participation*, 17 Fordham Urb. L. J. at 197.

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and LM-2.¹⁶ Those reports are available for review by the public through OLMS. Title II also grants members, but not the public, the right to inspect and verify records that support an organization's reports to the Department of Labor.¹⁷

Title III of the LMRDA limits a parent labor organization's ability to create a trusteeship over local or subordinate unions.¹⁸

Title IV of the LMRDA requires regular secret ballot elections of officers at the national and local levels.¹⁹

Title V of the LMRDA creates a fiduciary duty for officers and employees of a labor organization to the members regarding the organization's money and property.²⁰ It requires officers to hold the labor organization's money solely for the benefit of the organization and to refrain from "holding or acquiring any pecuniary or personal interest which conflicts with the interest of such organization."²¹

The Definition of a Labor Organization under the LMRDA:

The strong protections of the LMRDA, however, only become meaningful if groups purporting to represent workers are found to be labor organizations subject to the statute. The definition of a labor organization under the LMRDA appears in section 3(i) of the statute with clarifying examples in section 3(j).²²

The strong protections of the LMRDA, however, only become meaningful if groups purporting to represent workers are found to be labor organizations subject to the statute.

Section 3(i) defines a labor organization as any organization,

"engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body."²³

¹⁶ 29 CFR §§ 401-404.

¹⁷ 29 U.S.C. § 431(c).

¹⁸ 29 U.S.C. § 461.

¹⁹ 29 U.S.C. § 481.

²⁰ 29 USC § 501.

²¹ 29 USC § 501(a).

²² 29 USC § 402(i) and (j).

²³ 29 USC § 402(i).

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Section 3(j) provides five *examples* of organizations that qualify as labor organizations.

A labor organization shall be deemed to be engaged in an industry affecting commerce if it:

1. is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or
2. although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or
3. has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or
4. has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or
5. is a conference, general committee, joint or system board, or joint council, subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection, other than a State or local central body.²⁴

The examples set forth in Section 3(j) are just that - examples. Section 3(j) is not intended to limit coverage of the LMRDA only to groups identical to the examples provided.

The examples set forth in Section 3(j) are just that - examples. Section 3(j) is not intended to limit coverage of the LMRDA only to groups identical to the examples provided. Rather, it is intended to *maximize* coverage by ensuring that labor organizations cannot wriggle out from under the Act by claiming that they are not "engaged in an industry affecting commerce." In fact, Courts have rejected attempts to use the 3(j) list to exclude entities from coverage under the LMRDA.

Specifically, in *Brennan v. United Mine Workers of America*,²⁵ the United States Court of Appeals for the District of Columbia rejected an attempt by a labor organization to skirt coverage under the LMRDA merely because the form in which it existed was not included in one of the five enumerated examples set forth in Section 3(j). Finding the entity at issue in the case to be a labor organization subject to coverage under the LMRDA, the Court held that

²⁴ 29 U.S.C. 402(j).

²⁵ 475 F.2d 1293 (DC Cir. 1973).

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Sections 3(i) and 3(j) exist as a complement to one another because Congress intended for them to "increase the scope of the statute's reach and not restrict it."²⁶ The Court went on to confirm that Congressional intent in passage of the LMRDA was "to provide comprehensive coverage of labor organizations engaged in any degree in the representation of employees or administration of collective bargaining agreements" irrespective of what they are called.²⁷

If an organization "represents its members in any manner regarding grievances, labor disputes, or terms or conditions of employment, the organization is subject to the Act regardless of any formal attributes... or the extent of its representative activities."²⁸

The regulations promulgated under the LMRDA also confirm that the definition of a labor organization is very broad.

The regulations promulgated under the LMRDA also confirm that the definition of a labor organization is very broad. First, the LMRDA covers all organizations not expressly excluded, irrespective of what they are called and "irrespective of size or formal attributes."²⁹ "To come within the quoted language in section 3(i) the organization must exist for the purpose, in whole or in part, of dealing with employers concerning grievances, etc. In determining whether a given organization exists wholly or partially for such purpose, consideration will be given not only to formal documents... but actual functions and practices of the organization as well. Thus, employee committees which regularly meet with management to discuss problems of mutual interest and handle grievances are 'labor organizations,' even though they have no formal organizational structure."³⁰

Flaws of OLMS's 2008 and 2013 Guidance Letters:

The specific mention of "employee committees" is key because it contradicts guidance letters published by OLMS in 2008 and 2013.³¹ In the 2008 letter, OLMS states that "a labor organization 'must also be engaged in an industry affecting commerce under section 3(j) of the Act, 29 U.S.C. 402(j).'" Likewise, the 2013 letter (referring to the 2008 letter) states that the Restaurant Opportunities Center (ROC) could not be a labor organization because it "was not engaged in an industry affecting commerce under section 3(j) of the Act." Thus, both letters suggest that unless an organization comports with at least one of the examples in 3(j), it cannot be considered a labor organization. This interpretation is incorrect as a matter of law.

²⁶ *Id.* at 1295, fn. 8 (citing 105 Cong. Rec. 6516 (1959)(remarks of Senators Goldwater and Kennedy), and H.R. Rep. No. 741, 86th Cong., 1st Sess. at 28, U.S. Code Cong. & Admin. News 1959, p. 2424).

²⁷ *Id.* at 1296 (citing H.R. Rep. No. 741, 86th Cong., 1st Sess. at 28 U.S. Code Cong. & Admin. News 1959, p. 2451)(emphasis added). See also, *Donovan v. National Transient Division*, 736 F.2d 618 (10th Cir. 1984).

²⁸ *Donovan v. National Transient Division*, 736 F.2d 618 (10th Cir. 1984)(emphasis added)(citing *Brennan v. United Mine Workers*, 475 F.2d 1293, 1295-96 (D.C. Cir. 1973) and *National Education Assn. v. Marshall*, 100 LRRM 2565 (D.D.C. 1979)).

²⁹ 29 C.F.R. § 451.3(a)(1). See also, *Roddy v. United Transportation Union*, 479 F. Supp. 57, 60 (N.D. Ala. 1979).

³⁰ 29 C.F.R. § 451.3(a)(2).

³¹ Memo from Andrew Davis, January 16, 2008; Letter from Brian Kennedy, Assistant Secretary OCIA, to Rep. John Kline, August 26, 2013.

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In fact, the example above from the LMRDA's implementing regulations regarding employee committees would simply make no sense if 3(j) were a limiting clause and only organizations meeting the examples therein could be considered labor organizations. Likewise, section 030.622 of OLMS's Interpretive Manual states: "loosely formed employee committees, appointed by employers to present grievances to the employers, and neither having bylaws or offices, nor collecting dues, are 'labor organizations' under the Act."³² Again, this analysis of the LMRDA provided by OLMS itself would make no sense if the approach taken in the 2008 and 2013 letters regarding 3(j) were correct. Finally, there is the language of section 030.668 of the interpretive manual, which states: "the definition of 'labor organization' and the examples of labor organizations deemed to be engaged in an industry affecting commerce in section 3(j)(5)..."³³

Thus, the language of the LMRDA and of its accompanying regulations as well as OLMS's own Interpretive Manual make it perfectly clear that an organization need not match the examples set forth in section 3(j) of the Act to be found a labor organization.

In addition to the flawed interpretation of section 3(j), OLMS's 2008 and 2013 letters include other incorrect interpretations of the statute.

In addition to the flawed interpretation of section 3(j), OLMS's 2008 and 2013 letters include other incorrect interpretations of the statute. For example, the 2008 letter attaches weight to the fact that "there was no evidence of ROC being a signatory to a collective bargaining agreement (CBA) with an employer or ROC seeking to negotiate a CBA with any employer."³⁴ However, the OLMS Interpretive Manual states: "the fact that [an organization] does not now have contracts with any employers does not place it outside the scope of the Act."³⁵ In other words, having a CBA in place, or even having the intent to enter a CBA (as opposed to other less formal methods of "dealing with" an employer), is not necessary for an organization to be covered under LMRDA.

Likewise, the 2008 letter, in analyzing the meaning of "dealing with an employer," states: "the term refers to an interchange or transaction between two or more parties resulting in a mutually beneficial agreement. In the labor-management context, this logically refers to collective bargaining..."³⁶ Again, however, this analysis is contradicted by the language of the Interpretive Manual, both in section 030.611 referenced above and in section 030.610: "an organization in which employees participate need not actually deal with employers; only exist for the purpose..."³⁷

³² OLMS Interpretive Manual, section 030.622.

³³ OLMS Interpretive Manual, section 030.668 (emphasis added).

³⁴ Memo from Andrew Davis, January 16, 2008.

³⁵ OLMS Interpretive Manual, section 030.611.

³⁶ Memo from Andrew Davis, January 16, 2008.

³⁷ OLMS Interpretive Manual, section 030.610.

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The 2008 letter further states that “employers have not negotiated over [ROC’s] demands, nor has ROC sought to negotiate over such demands.”³⁸ But whether formal negotiations have taken place is irrelevant under the statute, as the language of 030.610 mentioned above makes clear. To sum up, the 2008 letter simply gets it wrong: actual negotiations, let alone a formal CBA, are not necessary to establish coverage under the Act.

Finally, the 2008 letter includes an unusual and unwarranted definition of “participate.” The letter states that ROC members “do not ‘participate’ in the governance or operations of the organization.”³⁹ This definition of “participate” as meaning the actual governance or steering of the operations of an organization is wholly lacking in the statute. In fact, “participate” is left undefined in the LMRDA. However, Webster’s defines “participate” as “to take part” or “to have a part or a share in something,” which is much broader than the definition in the 2008 letter.⁴⁰ The broader definition is consistent with the Interpretive Manual, which states: “The terms used in the Act are, generally speaking, defined broadly so as to provide the maximum coverage.”⁴¹ It is not clear why OLMS settled for such a restrictive definition of “participate” in its 2008 letter.

To sum up, the 2008 letter simply gets it wrong: actual negotiations, let alone a formal CBA, are not necessary to establish coverage under the Act.

The 2013 letter repeats the flawed interpretations of the 2008 letter. However, it makes an even stronger implication that an organization must meet one of the definitions of 3(j) to be found a labor organization.

None of this is determinative of whether, at the time those letters were written, ROC was a labor organization. However, it should be abundantly clear that the analysis used to determine that ROC was *not* covered by the Act was deeply flawed. To ensure that other stakeholders do not rely on these letters in making their own determinations, the Department of Labor should issue clarifying guidance as soon as possible.

Issues Relating to “Employer” Under the LMRDA:

With respect to what constitutes an “employer,” the LMRDA and its corresponding regulations make it very clear that the statute covers any “employer within the meaning of any law of the United States relating to the employment of any employee.”⁴² Such laws include the Fair Labor Standards Act, the Railway Labor Act, the Labor Management Relations Act and the Internal Revenue Code. This broad coverage includes employers that are in industries that may not be subject to federal laws that govern labor relations. For example, labor

³⁸ *Id*

³⁹ *Id*

⁴⁰ <https://www.merriam-webster.com/dictionary/participate>.

⁴¹ OLMS Interpretive Manual, section 020.005.

⁴² 29 USC § 403(e); 29 CFR § 451.3(a)(3).

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organizations that represent agricultural employees, which have no federally protected right to form such labor organizations and engage in collective bargaining, are covered by the LMRDA.⁴³ The same goes for labor organizations that represent employees in industries over which the National Labor Relations Board has declined to exercise jurisdiction, such as the horse racing industry.⁴⁴

In determining whether an organization exists for the purpose in whole or part, of "dealing with employers," the regulations promulgated under the LMRDA cite to Supreme Court interpretations of the phrase under the National Labor Relations Act.⁴⁵ Although interpretations of the phrase under the National Labor Relations Act are not binding on the Department of Labor, they can be instructive in guiding compliance and offering certainty with respect to compliance with the law. Under the NLRA, the phrase "dealing with employers" has been extensively analyzed.

The concept of "dealing with employers" is far broader than collective bargaining in the traditional sense.

The concept of "dealing with employers" is far broader than collective bargaining in the traditional sense. When the Senate debated definitions in the original draft of the Wagner Act, the Secretary of Labor recommended "dealing with" be replaced with "bargaining collectively."⁴⁶ That recommendation was rejected in favor of broader language.⁴⁷

The National Labor Relations Board (NLRB or Board), the independent federal agency that administers the NLRA, has also developed a significant body of law surrounding this phrase. It has reached a similar conclusion that the phrase is very broad and goes well beyond mere collective bargaining. Much of the analysis arises within the context of employer dominated labor organizations or employee committees established by an employer for the purpose of engaging with management to address matters of employee interest, which is unlawful.⁴⁸ For example, where an organization makes recommendations to an employer regarding policies and employment actions, and the employer responds to the demand, the Board will find the "dealing with" requirement satisfied.⁴⁹ In general, there should be more than a one-time communication with an employer over a discrete issue.⁵⁰

⁴³ 29 CFR 451.3(a)(3).

⁴⁴ *Stein v. Mutual Clerks Guild of Massachusetts, Inc.*, 560 F.2d 486 (1st Cir. 1977).

⁴⁵ 29 C.F.R. § 451.3(a)(2), fn. 6 (citing *National Labor Relations Board v. Cabot Carbon Co.*, 360 U.S. 203 (1959)).

⁴⁶ *National Labor Relations Board v. Cabot Carbon Co.*, 360 U.S. 203, 210-212 (1959) (citing the legislative history of the Wagner Act at S. 1958, 74th Cong., 1st Sess. 66-67, reprinted in 1 Leg. Hist. (1935) 1442-1443).

⁴⁷ *Id.*

⁴⁸ 29 USC § 158(a)(2). See e.g., *Electromation, Inc.*, 309 NLRB 990 (1992); *E.I. du Pont & Co.*, 311 NLRB 893 (1993); *Keeler Brass Co.*, 317 NLRB 1110 (1995); *Crown Cork & Seal Co.*, 334 NLRB 699, 700 (2001).

⁴⁹ *Keeler Brass Co.*, 317 NLRB 1110 (1995).

⁵⁰ *Stoody Co.*, 320 NLRB 18 (1995); *Vencare Ancillary Services, Inc.*, 334 NLRB 965, 969-970 (2001), *enf. denied* on other grounds, 352 F.3d 318 (6th Cir. 2003). *But see, Porto Mills, Inc.*, 149 NLRB 1454 (1964) (holding that an informal group had "dealt with" the employer by demanding the termination of an employee leading a union organizing effort).

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A critical element in the analysis under the NLRA is whether or not there exists intent on the part of the organization to “deal with” the employer. In many cases the requisite intent is easy to find. Such cases often involve organizations established by an employer to facilitate employer-employee engagement. Within that context, intent is implicit in the fact that the employer created the organization for the purpose of dealing with it. The focus of the analysis therefore is on the manner of dealing, and the subject matter of those dealings, not the existence of intent.

A different analysis must take place when the case involves independent organizations that the employer had no hand in creating, and with which the employer may not wish to deal at all. In those cases, care needs to be taken to fully understand the overall purpose of the organization to discern whether the organization possesses the requisite intent to deal with employers.

In light of the limited authority interpreting intent under the LMRDA, one must turn to interpretation of the NLRA for guidance. Under the NLRA, to determine whether a group possesses the requisite intent to deal with an employer, a thorough analysis of the overall purpose of the organization must occur. In undertaking such an analysis, several principles become evident.

First, intent to deal with an employer can exist even if there is no dealing at all.⁵¹ In other words, the NLRB has found groups of employees to meet the definition of a labor organization under the NLRA where they sought to “deal with” an employer but never managed to do so. The mere making of demands, even if the demands amount to nothing, satisfies the requisite intent on the part of the organization to deal with an employer.⁵²

Second, intent to deal with an employer may also be found even if demands made of an employer are not customarily associated with collective bargaining. For example the NLRB has found that refusing to work with an unpopular employee is evidence of intent to deal with because it amounts to “asserting a grievance and seeking to effect a change in their working conditions.”⁵³

The mere making of demands, even if the demands amount to nothing, satisfies the requisite intent on the part of the organization to deal with an employer.

Third, intent to deal with an employer must be evidenced by more than the mere pursuit of a broad social cause that does not target an employer to impact its wages, hours or terms and conditions of employment.⁵⁴ However, the mere pursuit of a broad social cause does

⁵¹ For example, in *Coinmach Laundry*, 337 NLRB 1286 (2002), an NLRB Administrative Law Judge wrote that “under this definition, an incipient union which is not yet actually representing employees may, nevertheless, be accorded 2(5) status if it admits employees to membership and was formed for the purpose of representing them.” See also, *Early California Industries*, 195 NLRB 671, 674 (1972) (finding a group of employees to constitute a labor organization where the group’s purpose was to negotiate wages, hours and working conditions with an employer, even though such negotiations had not yet occurred).

⁵² *Retances Health Unit*, 283 NLRB 369 (1987).

⁵³ *Porta Mills, Inc.*, 149 NLRB 1454, 1471 (1954).

⁵⁴ See e.g., *Center for United Labor Action*, 219 NLRB 873 (1975) (finding that a group that never directly engaged or sought to engage an employer but pursued a broad social purpose was not a labor organization); *Northeastern University*, 235 NLRB 858 (1978).

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not exempt an organization from compliance with the LMRDA if it engages in other conduct that evidences intent to deal with employers. It should be noted that many established labor organizations pursue broad social causes.

Application of the LMRDA to Worker Centers:

The worker center, although not new, has evolved in the last decade. In the past, they were non-profit, community-based organizations that offered a variety of services to their members, including education, training, employment services and legal advice. They historically advocated for worker rights through research, communication, lobbying and community organizing, rather than through direct engagement with specific employers. In the early 1990s there were only a handful of known worker centers, but they now number in the hundreds.

A recent trend has seen some of these organizations move away from their historical mission and toward the goal of targeting specific employers for the purpose of effectuating change in specific workplaces. These groups have also acted as surrogates of established labor organizations to advance the interests of those organizations. Those interests may include increased membership, effectuating change in the workplace, or to gain recognition rights. At the same time, many convey the public impression that they are organic or grassroots groups created by workers.

There can be little doubt about the fact that a number of worker centers have the requisite intent to deal with employers about wages, hours and terms and conditions of employment.

There can be little doubt about the fact that a number of worker centers have the requisite intent to deal with employers about wages, hours and terms and conditions of employment. Assuming they meet the remaining elements of section 3(i), they would be labor organizations as that term is defined under the LMRDA. Recent studies of select worker centers reflect this fact. A 2014 study by the United States Chamber of Commerce revealed that several prominent worker centers at the time were either sponsored by established labor organizations or independent entities that acted like labor organizations under the definition of 3(i).⁵⁵

The evolution of the worker center model over the past decade has created confusion about who these organizations are and on whose behalf they are acting. One of the fundamental purposes of the LMRDA is to promote transparency and organizational democracy within labor organizations. It is within the context of the confusion surrounding many of these organizations that the LMRDA offers an elegant and simple solution to provide clarity to the workers these organizations count as members and purport to represent, as well as to the public. For that reason, OLMS should pay particular attention to worker centers and similar organizations that meet the definition of a labor organization under the LMRDA.

⁵⁵ See, *The New Model of Representation*, <https://www.uschamber.com/report/the-new-model-representation-overview-leading-worker-centers>. See also, Marculewicz and Thomas, *Labor Organizations by Another Name: The Worker Center Movement and its Evolution into Coverage under the NLRA and LMRDA*, 13 Fed. Soc. Engage 64 (2012).

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Analysis of Specific Worker Centers under the LMRDA:

The following is a list of several worker centers that are likely to meet the definition of a labor organizations under the LMRDA. If so, they should comply with the law by structuring themselves as democratic institutions governed by officials elected by their members, and filing the requisite forms with OLMS.

1. Retail Action Project

The Retail Action Project ("RAP") was founded in 2005 as an organization of retail workers "dedicated to improving opportunities and workplace standards in the retail industry."⁵⁶ In 2010, RAP expanded to a membership organization of retail workers.⁵⁷ In addition to providing educational and advocacy services, RAP has been involved in a variety of campaigns targeting workers' rights at retailers in New York City.⁵⁸ As part of this process, RAP works with labor unions and other community advocacy organizations.⁵⁹ For instance, the Retail, Wholesale and Department Store Union ("RWDSU"), which is part of the United Food and Commercial Workers Union ("UFCW"), lists RAP as an RWDSU campaign on its website.⁶⁰ As an RWDSU campaign, RAP and this union work closely to target specific employers.

In 2006, RAP accused a New York City clothing chain of violating state and federal minimum wage and overtime laws, failing to comply with New York's reporting pay requirements, and forcing stock employees to work in poor conditions.⁶¹ RAP filed a lawsuit on behalf of employees. While filing litigation in and of itself would not be evidence of "dealing with" an employer, RAP used this lawsuit to convince the employer to enter a neutrality agreement with the RWDSU.⁶² RAP has also pursued other campaigns to pressure specific employers to increase wages and services to workers.⁶³

⁵⁶ See About, Retail Action Project, available at <http://retailactionproject.org/about/> (last visited Sept. 26, 2017).

⁵⁷ *Id.*

⁵⁸ Allies, Retail Action Project, available at <http://retailactionproject.org/about/allies> (last visited Sept. 26, 2017). Amongst its social platforms, RAP is involved in the NYC Minimum Wage Campaign, which lobbies to raise the minimum wage in New York State from the federal minimum of \$7.25 per hour to \$8.50 per hour, the NYC Paid Sick Days Campaign, which lobbies for minimum paid sick time for part-time and full-time employees. See <http://retailactionproject.org/coalitions/> (last visited Sept. 26, 2017).

⁵⁹ See Former Scoop NYC Workers File Lawsuit Against Trendy Retail Chain Citing Wage Theft and Labor Violations, Retail Action Project, available at <http://retailactionproject.org/2009/07/former-scoop-nyc-workers-file-lawsuit-against-trendy-retail-chain-citing-wage-theft-and-labor-violations/> (last visited Sept. 26, 2017) ("Fired workers from high end retail clothing store Scoop NYC joined with leaders of the RWDSU and its Retail Action Project (RAP), elected officials and labor and community leaders to announce a lawsuit against the trendy clothing retailer for labor violations, wage theft and discrimination over a period of 8 years from 2000-2008." (emphasis added)).

⁶⁰ See RWDSU's website at <http://rwdsu.info/> (last visited Sept. 26, 2017).

⁶¹ See Lincoln Anderson, Cornered, Yellow Rat Bastard must cough up green to workers, *The Villager* Volume 77 / Number 37, Feb. 13-19, 2008, available at http://thevillager.com/Villager_250/corneredyellowrat.html (last visited Sept. 26, 2017).

⁶² See *Mohammed Saleh, et al. v. Shoe Mania, LLC*, 09-cv-04016-LTS, Document No. 125. See also, Mischa Gaus, NY Boutique Boss Arrested, Faces 4 Years in Jail for Stealing Wages, *Labor Notes*, December 25, 2010, available at <http://labornotes.org/2010/02/ny-boutique-boss-arrested-faces-4-years-jail-stealing-wages> (last visited Sept. 26, 2017).

⁶³ See "Protesters rally in front of Qns. Center," *Queens Chronicle*, November 4, 2010, available at http://www.qchron.com/editions/central/protesters-rally-in-front-of-qns-center/article_38292a89-f2b8-5e41-bcf2-7b22067b79fd.html (last visited Sept. 26, 2017).

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Through these actions, RAP is acting as a labor organization within the LMRDA. RAP is a membership organization in which employees participate and on whose behalf RAP seeks to deal with employers.⁶⁴ RAP also appears to serve as an agent of the RWDSU by organizing workers and convincing employers to enter neutrality agreements with RWDSU.⁶⁵ As such, RAP is a labor organization within the scope of the LMRDA and should comply with it.

2. Organization United for Respect at Walmart and Making Change at Walmart

Some of the most active worker centers in recent years have been those focused on Walmart. They include the Organization United for Respect at Walmart ("OUR Walmart") and Making Change at Walmart ("MCAW"). Both OUR Walmart and MCAW are distinct from most worker centers because their efforts are aimed at a single entity instead of an industry or sector.

As part of its ongoing campaigns against Walmart, the United Food and Commercial Workers International Union ("UFCW") sought to change its approach toward the company by creating OUR Walmart and MCAW. In public statements, these groups claim to have organized thousands of hourly workers in dozens of Walmart stores across the United States.⁶⁶

MCAW is a campaign that has undertaken a self-described effort to change Walmart into a more responsible employer and to improve the lives of Walmart workers.⁶⁷ Membership in the MCAW is open to current or former hourly Walmart employees.⁶⁸ It seeks to challenge the company's employment practices and expansion efforts⁶⁹ and specifically highlights the following "issues":

- Claims that Walmart's jobs and wages allegedly keep communities "in poverty" and that "[m]inorities are disproportionately represented in low-paying positions at

⁶⁴ RAP is described on its website as a membership organization of retail workers. See <http://retailactionproject.org/about/> (last visited Sept. 26, 2017).

⁶⁵ See U.S. Social Forum Takes Detroit by Storm, Labor Notes, <http://www.labornotes.org/blogs/2010/06/us-social-forum-takes-detroit-storm?language=es> (last visited Sept. 27, 2017) (explaining that RAP's strategy is to use the lawsuits "to convince employers to sign neutrality agreements and then win union elections."); See also, Pam Whitefield, Sally Alvarez, Yasmin Emrani, Is There A Woman's Way Of Organizing? Gender, Unions, and Effective Organizing, Cornell University Division of Extension and Outreach School of Industrial and Labor Relations Report, page 13 (explaining that "RAP was created through the efforts of RWDSU as a way to reach out to young NYC retail workers, spark organizing campaigns, and establish a worker-community base"), page 26 (noting RWDSU trains members of RAP in organizing: "With our Member Volunteer Organizing Training, we are trying to develop the leadership of RAP so they can get involved in organizing. We do workshops so they can build their skills and can step up. [We have workshops on] how to do outreach, how to talk to your coworkers, how to motivate them, how to deal with excuses, overcome fear, listening skills.");

⁶⁶ Steven Greenhouse, "Wal-Mart Workers Try the Nonunion Route," New York Times, June 14, 2011, available at <http://www.nytimes.com/2011/06/15/business/15walmart.html?pagewanted=all> (last visited Sept. 26, 2017).

See About Us, Making Change at Walmart, available at <http://changewalmart.org/about-us/> (last visited Sept. 29, 2017).

⁶⁷ See Are you a Walmart Worker?, available at <http://changewalmart.org/action/do-you-work-at-walmart/> (last visited Sept. 24, 2017).

⁶⁸ See Making Change at Walmart, available at <http://changewalmart.org/> (last visited Sept. 26, 2017).

⁶⁹ See Walmart and the African American Community, Making Change at Walmart, available at <http://changewalmart.org/issues/african-americans/> (last visited Sept. 24, 2017).

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Walmart.”⁷⁰

- Claims that “Walmart’s health care plans fail to cover hundreds of thousands of associates.”⁷¹
- Claims that “[p]eople of color are underrepresented in management jobs.”⁷²
- Claims that “Walmart has a disturbing track record of discrimination when it comes to women and mothers in the workplace.”⁷³
- Claims that the company has taken “drastic steps to discourage its employees from exercising their right to organize and collectively bargain.”⁷⁴

A separate organization, OUR Walmart, was also backed by the UFCW. The UFCW supplied organizers to OUR Walmart to recruit workers and is alleged to have paid members to engage in recruiting.⁷⁵ In 2015, OUR Walmart split into two factions. One faction remained aligned with the UFCW and appears to have merged its operations with MCAW.⁷⁶ The second faction, which was headed by Dan Schlademan, split from the UFCW and continued operations as “OUR Walmart.”⁷⁷

Prior to its split, in June of 2011, a group of OUR Walmart members traveled to the company’s headquarters and demanded to meet with Walmart’s CEO and presented a Declaration of Respect to a member of senior management.⁷⁸ Through its “Declaration of Respect,” OUR Walmart seeks to have Walmart change wages, hours and terms and conditions of employment for employees.⁷⁹ The changes sought include:

- “Confidentiality in the Open Door and provide associates with a written resolution to issues that are brought up and always allow associates to bring a co-worker as a witness;”
- Wages of “at least \$15 per hour and provide consistent, full-time schedules to all those that want them;”

⁷⁰ See Walmart and the African American Community, Making Change at Walmart, available at <http://changewalmart.org/issues/african-americans/> (last visited Sept. 24, 2017).

⁷¹ See Healthcare, Making Change at Walmart, available at <http://changewalmart.org/issues/healthcare/> (last visited Sept. 24, 2017).

⁷² See Latinos, Making Change at Walmart, available at <http://changewalmart.org/issues/latinos/> (last visited Sept. 24, 2017).

⁷³ See Women, Making Change at Walmart, available at <http://changewalmart.org/issues/women/> (last visited Sept. 24, 2017).

⁷⁴ See Workers, Making Change at Walmart, available at <http://changewalmart.org/issues/workers/> (last visited Sept. 24, 2017).

⁷⁵ See “Wal-Mart Workers Try the Nonunion Route”, <http://www.nytimes.com/2011/06/15/business/15walmart.html> (last visited October 30, 2017) (explaining that UFCW paid most of the salary of several hundred members, on leave from their jobs, to knock on doors and otherwise reach out to Wal-Mart employees to urge them to join OUR Walmart). See also Lila Shapiro, “The Walmart Problem: Uncovering Labor’s Place in an Era of Joblessness,” *Huffington Post*, December 12, 2011, available at http://www.huffingtonpost.com/2011/12/12/our-walmart-labor-unions_j_1143527.html (last visited Sept. 26, 2017). Article profiles Philip Meza, a member of the UFCW who is paid to organize Walmart employees on behalf of OUR Walmart.

⁷⁶ Nathan Layne and Lisa Baertlein, Wal-Mart worker group splits in two; both sides vow to continue wage fight, *Reuters* (Sept. 15, 2015), available at <http://www.reuters.com/article/us-walmart-union/wal-mart-worker-group-splits-in-two-both-sides-vow-to-continue-wage-fight-idUSKCNORH06O20150917> (last visited Sept. 26, 2017).

⁷⁷ See, <https://www.united4respect.org/> (last visited October 30, 2017).

⁷⁸ See “Making Change at Walmart Stands With Walmart Associates in Bentonville, Arkansas,” UFCW Newsletter, Volume 10, Issue 11, June 21, 2011, available at <http://www.ufcw400.org/2011/06/22/on-point-making-change-at-walmart-stands-with-walmart-associates-in-bentonville-arkansas/>.

⁷⁹ OUR Declaration of Respect, OUR Walmart, available at http://www.united4respect.org/our_declaration_of_respect (last visited Sept. 24, 2017).

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- “Wages and benefits that ensure that no Associate has to rely on government assistance;” and
- “Predictable and dependable” scheduling.⁸⁰

OUR Walmart has also engaged in work stoppages at Walmart stores, and other protest activities, including highly publicized Black Friday marches and rallies at company locations across the country.⁸¹ OUR Walmart also claimed to have successfully demanded the discipline and replacement of an unpopular supervisor.⁸²

Both OUR Walmart and MCAW meet the definition of a labor organization under the LMRDA. First, both constitute an “organization” of “employees” as those terms are defined under the LMRDA.⁸³ OUR Walmart solicits money from members⁸⁴ and both organize events at which they promote their agenda. MCAW is actively recruiting workers to reach out to it and to let it know if the employee would “like to be involved in the campaign.”⁸⁵ Likewise, OUR Walmart holds itself out to be “a nationwide membership organization of current and former Walmart and retail associates coming together to stand up for change at Walmart.”⁸⁶

It is clear that both OUR Walmart and MCAW possess the requisite intent to “deal with” Walmart as an employer.

Regarding MCAW, the organization’s self-described purpose is “to change Walmart into a more responsible employer and to improve the lives of Walmart workers.”⁸⁷ Specifically, the MCAW web site contains a variety of demands the organization has made of Walmart that demonstrate an intent on the group’s part to deal with the company. For example, MCAW claims that Walmart engages in discriminatory practices by locking up certain merchandise because of crime.⁸⁸ As the solution, in a petition to the management at the Walmart Supercenters at issue, MCAW asks them to “institute meaningful changes to staffing and security.”⁸⁹ In another request, MCAW asks Walmart to pay for the medical care of an associate by the name of Maria who allegedly

⁸⁰ *Id.*

⁸¹ See Patrick Flannery, “Rockers Rally Against Low Wages and New Walmart Store in Los Angeles,” *Rolling Stone Magazine*, June 30, 2012, available at <http://www.rollingstone.com/music/news/rockers-rally-against-low-wages-and-new-walmart-store-in-los-angeles-20120630#ixzz2O4bvswx6> (last visited Sept. 26, 2017).

⁸² See Spencer Woodman, “Labor Takes Aim at Walmart—Again,” *The Nation*, January 4, 2012, available at <http://www.thenation.com/article/165437/labor-takes-aim-walmart-again> (last visited Sept. 26, 2017).

⁸³ Walmart has been the subject of a number of NLRB cases in which Associate coverage has been presumed. See e.g., *Wal-Mart Stores, Inc.*, 352 NLRB 815 (2008).

⁸⁴ See <https://www.united4respect.org/donate> (OUR Walmart); and

⁸⁵ See <http://changewalmart.org/action/do-you-work-at-walmart/> (last visited October 30, 2017).

⁸⁶ Join OUR Walmart, OUR Walmart, available at <https://united4respect.nationbuilder.com/join> (last visited Sept. 24, 2017).

⁸⁷ See About Us, Making Change At Walmart, <http://changewalmart.org/about-us/> (last visited Sept. 24, 2017).

⁸⁸ See <http://changewalmart.org/action/tell-walmart-to-stop-this-discriminatory-practice/> (last visited October 30, 2017).

⁸⁹ *Id.*

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injured herself at work.⁹⁰ In still another, MCAW seeks to have Walmart reinstate laid off workers⁹¹ and apologize to an associate who was terminated.⁹²

With respect to OUR Walmart, its stated purpose is to convince Walmart's management to meet with it and address concerns regarding wages, hours and terms and conditions of employment at the company.⁹³ It tells the current and former members that:

As a member of OUR Walmart, you help set the agenda for how we approach Walmart as an employer and work together to create opportunities to improve our work environment and our lives.... With your membership, you will gain a voice in our independent group of like-minded Associates as we work together to fix what is broken in our stores and shape our own destinies.⁹⁴

Whether successful or not, both MCAW and OUR Walmart possess the intent to engage Walmart. As such, they seek to engage the "bilateral mechanism" necessary to meet the "dealing with" element. It does not matter that Walmart may not have formally responded to their demands or will ever do so.

Because both MCAW and OUR Walmart meet the definition of a labor organization under the LMRDA, both should fulfill their obligations under the statute.

3. The Coalition of Immokalee Workers

The Coalition of Immokalee Workers ("CIW") is a worker center organization based in Immokalee, Florida. It claims to be a "worker-based human rights organization" whose work encompasses three broad and overlapping spheres": (1) the Fair Food Program, under which the CIW conducts worker-to-worker education sessions, audits employers' compliance with the Fair Food Program, and charges a small Fair Food premium that tomato growers pass on to workers as a line-item bonus on their regular paychecks; (2) an anti-slavery campaign; and (3) a Campaign for Fair Food, which educates consumers on the issue of farm labor exploitation.⁹⁵

⁹⁰ See <http://changewalmart.org/action/tell-walmart-to-pay-for-marias-medical-care/> (last visited on October 30, 2017).

⁹¹ See <http://changewalmart.org/action/walmart-reinstate-laid-off-workers/> (last visited on October 30, 2017).

⁹² See <http://changewalmart.org/action/tell-walmart-to-apologize-to-frank-swanson-and-the-west-plains-community/> (last visited on October 30, 2017).

⁹³ The OUR Walmart Vision and Mission posted on the organization's website confirms the participants in the organization are employees: "We envision a future in which our company treats us, the Associates of Walmart, with respect and dignity. We envision a world where we succeed in our careers, our company succeeds in business, our customers receive great service and value, and Walmart and Associates share all of these goals."; available at <http://www.united4respect.org/splash?splash=1> (last visited Sept. 26, 2017).

⁹⁴ Join OUR Walmart, OUR Walmart, available at <https://united4respect.nationbuilder.com/join> (last visited Sept. 24, 2017).

⁹⁵ See "About CIW", available at <http://www.ciw-online.org/about/> (last visited Sept. 24, 2017).

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It is the CIW's Fair Food Program that satisfies the necessary elements of the test that defines the CIW as a labor organization under the LMRDA. The program seeks to improve working conditions for its members, including through increased wages. In the past decade, according to CIW, it has engaged with many national companies, including Subway, Whole Foods, and Walmart.⁹⁶ Signatories to the Fair Food Agreements pay a little extra per pound of tomatoes purchased, which is allegedly passed on to workers represented by CIW, and commit to purchase tomatoes solely from growers that abide by a Code of Conduct.⁹⁷ CIW regularly engages and deals with these employers, according to its website. While some might argue that engaging with employers like Subway, Whole Foods, and Walmart does not implicate coverage under the LMRDA, because they do not employ the workers CIW purports to represent (farmworkers), the OLMS Interpretive Manual is clear that the "participating employees" referred to in section 3(i) of the Act need not necessarily be the employees of the employer with whom the labor organization deals, so long as they fall within the broad definition of "employee" under the Act.⁹⁸

The Code of Conduct contains many basic terms and conditions of employment one might find in a traditional collective bargaining agreement.⁹⁹ It provides that growers pay a "minimum fair wage," abide by state and federal wage and hour laws, install time clocks, permit break periods, monitor worker health and safety, and provide written guidelines for employee advancement opportunities.¹⁰⁰ The Code requires growers to grant CIW access to their facilities to perform training and orientation for employees, and creates an enforcement mechanism to ensure the employer complies with the Code.¹⁰¹

Given the foregoing, there is little doubt CIW meets the elements of a statutory labor organization under the LMRDA. CIW is a membership organization which consists of employees (agricultural employees in CIW's case).¹⁰² Additionally, one of CIW's stated purposes is to deal with employers through its Fair Food Program. As evidenced by the existence of Codes of Conduct, CIW intends to deal with employers over wages, hours and other terms and conditions of employment and maintains the contractual right to monitor working conditions.¹⁰³ Because it is a labor organization under the LMRDA, CIW should comply with the requirements of the LMRDA.

⁹⁶ *Id.*

⁹⁷ See Bon Appetit Management Company Code of Conduct for Sustainable Tomato Suppliers, dated April 24, 2009, available at http://www.bamco.com/content/uploads/2014/01/TomatoGrowers_CodeofConduct_BAMCO_CIW.pdf (last visited Sept. 24, 2017).

⁹⁸ OLMS Interpretive Manual, section 030.6021.

⁹⁹ See Bon Appetit Management Company Code of Conduct for Sustainable Tomato Suppliers, dated April 24, 2009, available at http://www.bamco.com/content/uploads/2014/01/TomatoGrowers_CodeofConduct_BAMCO_CIW.pdf (last visited Sept. 24, 2017).

¹⁰⁰ *Id.* The Code of Conduct also requires that the grower provide transparency to CIW and permit "third-party monitoring" to ensure the worker center is passing the "penny per pound" payments on to workers. *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

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4. Restaurant Opportunities Center and its Affiliates

The Restaurant Opportunities Center (“ROC”) is a national worker center organization with affiliates in various cities throughout the United States.¹⁰⁴ ROC and its affiliates offer a variety of services to workers, including: (1) research and policy advocacy, which include lobbying at the state and federal levels;¹⁰⁵ (2) the High Road Initiative, which includes an organization of employers with ROC-approved employment practices;¹⁰⁶ and (3) a workplace justice campaign, in which ROC engages consumers to improve “wages and working conditions for people who work in the industry.”

ROC claims that it has organized over 25,000 workers and won more than \$10 million in settlements of lawsuits.¹⁰⁷ Through its efforts, ROC claims to have secured other benefits for workers at specific restaurants, such improvements in workplace policies, including grievance procedures, raises, sexual harassment and anti-discrimination policies, sick days, and job security.¹⁰⁸ The agreements ROC claims to have negotiated since 2009 also cover these terms and conditions of employment, which are similar to those contained in a traditional collective bargaining agreement. At least some of them require employers to provide ROC written notice prior to terminating any employee, affording ROC the opportunity to investigate.¹⁰⁹ The agreements also contain provisions that allow ROC to investigate and grieve a violation of the settlement agreement before it is turned over to arbitration.¹¹⁰

In a 2010 interview, ROC’s national policy coordinator, Jose Olivia, likened the worker center movement to the auto industry labor unions stating that “[b]efore people were unionized in the auto industry, it was dragging down the rest of manufacturing. Restaurants set the standards for the service industry. We’re trying to create a culture of organizing there, to make restaurant jobs stable jobs.”¹¹¹

¹⁰⁴ See About Us, ROC United, available at <http://rocunited.org/about-us/> (last visited Sept. 24, 2017).

¹⁰⁵ See Our Work, ROC United, available at <http://rocunited.org/our-work/> (last visited Sept. 24, 2017).

¹⁰⁶ Id.

¹⁰⁷ See Our History, ROC United, <http://rocunited.org/about-us/#our-history> (last visited Sept. 24, 2017).

¹⁰⁸ See ROC United Worker Place Justice, available at <http://rocunited.org/2013/06/workplace-justice-outreach-organizer/>, (last visited Sept. 26, 2017).

¹⁰⁹ See “Cleared plate: Dispute between Andiamo Dearborn and Employees Finds Resolution,” Metro Times, March 9, 2011, available at <https://www.metrotimes.com/detroit/cleared-plate/Content?oid=2148314> (last visited Sept. 24, 2017). See also, Sean Delaney, “Andiamo lawyer disputing ROC-MI allegations,” Press & Guide Newspapers (Dec. 1, 2009), available at http://www.pressandguide.com/news/andiamo-lawyer-disputing-roc-mi-allegations/article_d7f014dd-6812-5010-b32d-0fe5e71b0e.html (last visited Sept. 24, 2017); see also, Olivia Carrino See “U students protest Andiamo restaurant of Dearborn for workers’ rights breaches,” The Michigan Daily (Feb. 18, 2010), available at <http://www.michigandaily.com/content/u-students-protest-andiamo-restaurant-dearborn> (last visited Sept. 24, 2017). Quoting Jamie Philip, a ROC-MI intern, who said the organization began its campaign against Andiamo restaurant by delivering a demand letter to the restaurant on Nov. 5, which all the workers involved in the campaign had signed. Id.

¹¹⁰ See “Cleared plate: Dispute between Andiamo Dearborn and Employees Finds Resolution,” Metro Times, March 9, 2011, available at <https://www.metrotimes.com/detroit/cleared-plate/Content?oid=2148314> (last visited Sept. 24, 2017).

¹¹¹ Paul Abowd, Restaurant Workers Launch Multi-City Campaign to Transform Low-Wage Industry, Labor Notes, February 4, 2010, available at <http://labornotes.org/2010/01/restaurant-workers-launch-multi-city-campaign-transform-low-wage-industry> (last visited Sept. 24, 2017).

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Applying the LMRDA test, ROC and its affiliates are labor organizations subject to the provisions of the statute. First, ROC is an organization in which employees participate.¹¹² Second, the successes ROC has promoted demonstrate that the group's purpose is to deal with employers.¹¹³ Given the foregoing, ROC is a labor organization within the LMRDA and should comply with the statute.

5. Jobs With Justice

Since its founding in 1987, Jobs With Justice has campaigned with the goals of building "power for working people ... and developing strategic alliances nationally and globally that strengthen the movement for workers' rights, economic justice, and our democracy."¹¹⁴ Employees can join Jobs With Justice by signing up to be part of their online activist network.¹¹⁵ They can also donate money to the organization.¹¹⁶

Employees who join Jobs With Justice commit to the organization's pledge to do the following actions at least five times during the year:

- Stand up for our rights as working people to a decent standard of living;
- Support the rights of all workers to organize and bargain collectively;
- Fight for secure family-wage jobs in the face of corporate attacks on working people and our communities;
- Organize individuals to take aggressive action to secure a better economic future; and,
- Mobilize those already organized to join the fight for jobs with justice.¹¹⁷

Additionally, Jobs With Justice has noted in its mission statement that "all workers should have collective bargaining rights, employment security and a decent standard of living within an economy that works for everyone" and claims to lead and incubate strategic campaigns to make concrete advancements in workers' lives.¹¹⁸ In furtherance of this mission, Jobs With Justice has taken steps to campaign for union representation on behalf of workers. Specifically, in 2008, after a 14-year campaign, Jobs With Justice helped the UFCW organize 5,500 workers at the world's largest pork processing plant.

Jobs With Justice has also undertaken a number of campaigns on behalf of its members to make changes to working conditions at particular employers. A number of these efforts have been detailed in the group's annual reports.

¹¹² See About Us, ROC United, available at <http://rocunited.org/about-us/> (last visited Sept. 26, 2017).

¹¹³ Michael C. Duff, *Days Without Immigrants: Analysis and Implications of the Treatment of Immigration Raillies Under the National Labor Relations Act*, 85 *Denver Univ. L. Rev.* 93, 134-135 (2007); Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law*, 30 *Berkeley J. Emp. & Lab. L.* 232, 238 (2009).

¹¹⁴ See Our History, Jobs With Justice, available at <http://www.jwj.org/about-us/our-history> (last visited Sept. 26, 2017).

¹¹⁵ https://actionnetwork.org/forms/join-our-online-activist-network?&source=NAT_W_joinnavbutton. (last visited Nov. 6, 2017).

¹¹⁶ https://actionnetwork.org/fundraising/support-jobs-with-justice?&source=NAT_W_joinnavbutton (last visited Nov. 6, 2017).

¹¹⁷ *Id.*

¹¹⁸ See About Us, Jobs With Justice, available at <http://www.jwj.org/about-us> (last visited Sept. 26, 2017).

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For example, in the group's 2014 Annual Report, it detailed one claimed success, which involving making changes to working conditions at Walmart. Promoting its successes, Jobs With Justice wrote the following description:

Given that 57 percent of the 1.3 million people who work at the nation's largest private employer are women, there is great opportunity to better women's lives by pressing Walmart to improve its labor practices. After two Walmart moms submitted a shareholders' resolution on the company's insufficient policies for pregnant associates in 2014, coupled with advocacy from Jobs With Justice, Walmart revised its policy by allowing reasonable work accommodations for any temporary disabilities caused by pregnancy. In coordination with Walmart moms, we supported know-your-rights public education efforts about this important first step. We also urged Walmart to not require pregnant associates to prove they are disabled in order to be eligible for reasonable accommodations by mobilizing a dozen allies to sign a letter and thousands of our supporters to sign a petition.¹¹⁹

Here, Jobs With Justice sought to change Walmart's workplace policies regarding pregnant associates, and claimed its efforts to be a success when that change was made.

In its 2013 Annual Report, Jobs With Justice detailed its involvement in a dispute with another employer, Republic Services, in which the group claimed that it had advocated to protect the health and safety of the workers, and stopped employee benefit cuts.

After a fire uncovered Republic Services' 40-year history of illegally dumping radioactive nuclear waste at its Westlake Landfill in Bridgeton, Missouri, Jobs with Justice responded by launching a campaign to ensure the company's remediation of the crisis would not cause ensuing damage to the environment and would protect the health and safety of workers and the community. By building a partnership with environmental groups and local labor allies, the campaign succeeded in keeping over 300,000 area residents safe while also simultaneously stopping employee benefits cuts.¹²⁰

Again, Jobs With Justice claimed that its activities on behalf of workers resulted in protection for workers and prevented the loss of employee benefits.

Finally, in their 2012 Annual Report, Jobs With Justice touted the successes of their local chapters in making changes to working conditions at various employers the group had targeted. Of particular note are the efforts undertaken by Jobs With Justice on behalf of employees of AT&T.

¹¹⁹ http://www.jwj.org/wp-content/uploads/2013/11/jwjannualreport2014F_small.pdf (last visited Nov. 6, 2017).

¹²⁰ <http://www.jwj.org/wp-content/uploads/2013/11/jwjannualreport2013final.pdf> (last visited Nov. 6, 2017).

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"Atlanta Jobs with Justice helped prevent hundreds of AT&T workers from layoffs. The coalition stood up to the telecommunications giant utilizing civil disobedience, nonviolent direct action, and occupation in collaboration with labor and allies."¹²¹

Jobs With Justice also plays an active role in strike activities in its attempts to engage employers. Members of Massachusetts Jobs With Justice attended an August nursing strike at Tufts Medical Center.¹²² Jobs With Justice also called for a general strike as part of its International Women's Day events, encouraging women to work only 82 percent of the day—to reflect the 82 cents on the dollar that women make compared to men. Jobs With Justice organizer Gillian Mason said: "The idea is pretty simple: Withhold part of our labor that we aren't being paid for and see what it looks like."¹²³

Moreover, Jobs With Justice has partnered with MCAW, which as discussed above, meets the definition of a labor organization under the LMRDA. Indeed, Jobs With Justice has said that it is "a core partner driving a comprehensive and historic campaign to push Walmart to reform its business practices and ensure wholesale changes across the retail sector."¹²⁴

While Jobs With Justice engages in a wide variety of activities, a significant portion of their work is intended to make changes to working conditions at targeted employers. Not only has the group sought to make such changes, but it has been successful in numerous situations. Because it is an organization in which employees participate, and which, in part, seeks to deal with employers, it meets the definition of a labor organization under the LMRDA.

Conclusion:

It is apparent that a number of worker centers have moved beyond the activities that once traditionally defined these organizations. Instead, they now regularly advocate for specific changes in wages and working conditions at specific employers. In so doing, they have crossed the line to become "labor organizations" under the LMRDA.

The LMRDA was enacted to provide important protections for workers with regard to organizations that claim to speak on their behalf. As long as groups like those referenced in this paper are allowed to escape coverage of the Act, the LMRDA will fail to live up to its purpose. It is up to the Department of Labor, and specifically OLMS, to ensure that this no longer occurs.

¹²¹ http://www.jwj.org/wp-content/uploads/2013/11/2012-JW-AWAW_Annual_Report.pdf (last visited Nov. 6, 2017).

¹²² Tufts Daily, Tufts University, August 29, 2017.

¹²³ Boston Globe, "Women Consider Strike Goals," March 7, 2017.

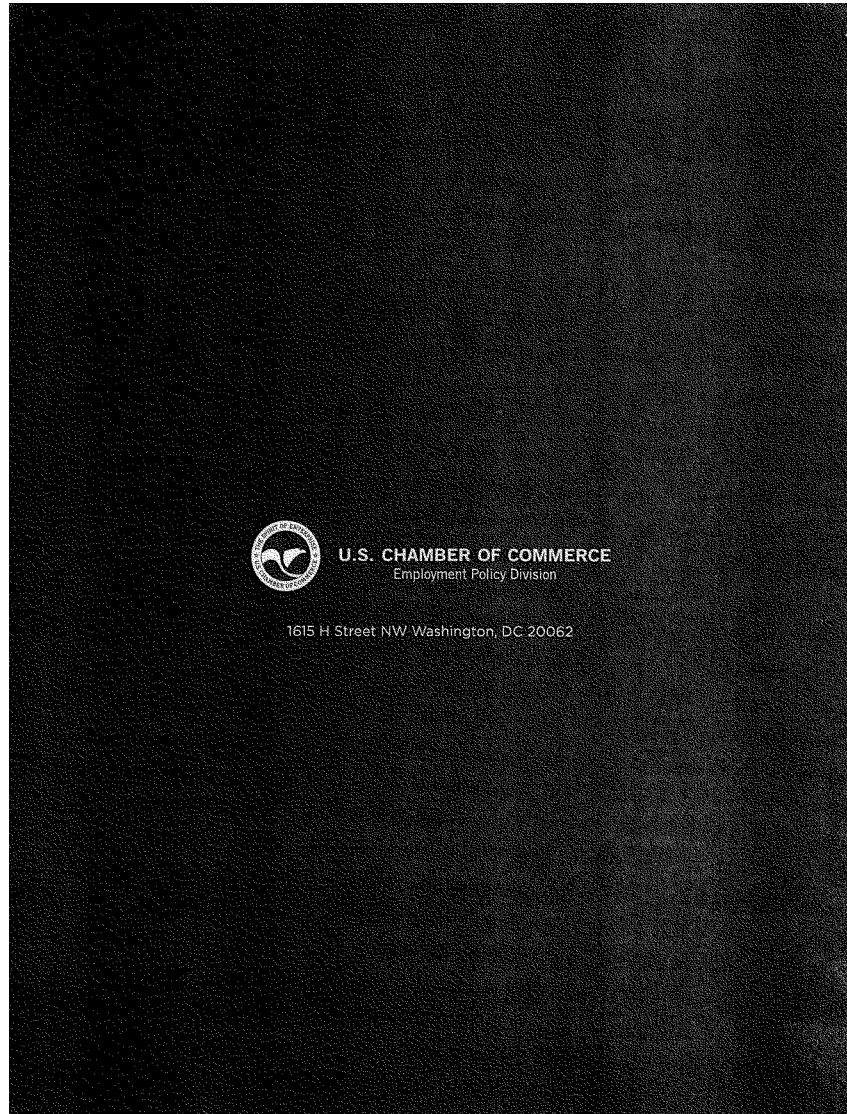
¹²⁴ Change Walmart, Change the Economy, Jobs With Justice, available at <http://www.jwj.org/our-work/change-walmart-change-the-economy> (last visited Sept. 26, 2017).

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Notes:

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Notes:



Mr. ROONEY. Thank you. The SEIU has spent \$90 million on worker centers. The UFCW has dumped millions of dollars into a retail worker center with nothing to show for it. The Coalition of Immokalee Workers regularly pickets, boycotts, and raises money, and even engages in secondary boycotts, which, as we know, are illegal under the NLRA. So how are they not a union? They walk and quack, but they are not a duck?

I brought up these abusive and dishonest tactics of worker centers to Secretary Acosta, and will continue to work with him on this issue. So I would like to ask Mr. Marculewicz, what is the best way to ensure that the LMRDA is appropriately enforced, and should Congress amend the LMRDA to include these obviously union-like worker centers?

Mr. MARCULEWICZ. Thank you, Congressman. I would say two-fold. The most important piece is to get an administrator into the OLMS to enforce the laws and regulations that we currently have.

The law—there are probably many ways that the LMRDA could be amended to modify different aspects of things and to further enhance the democratic aspects of labor organizations. But frankly, given the context of what we are dealing with today, enforcing the existing laws as they were written by Congress and as they were intended by Congress would go a very long way to dealing with organizations such as the ones that you mentioned.

Mr. ROONEY. Thank you.

Mr. Bowman, thank you for being here. Those are compelling stories, yours and Mr. Jackson's, both.

Today's factory is not the same one that your father walked into in the fifties. Automation and a lot of things have changed. Are you aware that, according to the UAW constitution, article 31, you could and probably would be subject to a fine for trying to de-certify the existing union?

Mr. BOWMAN. I am very well aware of union fines, and what can happen for an individual member to voice their opinion, voice their First Amendment right of free speech. So yes, I am very well aware of that possibility.

I have not started an organizing drive to de-certify. But in many cases, just speaking of it and talking about it can make me subject to fines from the UAW.

However, I resigned my union membership in 2015, so I am no longer a member of the UAW.

Mr. ROONEY. So now you got your First Amendment rights back.

Mr. BOWMAN. Some of them. I am still forced, under threat of being fired, to accept union representation that I may not want, because the union negotiated freely to be the exclusive representation agent of all employees in the collective bargaining agreement. So I am still forced to be represented by a union that I do not like.

Mr. ROONEY. So you are not in a right-to-work state?

Mr. BOWMAN. I am in a right-to-work state. I don't pay union dues, and I am not—no longer a member of the UAW. But I am still forced to accept their representation—

Mr. ROONEY. I got it, okay.

Mr. BOWMAN.—on their contract, yes.

Mr. ROONEY. So going back to the previous question, do you think that employees deserve to have First Amendment rights if they are in a union?

Mr. BOWMAN. Well, I think that question is almost obvious in its answer. Of course I do. It is why I support the *Employee Rights Act*, which goes, I think, a long way into ensuring that union workers' rights, freedoms, and protections continue and are protected in the long run, and it also gives unions tools to effectively go forward in the 21st century, instead of living in a 1930s business model. So yes, absolutely.

Mr. ROONEY. Thank you very much. I yield.

Mr. BOWMAN. Thank you.

Chairman WALBERG. I thank the gentleman. I recognize the gentlelady from New Hampshire, Ms. Shea-Porter.

Ms. SHEA-PORTER. Thank you very much.

So, Mr. Bowman, I have read your testimony and you work in a factory. So did I. I worked in a non-union factory and you worked in a union factory. And you said that your father worked in that factory.

Mr. BOWMAN. Not that factory, but in a Ford factory, yes.

Ms. SHEA-PORTER. Ford, right. And that he retired in the early nineties.

Mr. BOWMAN. Yes.

Ms. SHEA-PORTER. Did he retire with a pension?

Mr. BOWMAN. He retired with a pension, yes.

Ms. SHEA-PORTER. Oh. Well, that is great, because my non-union factory did not offer that.

Why did you go to Ford Motor? Were there any non-union factories that you might have felt more comfortable in?

Mr. BOWMAN. Ford Motor Company is—it is almost genetically built into my family. I have—

Ms. SHEA-PORTER. But there are other factories.

Mr. BOWMAN.—family members all over the place in Ford factories. It is—

Ms. SHEA-PORTER. Okay, but you chose a union factory. And I just want to ask—

Mr. BOWMAN. I chose Ford Motor Company, not necessarily because it was a union factory.

Ms. SHEA-PORTER. Was it because of better pay?

Mr. BOWMAN. The—when I went there, yes, it was better pay than what I was getting.

Ms. SHEA-PORTER. Did you have better benefits, like—

Mr. BOWMAN. Not benefits, but better pay, yes.

Ms. SHEA-PORTER. But did you have sick pay, and the things—

Mr. BOWMAN. I had sick pay and vacation time all before that.

Ms. SHEA-PORTER. You know, you are so fortunate, because I didn't. And what else did that unionized factory give you, you think, that maybe I didn't get?

Mr. BOWMAN. I can't guess, because I don't know the situation, but—

Ms. SHEA-PORTER. Let me help.

Mr. BOWMAN. Unions do negotiate benefits and—

Ms. SHEA-PORTER. So—

Mr. BOWMAN.—I have no problem with unions collective bargaining.

Ms. SHEA-PORTER. Okay. So better pay, better benefits, better retirement, and you went in there by choice. And then you said that you don't actually have to pay for what unions bring.

But just to give you an idea, since I know that you ran for office—and I have a couple of questions about that—did the United Auto Workers ever prohibit you from donating to a candidate of your choice, or did they ever prevent you from exercising your right to run for office?

Mr. BOWMAN. No, but one thing the UAW did do is provide our union hall to gather ballot petition signatures for my opponent.

Ms. SHEA-PORTER. Well, let me just tell you that I know, though, something about that, being in a swing district. I have had the NRA and every other group against me, too. It is the nature of the business, and I am sure that you understand that.

But this is why I think we need a union. A former colleague of mine, who is now sitting in the White House, met with 1,300 bankers and lobbyists recently and said—and I quote—"If you are a lobbyist who never gave us money, I didn't talk to you. If you are a lobbyist who gave us money, I might talk to you."

So if we don't have the ability to give the middle class a tool to speak up and be heard in that kind of noise there, then what do you suggest we do?

Mr. BOWMAN. Well, again, I support the *Employee Rights Act*, which gives additional workers additional rights, freedoms, and protections. How that can hurt the middle class is beyond me in logic. So I can't comment beyond what I am saying here.

Ms. SHEA-PORTER. Okay. So I assume that, like everybody else, you studied history in school.

Mr. BOWMAN. Sure.

Ms. SHEA-PORTER. Right. So you know a lot about how the labor movement was born.

Mr. BOWMAN. How—what? I am sorry?

Ms. SHEA-PORTER. How the labor movement was born.

Mr. BOWMAN. Sure.

Ms. SHEA-PORTER. You know about the march of the children, right, trying to not work seven days.

So when you are saying—I don't think you do, but that is okay. There is a lot that happened to lead to a labor movement, and people gave their lives for it, and it wasn't because they just felt like this would be a pretty cool thing to do. It was born out of a need, which I believe still exists.

And I will tell you that when I worked in a factory, I remember a pregnant woman fainting on the line. They had sped up the line, there were many chemicals, it was a—we made auto parts, so—

Mr. BOWMAN. Okay, sure.

Ms. SHEA-PORTER. You know the smell of that, right? And she fainted. And so they came over and they said to her, "Go to the nurse, and on the way stop by and pick up your check, you are out of here." No union. No way to go protect yourself and your paycheck. Nobody to stand up and say, you know, when you are sick, you don't get fired right on the spot when you have been doing your

job. That is why they need a union, and that is why people need an opportunity to come together to create a union.

And I agree that we should never see coercion on any side at all, although I would argue that my former colleague used a form of coercion on those people, those lobbyists and those bankers, saying, “If you want to be heard you better give money.”

I don’t think—you wouldn’t—you don’t think that is good, right?

Mr. BOWMAN. Well, again—

Ms. SHEA-PORTER. Well, do you think that is good or not, for them to—

Mr. BOWMAN. I am not against unions in any way, shape, or form. I think unions should exist, and that is why we are here, to make sure that we update them for the 21st century and beyond. It is just the fact that the—

Ms. SHEA-PORTER. Actually, I—

Mr. BOWMAN.—the *Wagner Act* and—is 83 years old, and—

Ms. SHEA-PORTER. Okay, so we won’t argue that. But I will just say that if you are not against union organizing, you sure have fooled us.

Thank you, and I yield back.

Chairman WALBERG. I thank the gentlelady. Now I recognize the gentleman from Georgia, Mr. Allen.

Mr. ALLEN. Thank you, Mr. Chairman, and I thank you for this hearing. Thank you for our panel.

And Mr. Bowman. I was looking at the—your written statements that you said that—let’s see, I believe that the National Institute for Labor Relations Research reports in its 2016 election cycle it spent over 1.7 billion in politics. Can you explain how that was done?

Mr. BOWMAN. No, I can’t explain how—specifically how every union spent their money on politics. It is just a total that the NILRR, the National Institute of Labor Relations Research, compiled from government reports that the unions supplied at the end of their year, when they have to report.

Mr. ALLEN. But I also read where—that the unions can deduct this from your pay to make—

Mr. BOWMAN. In many political spendings, absolutely. They can—they don’t need prior approval from any union members or anybody paying dues to—how they can—how they are supposed to use their dues in the long run.

In other words, if a union member is upset with the way their union dues are used to support a political or social cause, they then have to resign their union membership, first of all, which can be very intimidating and full of fear—and again, that is something I have personal experience with—and then become what is called an agency fee payer, which is supposed to be a reflection of the true cost of what the union has to represent you in collective bargaining and grievance handling, and so forth.

But the amount of money that unions spend on politics—for instance, donations to groups like Planned Parenthood—they do not need to get prior approval from a union worker before they do that. My thought is I think all union members should receive the opt in permission from the beginning to say, yes, I would like some of my

union dues to go towards political causes and social causes, instead of having to do that often burdensome opt-out—

Mr. ALLEN. Even if it conflicts with your faith or your values?

Mr. BOWMAN. Absolutely. If it conflicts with anything. You know, you can make it a faith issue, you can make it just somebody who dislikes another organization, or for any reason they do not want to support a political or social cause that the union is spending money on. They should have the ability to opt in, instead of having to do that opt out, where their money is used first and then have to opt out for it afterwards. The *Employee Rights Act* provides that provision, where employees are given the opportunity to opt in for political and social spending from the beginning.

Mr. ALLEN. All right. Quickly, we saw the chart of declining union membership. And of course, there are various arguments why that is occurring. It sounds like, from Mr. Bowman and Mr. Jackson, your testimony, that you got a real problem with the way the thing is organized and, obviously, with your leadership.

I would like a comment from both of you. I mean don't you elect your leadership in the union? And that leadership is supposed to represent you and your interests. And then, if you voice your interest, they are supposed to listen and respond. How does it work, say, with United Auto Workers?

Mr. BOWMAN. Well, for the UAW we do not elect our national-level executives.

Mr. ALLEN. How do they get that authority?

Mr. BOWMAN. They get that authority through a convention, where representatives from each plant come and then represent and vote for union leadership. It usually comes from something called the Reuther caucus, which is already pretty much a pre-programmed idea of who is going to be president, even before the vote gets there.

Mr. ALLEN. Okay.

Mr. BOWMAN. So that is how it happens in the UAW.

Mr. ALLEN. So do you think it would be more popular to change that to a—I mean, you know, an election process like the way we are elected, where you actually go out and you say, "Hey, I got new ideas, and I think I can help our workers, and"—

Mr. BOWMAN. Well, I—yes. For union executives on the national level—for union—or for UAW executives, I think a secret ballot election, again, should come to all workers—

Mr. ALLEN. Right.

Mr. BOWMAN.—and all the plants.

Mr. ALLEN. You got 12 seconds, Mr. Jackson. How about your situation?

Mr. JACKSON. We voted for representation and now we are trying to undo that. We didn't actually vote for anyone specifically, it was as a collective group.

Mr. ALLEN. I got you. Okay. All right.

Thank you, I yield back.

Chairman WALBERG. I thank the gentleman. I recognize the gentleman from Connecticut, Mr. Courtney.

Mr. COURTNEY. Great, thank you, Mr. Chairman, and thank you to the witnesses for being here today.

I want to follow up on a point that Mr. Scott raised today regarding what really is a crisis at the NLRB, which is that we have a newly confirmed member who, again, was sanctioned by not just the inspector general, but the ethics office, in terms of participation in the *Browning-Ferris* decision.

And again, this, I think, screams out for a hearing by this subcommittee, given the fact that not only was these findings made, this is not a settled matter. You know, Mr. Emanuel's lawyer has communicated to Congress that he basically rejects the opinions of the ethics office and the inspector general, and continues to insist that he has the right to vote on matters that he handled, or his law firm handled, in—prior to his holding office.

This is like having a member of Congress saying that they will fully refuse to accept a decision by the ethics office. I served on the Ethics Committee for two years, and we have various sanctions, in terms—and it was bipartisan. In fact, it is totally non-partisan, there is no majority on that committee.

And to allow a state of affairs to continue to exist at the National Labor Relations Board—again, Dr. Lofaso, having been, you know, somebody who was proximate to the way the board operates, I mean, this is a real problem, in terms of just the functioning of the board.

Dr. LOFASO. Yes. I want to limit my comments to saying that I don't know about his specific situation. And so I am going to say it hypothetically. But let's say everything you said is absolutely an accurate description of what is going on.

The problem is that the people who will be—inspector general and the ethics officers, these are people that are—and people who work on these things are generally career employees who are not—they are not trying to be political. If anything, these—what they are trying to do is maintain the integrity of government, which is one of the most important things, to keep our faith in government, and the public faith in government.

So it is very important that what we understand is that if you have an ethics decision that is unfavorable to an employee of that agency, you have to understand—is that in general they are looking for any way they can to say this was ethical. And so I would say that there is a lot of weight behind that.

And that—for someone to then say I am not going to listen to that, I think creates, like, the equivalent of a constitutional crisis, but within the agency. So it is something I think that we have to take really seriously and try to understand.

Now, of course, if there were really—if there really is something wrong, where the ethics people are going wild and saying this is wrong, then also you should get to know that, too. So a hearing would actually—could vindicate him.

Mr. COURTNEY. Right. And again, a hearing, which, you know, I think is obvious for this subcommittee to hold, is really—as I said, it sort of screams out for it.

As someone—I practiced law for 27 years before having the honor of representing Connecticut's second district, you know, one of the things we did in our law firm, any time a new client was coming in is you kind of just ran the traps, in terms of making sure that there was no conflicts.

I mean this stems beyond, you know, serving in a public agency like NLRB. I mean it is really sort of boilerplate rules that attorneys and—have to follow, as a matter of course, where you would be subject to ethics sanctions by the state grievance committee.

Dr. LOFASO. Or the—

Mr. COURTNEY. Also, Doctor, if I could just follow up real quick on it, we have heard a lot about card check, and somehow that this is sort of, you know, ramming over people's rights.

Again, this has been part of the law since 1935. The Supreme Court has actually had a number of cases where, you know, individuals like Mr. Bowman have challenged, you know, whether or not this somehow usurps people's rights by providing an avenue of recognition that—you know, through the card check process. Every single instance the Supreme Court has upheld that provision of the law. Earl Warren, an appointee of Dwight Eisenhower, wrote one of those decisions.

Again, just real quick, I mean, we are not talking about something that is really, you know, ever challenged as somehow depriving individual workers of their rights. Is that correct?

Dr. LOFASO. That is correct. It is well developed in the jurisprudence. Gissel is the main Supreme Court case from 1969.

Chairman WALBERG. I thank the gentleman.

I would like to again thank our witnesses for the time and attention that you have taken to be here, to travel here, to prepare your remarks, and to respond to our questions and concerns. I hope it has been a valuable experience for you, as I believe it has been for us.

This isn't a simple issue. We understood that when we established this hearing. We understand that this hearing isn't the end-all, but we thank you for being here and helping us.

Now, I am delighted to recognize my Ranking Member for any closing comments he might have.

Mr. SABLAN. Yes, thank you very much, Mr. Chairman. We obviously have different views on how to modernize labor law, but I appreciate very much your holding this hearing this morning, and I appreciate the time and effort put in by all of the witnesses. Thank you.

We must do better by our workers. They are working harder and harder for less and less, and their hard-fought rights and protections in their workplaces are being chipped away. We need to protect their right to join a union, have that union collectively bargain on their behalf, and enjoy a safe workplace, free of unfair labor practices.

And we need to fix the National Labor Relations Board. This is supposed to be an independent agency protecting workers' rights and promoting collective bargaining. My colleagues and I have been performing our oversight due diligence, writing several letters there. The agency has to function free from the reported chaos and infighting, and function fairly to carry out their mission.

I must, on a personal observation, note my agreement with—some agreement with Mr. Bowman. He noted that he doesn't have a say in who is the president of, say, UAW. And I also—because I also say that I would like to think that our nation should come—has come to a point where the person who gets the most vote in

a presidential election should be our president. And we just saw an experience where a person who wasn't—our president is selected by the electoral college, and not by voters directly. So maybe Mr. Bowman and I have some kind of agreement on the concept.

But Mr. Chairman, thank you very much. You have always been very kind and—of your time. And I yield the balance of my time.

Chairman WALBERG. I thank the gentleman. And I am not going to take on the electoral college. We will leave that for some other committee.

Mr. SABLAN. Yes, sir.

Chairman WALBERG. I kind of like it, and especially living in a rural area, I appreciate having a say.

But I appreciate having a say today, and what each of our panelists have brought to the table. And the discussion we have had as a subcommittee, it is important to have.

I am delighted that back in Michigan we are seeing "help wanted," "hiring now" signs all over the place. It almost gives the feeling that it is an employees' market right now. And being that is the case, we also see a lot of attention from employers on what it will take to provide incentive for employers to come and apply for those jobs (sic).

Our challenge is to make sure that they are trained and ready for those jobs, as well. And so, for us to have a setting in place where employers and employees feel like they have a seat at the table and can experience all that is best that this great country has allowed to happen, and been an example for the rest of the world is so important right now.

I am thankful that when—and my good friend flattered me by saying that I was born in 1973. You knew that wasn't true. But in 1969, when I graduated from high school and went to work at U.S. Steel South Works, south side of Chicago, where one time my father had worked and helped organize unions, steel workers, and did it for the purposes to make sure that he would come home at night safe and sound with all of his faculties, all of his body parts, that there would be a level playing field for benefits, enhancements, good pay for good day's work. I was glad that a lot of those things had taken place back in the forties and fifties, when my dad was there, and continued on as a union worker for most of his working career, until the latter days of his working career.

It made it a better working place for me at U.S. Steel, as a repairman's helper, as a third helper on the furnace, as a common laborer in the kitchen area, and as a—and please report this accurately—as a hooker in the scrap yard. Make that clear. And I appreciate the fact that there were unions that were doing that.

But I also know that times have changed, and we have laws in place because of some of those efforts. We have workplace requirements because of those efforts. We also have plenty of examples that my dad would tell if he were alive today of how he felt that the union went too far, and caused problems for a workplace and a continuation of work place.

And that is where I think we have to have that give-and-take and the ability for employees to determine their destiny, as well, and to vote whether they want to be part of a union or not.

My son is helping organize a union right now at a major communications organization because of some significant problems that developed in the changeover of ownership in this entity. And as I have talked with him, he said, "Dad, I never thought I would be a union man."

And I said, "Well, if it is for the right purpose, that is great. But make sure you do it for the right purpose, and don't go beyond what is necessary to foster a workplace that works for all, and to have an employment—place of employment that continues on, as well."

So that is why we had the reason for this hearing. And I think there are discussions that need to continue. But in this country, we certainly should not feel any compulsion to take away rights of individuals to make decisions for themselves. And I think that is why we want to see it happen.

So we will continue to look at this. We wish that we had better prospects in the Senate to do the same thing. But it is our purpose here in the House to make sure we look at all sides, and we make sure that Americans and America is served well. Having nothing else to be heard before this subcommittee, it is adjourned.

[Whereupon, at 11:24 a.m., the Subcommittee was adjourned.]

