TESTIMONY OF THE STATE ATTORNEY GENERAL
TWENTY-FIFTH LEGISLATURE, 2009

ON THE FOLLOWING MEASURE:
S.B. NO. 1621, S.D. 2, RELATING TO COLLECTIVE BARGAINING.

BEFORE THE:
HOUSE COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT

DATE: Friday, March 20, 2009 **TIME:** 9:30 AM

LOCATION: State Capitol, Room 309

TESTIFIER(S): Mark J. Bennett, Attorney General,
or James Halvorson, Deputy Attorney General

Chair Rhoads and Members of the Committee:

The Department of the Attorney General strongly opposes this bill.

The purposes of this bill are (1) to create a union representation privilege, including work product, by way of legislation; (2) to create a complete defense to prosecution for trespass and offenses against public order where a person or persons are engaged in a labor dispute; (3) to allow certification of a union representative through card check authorization without an election; and (4) to give complete immunity to unions for engaging in collective bargaining activities or for participating in a labor dispute.

1. Union Representation Privilege

One of the purposes of this bill under section 3 (page 3, lines 12-21, and page 4, lines 1-20) is the codification of an unnecessary and overbroad "union representation privilege," including union work product privilege, by way of legislation.

The only exception to the privilege under this measure is where the representational privilege is sought in furtherance of activities that the union "knew or should have known to be a crime or fraud." This exception is far too narrow and should also apply in the

investigations of any wrongdoing in administrative, civil, or criminal proceedings.

Further, if this bill passes in its current form, the holders of the privilege (namely the union leadership, who are solely vested with the power to waive the same) will be permitted to cherry pick when they want to "allow" testimony to be presented to a tribunal such as the Hawaii Labor Relations Board (HLRB) or an arbitrator, and stifle such testimony when they feel it will be detrimental to their interests. Simply put, if passed, this bill will undermine good faith public sector bargaining in Hawaii and will make it next to impossible even for individual union members to hold their unions accountable for violating their rights.

For example, chapter 89, Hawaii Revised Statutes (HRS), makes provision for public unions, public employers and individual union members to file complaints with the HLRB alleging that a union or employer has committed a "prohibited practice" and violated our labor laws. As written, this bill would have an immediate and dramatically negative effect on all future prohibited practice complaints filed by public employers and/or individual union members against public unions brought under section 89-13(b).

Conversely, the bill would have no such similar impact on prohibited practice complaints filed by public unions against public employers under section 89-13(a), HRS, but would severely affect the ability of the various public employers to defend themselves from such complaints filed by the unions.

As a concrete (not to mention timely) example, the State filed a prohibited practice complaint against the Hawaii State Teachers Associaion (HSTA) regarding random drug testing of teachers. In 2007, the State offered substantial pay and benefit increases for the 2007-09 contract period in return for HSTA's acceptance of the obligation to negotiate and implement procedures for random testing applicable to "all" teachers no later than June 2008. In July 2008, after the pay raises were made, HSTA refused to complete the negotiation of such

procedures, based upon the primary contention that the previous HSTA Chief Negotiator and her bargaining team never agreed to any such thing back when the contract was ratified in 2007.[1] On that basis, the State asserts that HSTA has refused to "negotiate in good faith," a term of art embedded within section 89-13(b)(2), HRS.

In order to prevail on a prohibited practice complaint filed under section 89-13, HRS, the complainant must establish that the other party in labor negotiations has "willfully" violated some aspect of chapter 89, HRS (such as the duty of both public employers and public unions to negotiate in good faith rather than with their fingers crossed behind their backs). This is a very high standard, and it is normally established through witness testimony.

If this bill passes, the current HSTA leadership could arguably prevent any and all former and current members of **both** bargaining teams (**even the State's**) from testifying precisely as to what was agreed upon in bargaining over the 2007-09 contract. Moreover, the current union leadership could itself refuse to testify as to what they believed was agreed upon, and could even prevent **individual teachers** from testifying as to what they were told by the HSTA leadership at the time they ratified the 2007-09 contract. This bill takes direct aim at limiting the State's ability to uncover and admit into evidence this very type of key information.

Obviously, the same sort of limitations will apply in every other prohibited practice complaint filed by the public employer or unions in the future. In other words, this bill promises to render the unions effectively immune from allegations of failing to negotiate in good faith. Moreover, the unions would be free to make such a charge against the public employers, and then invoke this one-way privilege to exclude exculpatory evidence. Clearly, if the union representation privilege and union work product privilege are recognized, they must be

[1] HSTA asserted that random testing is also unconstitutional, however HSTA's first and foremost reason for refusing to agree to random testing procedures applicable to all teachers is its claim that it never bound itself in negotiations to do so.

recognized for management as well. The failure to do so would give unfair advantage to the unions.

In addition, this bill seriously undermines the rights of individual union members to hold their unions accountable for violations of their rights. Every union has such a duty codified in section 89-13(b), HRS, which allows an employee to file a complaint against his or her union when the union willfully interferes, restrains, or coerces any employee in the exercise of any right guaranteed under chapter 89; refuses to bargain collectively in good faith with the public employer; refuses to participate in good faith mediation and arbitration procedures; or violates the terms of the collective bargaining agreement.

As noted, union members cannot invoke this privilege; only the union can. Thus, the bill not only prevents union members from obtaining confidential information (documents or statements) or work-product that bears directly on the union's fiduciary and fair representation duties owed to them; it even goes so far as to give the union leadership the power to prevent the very union member who filed the complaint from testifying against them.

Finally, the bill makes union representation privilege applicable not only in courts, but in administrative agencies, arbitrations, legislature, and other tribunals. However, chapter 380, HRS, is limited only to the jurisdiction of the courts. Administrative agencies are governed by other statutes, e.g., Hawaii Labor Relations Board is governed by section 89, HRS.

This bill is corrosive both to good faith public sector bargaining and to individual workers rights. It should be rejected by this committee.

2. Complete Defense to Prosecution for Trespass and Offenses Against Public Order

Section 3 of this bill amends chapter 380, HRS (page 5, lines 9-18), by adding a new section, entitled "Defenses for protected activity in a labor dispute." This section attempts to create complete defenses

to the criminal offenses of criminal trespass in the first degree, criminal trespass in the second degree, criminal trespass onto public parks and recreational grounds, simple trespass, disorderly conduct, failure to disperse, and obstructing, for persons engaged in a labor dispute. Although failing to clearly do so, it appears the section is attempting to provide a defense to these offenses when persons attempt to publicize a labor dispute on areas adjacent to the entry and exit points of an establishment involved in the dispute. The proposed defense provision will unreasonably allow individuals engaged in labor disputes to violate the law, commit criminal trespass of any degree, commit disorderly conduct, obstruct public passageways, violate terms of use of public parks, and disregard requests or lawful orders of law enforcement officers attempting to control situations.

3. Certification of Union Representative Through Card Check Authorization

The Department opposes section 4 of this measure (pages 8-9) because board certification of a union representative through card check authorizations has a tendency to undermine employees' right to organize for purpose of collective bargaining under both the constitution and the statute.

Employees have the constitutional right to "organize for purpose of collective bargaining." Article XIII, sections 1 and 2, Hawaii State Constitution. Based on this right, the Legislature granted employees the freedom to participate in the collective bargaining process through representation of their own choosing. Sections 89-3 and 377-4, HRS, were enacted and designed to protect employees. These statutes provide that employees have the right of self-organization and the right to form, join, or assist labor organizations, and bargain collectively through representatives of their own choosing. Further, sections 89-3 and 377-4 also provide that employees have a right to refrain from such activities.

In Hawaii, elections have been the exclusive means by which a union may obtain Board certification to act as a collective

bargaining agent for a group of employees. However, if enacted, this bill would obligate the HLRB to certify a union based on authorization cards without an election. Authorization cards are poor indicators of support and are susceptible to intimidation, coercion, and introduce irrelevant factors into the calculus of whether to select union representation. Secret ballot elections, on the other hand, provide employees with the opportunity to carefully consider their choice after being fully informed by both the union and the employer of the advantages and disadvantages of union representation. The National Relations Board has repeatedly stated that secret elections are generally the most satisfactory and indeed the preferred method of ascertaining whether a union has majority support.

We should continue the current process of certifying union representative through election, which is patterned after how we vote for public officials.

4. Union Immunity for Collective Bargaining Activities and For Participation in Labor Dispute

Section 6 of the bill amends section 380-6, HRS (page 11, lines 7-13), by adding a new subsection (b), which gives "immunity" from civil liability to unions for "engaging in lawful collectively bargaining activities or for participating in a labor dispute as defined in section 380-13(3)." The clause giving immunity for "participating in a labor dispute" is not limited to lawful participation or fair labor practices. It may, therefore, immunize unlawful participations or "unfair" labor practices. This is not good public policy.

We respectfully request that this bill be held.

LINDA LINGLE
GOVERNOR

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March 19, 2009

To: The Honorable Karl Rhoads, Chair
and Members of the House Committee on Labor and Public Employment

Date: Friday, March 20, 2009
Time: 9:30 a.m.
Place: Conference Room 309 State Capitol

From: Darwin L.D. Ching, Director
Department of Labor and Industrial Relations

Testimony in Strong Opposition of S.B. 1621 SD 2 – Relating to Labor

I. OVERVIEW OF PROPOSED LEGISLATION

Senate Bill 1621 seeks to do away with the federally-run democratic secret ballot election process, which employees currently follow when deciding to organize as a union. The Bill provides that if the Hawaii Labor Relations Board finds that a majority of the employees have signed a 'valid authorization' designating an individual or labor organization as their bargaining representative, then the board shall certify the individual or organization as the representative **without directing an election.**

This legislation also attempts to force employers, to enter into collective bargaining meetings within ten days after receiving a written request for collective bargaining from the non-elected representative.

The Bill provides procedure for conciliation under section 377-3 if an agreement is not entered into after ninety days. If after thirty days beginning on the date the request for conciliation is made, the parties have not entered into agreement, the Hawaii Labor Relations Board shall refer the dispute to an arbitration panel established by the board.

II. RELEVANT LAWS

Nothing in state or federal law prevents an employer from ***voluntarily*** entering into an agreement with a labor organization that wants to organize under "crosschecking" or "card check".

Federal laws have a long tradition of recognizing the rights of workers to join labor unions. Since the passage of the Wagner Act in 1935, federal law has protected employees' exercise of their free choice to decide whether to join a union. This statute, which is also known as the National Labor Relations Act ("NLRA"), prohibits discrimination due to union membership. The Act, in Section 8(a)(3), provides that:

> It shall be an unfair labor practice for an employer --:
> by discrimination in regard to hire or tenure of employment
> or any term or condition of employment to encourage or
> discourage membership in any labor organization.
> 29 U.S.C. §158(a)(3).

The NLRA, otherwise known as the Wagner Act, was passed by Congress in 1935. The NLRA is the grandfather of employee rights legislation in the United States. Although passed primarily to create a peaceful system for unionization and collective bargaining, the NLRA was also the first federal employment discrimination statute - making it illegal for employers to discipline or discharge employees because they engage in union activity and other protected concerted activities.

Exclusive jurisdiction for enforcement of the NLRA was vested in a unique administrative agency – the National Labor Relations Board ("NLRB"). The NLRB was given broad authority to interpret and enforce the rights and obligations created by the NLRA, and to develop through case-by-case adjudication, a body of law to govern labor-management relations.

The NLRA went through significant changes in 1947 when the Taft-Hartley Act added a set of provisions designed to regulate and disempower unions. The statutory scheme that exists today, the Labor Management Relations Act ("LMRA"), combines the original pro-labor provisions of the Wagner Act with the limitations on union activity established by Congress in 1947.

Section 7 of the NLRA describes the essential employee rights underlying the act:

> Employees shall have the right to self-organization, to
> form, join, or assist labor organizations, to bargain
> collectively through representatives of their own choosing,
> and to engage in other concerted activities for the purpose
> of collective bargaining or other mutual aid or protection,
> and shall also have the right to refrain from any or all of
> such activities....

Further, according to information provided by the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), "Most working people have the legal right under Section 7 of the National Labor Relations Act (NLRA) to join or support a union and to engage in collective bargaining (see www.aflcio.org). This includes the right to:

1. Attend meetings to discuss joining a union.
2. Read, distribute and discuss union literature (as long as this takes place in non-work areas during non-work times, such as break or lunch hours).
3. Wear union buttons, T-shirts, stickers, hats or other items on the job at most worksites.
4. **Sign a card asking your employer to recognize and bargain with the union.**
5. Sign petitions or file grievances related to wages, hours, working conditions and other job issues.
6. Ask other employees to support the union, to sign union cards or petitions or to file grievances.

Section 8 of the NLRA says employers cannot legally punish or discriminate against any worker because of union activity. The employer cannot threaten to or actually fire, lay off, discipline, transfer or reassign workers because of their union support. The employer cannot favor employees who don't support the union over those who do in promotions, job assignments, wages and other working conditions. The employer cannot lay off employees or take away benefits or privileges employees already have in order to discourage union activity."

III. SENATE BILL

The Department supports the right of workers to organize, but strongly opposes this bill for the following reasons:

1. On April 14, 2008 Governor Lingle vetoed H.B. 2974 which is substantively the same Bill as S.B. 1621, for the following reasons:
    a. The "card check" procedure envisioned by this bill is a poor substitute for the secret ballot and is ripe for abuse.
    b. The use of the secret ballot election process provides the employee anonymity and the opportunity to carefully consider and weigh individual choices after having the time to be fully informed by both the labor organization and the employer of various advantages and disadvantages of being collectively represented.
    c. Nothing in this bill specifies how or when signatures can be obtained and there is no provision for neutral supervision. As a result there is no way to determine whether a worker's signature was given freely and without

intimidation, pressure, or coercion from fellow employees, labor representatives, or the employer.

d. Maintaining the secret ballot is the fair, appropriate, and democratic way to protect workers' privacy and to ensure workers have the ability to vote their conscience without fear of repercussion or retaliation.
e. There is no compelling justification for replacing an unbiased, democratic process with one that has the potential to erode a worker's existing rights and protections under law.
f. This bill is also objectionable because it places arbitrary restrictions and deadlines on the negotiating parties without regard to the complexity of the agreement or the importance of free and non-coercive bargaining. Forcing parties to agree is antithetical to the system of labor relations that has served our country well for nearly 75 years.

2. This legislation is less-democratic as it forces the employer to effectively remain and to ensure that the NLRB election process is bypassed in an attempt by a labor organization to persuade their employees to join a union. Additionally, it does away with the secret balloting process that is inherent in our democratic society in allowing people to vote their conscience and imposes a simple "sign up" sheet.

   We should continue the current process which is patterned after how we vote for public officials. Alternatively, the Department questions the need for such legislation and has concerns about the abolishment of secret balloting, which is specifically designed to protect employees from undue coercion.

3. This is an issue of fairness. Employees should be allowed to voice their support for or against a union in the privacy of the voting booth without undue pressure or intimidation from both management and the union.

   Alternatively, an employer should be allowed a choice in determining whether they want to have an equal voice with the labor union in advocating for or against organizing their establishment. In forcing the employer to enter into this agreement, that choice is taken away from them. Again, under state and federal law, an employer can already "voluntarily" enter into these agreements.

   The Department believes it is bad public policy to force employers and employees to enter into these agreements as a condition of receiving state work or money. Further, the state strips the employee of their right to exercise their vote in private, without coercion or intimidation; and the employer of their right to insist on an election process that is both fair and ensures that employees are voting their conscience and not being peer pressured to sign a card.

   Under this bill, the state is using the "power of purse" to force employers to agree to this organizing tactic in order to get work.

4. According to information provided by the AFL-CIO, a worker's right to organize is already protected.

5. The NLRA has been developed over the last 69 years to ensure a proper balance between the rights of those employees that want to organize and those that do not, as well as providing a fair process that protects the rights of employers.

6. Although we defer to the Department of Agriculture on this issue, the Department of Labor and Industrial Relations would like to point out that the increased burden on Island Farmers would be detrimental to our State's efforts to improve our sustainability and self sufficiency.

LINDA LINGLE
GOVERNOR OF HAWAII

MARIE C. LADERTA
DIRECTOR

CINDY S. INOUYE
DEPUTY DIRECTOR

STATE OF HAWAII
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March 19, 2009

TESTIMONY TO THE
HOUSE COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT
For Hearing on Friday, March 20, 2009
9:30 a.m., Conference Room 309

BY

MARIE C. LADERTA, DIRECTOR

Senate Bill No. 1621, S.D. 2
Relating to Collective Bargaining

WRITTEN TESTIMONY ONLY

TO CHAIRPERSON KARL RHOADS AND MEMBERS OF THE COMMITTEE:

The purpose of S. B. No. 1621, S.D. 2 is to provide a union representation privilege to protect the functions of the union; allow certification of union representatives through a card-check authorization; require collective bargaining to begin upon union certification; set certain deadlines for initial collective bargaining agreements; set a civil penalty for unfair labor practices; extend certain authorities to labor organizations; and allow labor disputes to be defenses against prosecution for certain violations of law.

The Department of Human Resources Development **strongly opposes** the amendments to Chapter 380, Hawaii Revised Statutes, set forth in Section 3 of this measure (See page 3, beginning from line 12, through page 4, ending on line 20).

First, this bill would create a new, statutory union representational privilege which would allow Unions to withhold confidential union information and communications made in the course of rendering union representational services. The expansive scope of this new privilege is highly problematic, as it would protect union communications

and information from labor agreement negotiations, grievance and unfair labor/prohibited practice investigations and processing, exhaustion of internal union procedures and remedies, and actions to enforce rights established by contract or statutes. In addition, this protection would be unilateral since there is no provision in the bill to recognize a reciprocal management privilege. Thus, application of this privilege to a Chapter 380, HRS, labor dispute in court would give an unfair advantage to the unions because employers would have to produce their internal communications and information, generated by their managers, supervisors, and employees, while the unions would have no corollary obligation to do the same. There are no circumstances under which a court of law could render a sound opinion or ruling when the record consists only of one party's evidence.

Second, a union's status as an exclusive bargaining representative, with a duty to fairly represent its members, does not warrant the sweeping privilege sought to be established by this bill. With such a privilege in place, a member could not even prove that his or her union breached its duty of fair representation to the member since that member's communications with union officials could not be disclosed in any proceeding against the union. Such communications would form the crux of any fair representation claim by a member against a labor organization. This privilege, combined with the bill's proposed amendment to Section 380-6, HRS, to absolve the union of legal liability (under the justification that the union's actions are "lawful collective bargaining activities" or "participation in a labor dispute") is inapposite to the ultimate goal of a fair collective bargaining process for all parties—including employees and employers.

Third, and of greatest concern to the State, is the bill's requirement at Section 3, first subsection (d), that the "representational privilege shall be respected by the courts, administrative agencies, arbitrators, legislative bodies, and other tribunals." This attempt to extend the scope of the privilege beyond Chapter 380, HRS, proceedings usurps the power and authority of the courts, agencies, arbitrators, legislative bodies, and other tribunals to rule on issues of privilege and evidence based on their own statutes, rules, policies and procedures, and any other applicable laws. While these tribunals respect long-standing privileges—i.e., attorney-client and physician-patient—rooted in common law and statute, the union representational privilege can claim no

such status. Moreover, a union's assertion of this unusual privilege at an arbitration or HLRB hearing would leave many issues in routine cases unresolved—i.e., whether a grievance was untimely filed, because a key piece of evidence is when a member brought an issue to the union's attention. As another example, on almost any other issue, employers would be at a significant disadvantage because a union could choose to waive the privilege when its internal communications are supportive of its position but assert the privilege when such communications are unfavorable.

Therefore, we strongly urge that these amendments to Chapter 380, beginning from line 12 on page 3 up through line 20 on page 4, be deleted in their entirety.

Thank you for the opportunity to submit comments on this matter.

LINDA LINGLE
Governor

SANDRA LEE KUNIMOTO
Chairperson, Board of Agriculture

DUANE K. OKAMOTO
Deputy to the Chairperson

State of Hawaii
DEPARTMENT OF AGRICULTURE
1428 South King Street
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TESTIMONY OF SANDRA LEE KUNIMOTO
CHAIRPERSON, BOARD OF AGRICULTURE

BEFORE THE HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT
FRIDAY, MARCH 20, 2009
9:30 A.M.
ROOM 309

SENATE BILL NO. 1621, SD2
RELATING TO LABOR

Chairperson Rhodes and Members of the Committee:

Thank you for the opportunity to testify on Senate Bill No. 1621, SD2 which provides a union representation privilege to protect the functions of the union as an exclusive bargaining representative to allow the union to perform its role in negotiations and contract enforcement; allows certification of union representatives through a card-check authorization; requires collective bargaining to begin upon union certification; sets certain deadlines for initial collective bargaining agreement procedures and conciliation of disputes; sets civil penalty for unfair labor practices; extends certain authorities to labor organizations representing employees for collective bargaining; allows labor disputes to be defenses against prosecution for certain violations of law. The Hawaii Department of Agriculture (HDOA) is in strong opposition to this bill.

The existing law honors a worker's right to a private ballot, thereby increasing the likelihood that the worker's decision was made free from influence, abuse and intimidation. If the results from the private ballot indicate interest in an election, then both the union and the employer have the opportunity to make their case to the workers. Under this bill, if more than 50% of workers sign a petition, which by its nature exposes the worker's position and therefore places the worker in a vulnerable situation, the

Hawaii Labor Relations Board would have to certify the union, and a private ballot election would be prohibited, even if the workers want one.

Agricultural workers are particularly vulnerable to misleading verbal or written explanations of a process that they may have little or no familiarity with. A language study undertaken by the National Agriculture Statistics Service indicates that the most prevalent language among agricultural workers is Ilocano; 89% comprehend English verbal instructions and 59% comprehend English written instructions. Among these same workers, comprehension of written instructions in their first language, Ilocano, is 79.7%. Among all agricultural workers, 87.9% can understand written instructions in their first language and 71.3% can understand written instructions in English.

There are 7,521 farms in Hawaii, 84.6% of these farms are family farms. 1,783 Hawaii farms hire labor with most of these farms on the Big Island (63.3%), followed by Honolulu county (14.1%), Maui county (13.7%) and Kauai county (8.9%). Smaller farms with 1-9 acres employ the most hired farm labor (30.5%). Farms with between 1 and 49 acres employ 56.4% of all farm labor.

This is not the time to be adding additional costs onto Hawaii's agricultural producers. Only 46.3% of all Hawaii farms have net financial gains with 87.9% of those with net gains reporting gains of $49,999 or less. 53.7% of the farms in Hawaii report net financial losses. Over 74.6% of Hawaii's farmers have to work two or more jobs to stay in agriculture.

Hawaii's farm workers are already the highest paid in the country. Among hired farm workers on all farms in Hawaii, the average wage paid in the period of January 11-17, 2009 in Hawaii was $12.69/hr. compared to $11.16 in California and $10.93 nationally (excluding Alaska). Among field and livestock workers on all farms in Hawaii, the average wage paid in the same period was $10.93, $10.10 in California, and $10.08

nationally (excluding Alaska). Hawaii is already at a competitive disadvantage due to the cost and availability of land and water, transportation costs, and effects of invasive species.

Hawaii's small, family farms would be disproportionately affected by this bill and all farms, regardless of their financial situation, would be subject to additional costs stemming from this bill. If this bill moves forward, despite our opposition, we recommend the following amendments be identified as (g) and (h) and inserted in Section 4:

"(g) Prior to final certification of the individual or labor organization as the bargaining representative, the board shall determine that each person that has signed the petition was first provided with a written translation of the petition and written translations of vital documents relating to the petition, if so requested. Written translations shall be the responsibility of the person or labor organization seeking to be the bargaining representative and shall be provided in the primary language of each group of speakers comprising 5% or more of the employee population.

(h) For the purposes of this section, the term "employee" means an employee, as defined in section 377-1; provided that the employee is employed by an employer with one hundred or more full-time employees and that the employer has achieved a net financial gain in each of the prior three fiscal years. Hawaii farmers and ranchers that meet or exceed the average percentage wage difference between Hawaii and comparable California farm workers, as determined by the Hawaii Agriculture Statistics Service, are exempt from this measure."

This bill as written sets back Hawaii's efforts to become more self-sufficient in food production and in the long-run will result in the lessening of opportunities for agricultural workers. It poses a huge burden for Hawaii's small farmers. We strongly urge that you do what is best for Hawaii agriculture by ensuring that this bill is not allowed into law.

SMALL BUSINESS REGULATORY REVIEW BOARD

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To: Chair Rhoads, Vice Chair Yamashita and Members of the Committee on Labor & Public Employment – Conference Room 309

Re: **SB 1621, SD2 – "Relating to Collective Bargaining"**

Date: March 20, 2009 at 9:30 a.m.

Aloha:

As the Chairperson of and on behalf of the Small Business Regulatory Review Board, I offer testimony in **opposition** of SB 1621, SD2 "Relating to Collective Bargaining. The secret ballot is the foundation of our democratic system. Basing the decision to use collective bargaining via card check procedure may allow fear of retribution or coercion to enter into the process. All employees deserve the chance to make this important decision in private with a secret ballot.

Employers should be afforded the opportunity to address employees prior to a secret vote and offer their concerns and ideas. Each business is unique, and binding arbitration could put the determination of the details of a union contract in the hands of persons not fully able understand the complexities of each business. Laws regarding property rights should not be permitted to be compromised for any reason by anyone.

While there may be a need to simplify the process by which employees determine their right to collective bargaining, SD1621 SD2 is contrary to basic democratic and constitutional principles and should not be passed.

Yours truly,

Lynne Woods

Lynne Woods, Chairperson
Small Business Regulatory Review Board

The Chamber of Commerce of Hawaii
The Voice of Business in Hawaii

Testimony to the House Committee on Labor & Public Employment
Friday, March 20, 2009
9:30 a.m.
State Capitol - Conference Room 309

RE: SENATE BILL NO. 1621 SD2 RELATING TO LABOR

Chair Rhoads, Vice Chair Yamashita, and Members of the Committee:

My name is Jim Tollefson and I am the President and CEO of The Chamber of Commerce of Hawaii ("The Chamber"). I am here to state The Chamber's strong opposition to Senate Bill No. 1621 SD2, relating to Collective Bargaining. This measure will hurt Hawaii's fledgling agricultural industry and small businesses at a time when Hawaii strives to become more sustainable.

The Chamber is the largest business organization in Hawaii, representing more than 1,100 businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of its members, which employ more than 200,000 individuals, to improve the state's economic climate and to foster positive action on issues of common concern.

This bill allows certification of certain employees or employee groups by signed authorization from the employee; requires collective bargaining to begin upon union certification; sets certain deadlines for initial collective bargaining agreement procedures and conciliation of disputes; sets civil penalty for unfair labor practices; extends certain authorities to labor organizations representing employees for collective bargaining; and allows labor disputes to be defenses against prosecution for certain violations of law. This bill is also known as the "card check" bill.

Under current law, the decision of whether or not to form a union is usually left to the workers — through a secret ballot election. That means that workers can choose — in private — whether they want to join a union. But in such an election, workers might not vote the "right" way.

Under Card Check, paid union organizers could unfairly pressure workers to publicly sign a card stating that they support the union.

Just as unconstructive, the Card Check bill includes a "binding arbitration" provision that mandates arbitrators dictate wages and benefits under a union contract, and then deprive workers of the chance to vote on that contract. This expansion of government power is almost like reestablishing wage and price controls in our economy, and could put many employers out of business. We cannot afford this type of legislation, especially as Hawaii weathers this economic storm.

Furthermore, at a time when the state is trying to become more self-sufficient for food and produce this legislation is counter productive. Moreover, more of us are shopping at discount stores and cutting coupons due to the rising costs. There has been a 7.5 percent jump in the price

of food consumed at home over the past 12 months. Prices for all foods and beverages are up an average of 5.9 percent. (Oct. 3, 2008 Gannett News Service).

The simple fact is that unionization would increase the cost of locally produced food, impair the growth and survival of Hawaii's shrinking agricultural industry and block new efforts to grow food locally.[1]

After decades of decline, unions have now turned to the Legislature to help them recover what is the natural progression of progressive management.

The pending Legislation will impose fast track unionization on all Hawaii agricultural operations and very small businesses[2] and non-profits not subject to the National Labor Relations Act, as well as submit their business assets and operational procedures to the dictates of a government appointed arbitrator. That is not right nor fair, and we ask that in these difficult economic times further costs not be imposed on Hawaii's businesses, particularly those affected by the proposed legislation.

To summarize, the following are key points as to why The Chamber of Commerce of Hawaii is strongly opposed to SB 1621, the "Card Check" bill.

- The heart of the current representation framework lies with the secret ballot. The bill would effectively disenfranchise thousands of Hawaii employees overnight, while we are simultaneously fighting for more democracy in the representation process overseas.

- There are rarely any "secrets" in connection with card-signing campaigns. Employees can easily be intimidated to sign a card to avoid confrontation with a union organizer. Employees cannot be expected to make a reasoned choice if they have heard only one side of the issue. The proposed legislation offers no safeguards for collateral investigation into signature authenticity, fraud, revocation and coercion.

- There is no corresponding provision extending card check to the decertification process. If it is fair for unions to win representation rights in this fashion, it's fair for them to lose those rights the same way.

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[1] Unionization can affect cost of production through increases in compensation, through shifts in technologies, and through deviations from the least-cost combination of inputs. Working Paper 8701 "Unionization And Cost Of Production: Compensation,Productivity, And Factor-Use Effects by Randall W. Eberts and Joe A. Stone, (Working papers of the Federal Reserve Bank of Cleveland January 1987). Union work rules and employment restrictions have the primary effect of distortions from the least-cost combination of inputs, or in other words, labor unions increase firms' costs of equity by decreasing their operating flexibility. "Labor Unions, Operating Flexibility, and the Cost of Equity", Huafeng (Jason) Chen, Marcin Kacperczyk, and Hernán Ortiz-Molina (May 2008).

[2] The NLRB's current jurisdictional limit for retailers is $500,000.00. Hawaii's law is going to affect a large number of small businesses.

- There is little if any evidence to suggest that the current framework is broken to begin with. The Canadian model on which this kind of legislation is based has been a failure in its own country. In response, a majority of Canadian provinces have shifted back to a secret ballot model over the past twenty years. Half of the Provinces that retain card check require a supermajority of cards prior to certification.

- This represents the first occasion in peace-time history that our State government would convey authority to a third party to essentially decide what a private sector employer must provide in terms of wages and benefits, free from the checks and balances of unit ratification.

- Dictated terms of an initial agreement give rise to the likelihood of decreased stability, as employers seek to recoup losses during renewal bargaining, only to be met with increased strike probability.

- There is a dearth of any legislative guidance pertaining to the proposed arbitration process, the method for choosing an appropriate arbitrator, and the manner for challenging any rendered decision.

- The arbitrary deadline for imposing interest arbitration is unreasonable in light of numerous surveys establishing the average length of first-contract negotiations.

- This is a time when local establishments need the flexibility with their business plans to adjust to the current economic climate. This measure will be counter-productive in the effort to stay afloat and save jobs.

- This measure unfairly removes private property rights if the union wants to trespass and picket.

- The provision that requires the Federal Mediation and Conciliation Service (FMCS) to order anyone to arbitration is probably unenforceable. We do not believe the State has the power to order a federal agency to act in any manner.

- Finally, the measure does an injustice to working men and women who are mislead or lied to by creating legal immunity for unions in actions relating to collective bargaining. No other group in our State has obtained legal immunity for their wrongful actions that harm others.

It is simply the wrong time for such legislation to be imposed on Hawaii. It would be wiser to await legislation on the federal level to evolve so that Hawaii's system would at least resemble the process used on the national level and benefit from the greater time and effort and developing a workable model that protects the rights of workers and employers alike.

Thus, The Chamber respectfully requests SB 1621 SD1 be held.

Thank you for the opportunity to testify.

KAUA'I Chamber of Commerce

March 19, 2009

To: Fax: 1-800-586-6189
Committee on Labor & Public Employment,
Testimony for Hearing on Friday March 20, 9:30 a.m.

Honorable Karl Rhoads, Chair, Rep. Kyle Yamashita, Vice Chair
and members Henry J. C. Aquino, Karen Awana, Faye P. Hanohano,
Gilbert Keith-Agaran, Marilyn B. Lee, Mark M. Nakashima, Scott K. Saiki,
Joseph M. Souki, Roy M. Takumi and Kymberly Marcos Pine

RE: Senate Bill No. 1621, SD2 Relating to Labor

My name is Randall Francisco and I am President of the Kauai Chamber of Commerce which represents 460 Kauai business members and consists of approximately 87% small businesses that reflect the rural character of Kauai's business community. Of the chamber's membership, approximately 8000 individuals are employees who range from the construction and tourism sectors to agriculture, retail and defense industries to name a few.

On behalf of the Kauai Chamber of Commerce, I am writing to express the member's opposition of this bill. We are in agreement/alignment with The Chamber of Commerce of Hawaii's position that was recently submitted also in opposition of the bill. The Kauai Chamber of Commerce agrees with their analysis.

Should I be of any assistance, please do not hesitate to contact me directly at 245-7363 or email at randall@kauaichamber.org. Aloha.

Sincerely yours,

Randall Francisco
President

The mission of the Kauai Chamber of Commerce founded in 1913 is:

"To promote, develop and improve commerce, quality growth, and economic stability in the County of Kaua'i"

KONA-KOHALA CHAMBER OF COMMERCE

75-5737 Kuakini Hwy. Suite 208
Kailua-Kona, HI 96740
Phone: 329-1758 Fax: 329-8564
www.Kona-Kohala.com info@kona-kohala.com

March 18, 2009

TO: HOUSE COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT

Chair Rhoads, Vice Chair Yamashita and members of the committee
March 20, 2009 hearing; 9:30 a.m.; Room 309; State Capitol

FROM: Kona-Kohala Chamber of Commerce (via email in lieu of in-person testimony)

SUBJECT: **Opposition of SB 1621, SD2 relating to Collective Bargaining**

My name is Vivian Landrum, Executive Director of the Kona-Kohala Chamber of Commerce (KKCC). KKCC represents **620** business members and is the leading business advocacy organization on the west side of Hawai`i Island. The KKCC also actively works to enhance the environment, unique lifestyle and quality of life in West Hawai`i for both residents and visitor alike.

On behalf of our membership, I respectfully ask that you hold SB 1621, SD2. Regardless of political affiliation, we believe this Bill is opposed by the majority of people in West Hawaii. At a time when we need to strengthen and support our business community, we fell this measure will hurt business, particularly small business.

Questions arise as to the extent of this bill's effect on our already fragile business industry. Unionization will increase the cost of locally produced products. At a time when businesses, both large and small, are struggling financially, this is not the time to bring unforeseen additional costs for them to bear.

This measure removes every employee's right to a secret ballot in determining whether to have union representation. We believe this bill denies workers their **fundamental right** to a secret ballot to determine their employment future.

Finally, the binding arbitration will hurt both employees and employers. Asking outside representation to determine the future of both the employee and employer, without vote could result in both parties having to settle for something neither was working towards and the consequences could equal the shutdown of a business and additional unemployment numbers.

For the above reasons, I strongly ask that you hold this bill. Thank you for the opportunity to submit written comments.

Sincerely,

Vivian Landrum

Vivian Landrum
Executive Director

HAWAII STATE AFL-CIO

320 Ward Avenue, Suite 209 • Honolulu, Hawaii 96814

Randy Perreira
President

Telephone: (808) 597-1441
Fax: (808) 593-2149

The Twenty-Fifth Legislature, State of Hawaii
Hawaii State House of Representatives
Committee on Labor and Public Employment

Testimony by
Hawaii State AFL-CIO
March 20, 2009

S.B. 1621, SD2 – RELATING TO COLLECTIVE BARGAINING

The Hawaii State AFL-CIO strongly supports the purpose and intent of S.B. 1621, SD2 and the proposed amendments to Chapter 377, and 380 HRS, (The Hawaii Employment Relations Act). As drafted, the bill would allow employees to unionize through majority sign-up. Presently, an employer does not have to recognize majority sign-up and can insist on a secret ballot election, resulting in numerous delays, threats, coercion and any other tactics to ensure union organizing drives fail. In fact, nationwide, over 86,000 workers have been fired over the past eight years for trying to unionize.

According to Kate Bronfenbrenner from Cornell University, "employers fire workers in a quarter of all campaigns, threaten workers with plant closings or outsourcing in half and employ mandatory one-on-one meetings where workers are threatened with job loss in two-thirds." Undeniably, employees are fearful of losing their jobs and therefore, vote no when the election finally occurs. This type of coercion needs to stop, and the employee free choice act can help prevent these hideous tactics from occurring.

Further, opponents claim the employee free choice act would take away the sanctity of the secret ballot and as a result oppose the bill. However, opponents should try and compare a union election to a political election. In a political election, candidates have equal access to the voters, whereas in a union election, the employers have access to the employees while the union does not. This is obviously not fair and a complete advantage to the employer. Additionally, the employee free choice act does not abolish the secret ballot election. Rather, S.B. 1621, SD2 empowers workers by giving them the ability to choose an established procedure in which workers sign cards to indicate their support for a union, or staging an HLRB election.

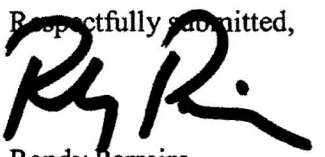
In addition, the other proposed additions to Chapter 377, HRS will prevent efforts by employers to stall negotiations indefinitely. The parties are required to make every reasonable effort to conclude and sign a collective bargaining agreement. If the parties are not successful after ninety days of negotiations, either party can request conciliation through the Hawaii Labor Relations Board. This will help thwart the numerous delays that employers use. In addition, as stated from SB 1621, SD2, "an employer who willfully or repeatedly commits unfair or prohibited practices that interfere with the statutory rights of employees or discriminate against employees for the exercise of

protected conduct shall be subject to a civil penalty not to exceed $20,000 for each violation." The civil penalty should hopefully protect the employee from employer abuses.

It is time to give middle class workers and their families a fair shake. Over the last eight years, workers have struggled to maintain parity with a rising cost of living; meanwhile, CEO's and other executives continue to receive multi-million dollar bonuses and large six to seven digit salaries. Even today, as many of these businesses have been bailed out by the Federal government, the working class continues to receive pay cuts. That is not the way to fix our ailing economy. It is time to pass the employee free choice act and level the playing field once and for all. Working class families will revitalize our economy and get us out of this economic crisis we are currently in. Passage of the employee free choice act is step in the right direction.

Thank you for the opportunity to testify in support of S.B. 1621, SD2.

Respectfully submitted,



Randy Perreira
President

EDWIN D. HILL
International President

LINDELL K. LEE
International
Secretary-Treasurer

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS®

The House of Representatives
Twenty-Fifth Legislature
Regular Session of 2009

Committee on Labor & Public Employment

Rep. Karl Rhodes, Chair
Rep. Kyle T. Yamashita, Vice Chair

Hearing: Friday March 20, 2009
Time: 9:30 a.m.
Place: Conference Room 309

Testimony of the International Brotherhood of Electrical Workers (IBEW)

Re: S.B 1621, SD2, Relating To Collective Bargaining

The current process under the NLRB for ensuring and protecting workers rights and freedom to form and join a union is badly broken and altogether useless for ensuring fairness and democracy.

I know that it's easy for me to identify with worker's difficult plight in unionizing because I see it and live it everyday. All of us in the labor movement regularly witness the horror and tragedy that these workers and their families face in attempting to unionize. This is why we are so passionate on this issue. If you haven't personally experienced what these workers must go through, it might be hard for you to comprehend why S.B 1621, SD2 is truly necessary.

So, allow me to attempt to frame it for you in such a way that will help you better understand and identify with the almost impossible obstacles workers face in forming a union.

All of you are elected and thus familiar with the process of elections and campaigning. But, I want to now share with you what the experience would be like if the current NLRB process was applied to your election.

- First off, you would always be considered the challenger and your opponent would always be the incumbent.

- Your opponent would not have to face election until you collected signed cards from 30% of the total people living in your district saying that they want an election. However, this is made even more difficult because you wouldn't be allowed in the district to get the cards signed.

- If you were some how able to get the necessary cards signed and force an election, you would have to do all your campaigning from outside your district, because neither you nor your aides would be allowed in the district.

-Your opponent would have unlimited TV time, including several hours a day of compulsory viewing time while you would be restricted to secret door to door canvassing.

- Your opponent could encourage everyone to wear his shirts and buttons and retaliate against those wearing your shirts and buttons.

- Your supporters would have to risk losing their jobs. Your opponent could fire one of your supporters in every precinct to send voters a message.

- Your opponent could prohibit your supporters from going to rallies to state their views.

- Should your opponent or his aides get caught threatening your supporters, they would only have to sign and post a letter, after the election, saying they won't do it again.

- Only your opponent would have access to the voters list.

- Your opponent could easily delay the election if he thinks that he'll do better later.

- The election would be held in your opponent's headquarters and voters would have to file by your opponents supporters as they vote.

- And, after all that, if you were miraculously still able to win, you wouldn't be able to take office because it would take years of litigation to enforce the election results.

Just imagine what it would be like and how difficult, if not impossible, for you to succeed.

No one would consider such an election process as this fair, just or democratic. Yet, this is exactly the process that workers must endure in order to gain union representation and recognition.

You can and should help change this ludicrous process by supporting S.B 1621, SD2.

Send a strong and clear message to those in this state, across the country and around the world that we as a state, value our people and will insist that they be treated with all fairness, dignity and respect in an environment clear from intimidation and harassment and will ensure that their right and freedom to join a union is truly protected.....This is the real democratic thing to do.

Thank you for the opportunity to provide testimony.

Harold J. Dias, Jr
International Representative
IBEW

International Brotherhood of Electrical Workers
LOCAL UNION NO. 1186 • Affiliated with AFL-CIO
1935 HAU STREET, ROOM 401 • HONOLULU, HI 96819-5003
TELEPHONE (808) 847-5341 • FAX (808) 847-2224

TESTIMONY SUPPORTING SB1621 SD2 RELATING TO COLLECTIVE BARGAINING

TO: **HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT (VIA FAX 586-6331)**

For Hearing on Friday, March 20, 2009, at 9:30 a.m., in Room 309

RE: SUPPORT FOR SB1621 SD2

Honorable Chair Rhoads, Vice Chair Yamashita, and House Committee Members,

My name is **Damien Kim**, and I am the Business Manager – Financial Secretary of the International Brotherhood of Electrical Workers Local Union 1186 representing over 3,500 members working in electrical construction, telecommunications, and Oceanic Cable. Our members include civil service employees at Pearl Harbor Shipyard, Kaneohe Marine Base and Hickam. IBEW Local 1186 also represents over 120 signatory electrical contractors that perform most of the electrical work in Hawaii.

SB1621 SD2 has been drafted to fix the problems and difficulties faced by workers who are regularly pressured by their employers against voting to join a union. This bill will set a level playing field and allow workers to decide fairly on union representation without threats and delays from their employers, who often take advantage of their employees due to their unequal power relationship.

Thank you for providing me with this opportunity to testify in strong support for SB1621 SD2.

Mahalo and aloha,

Damien Kim
Business Manager – Financial Secretary
International Brotherhood of
Electrical Workers, Local Union 1186

INTERNATIONAL LONGSHORE & WAREHOUSE UNION
LOCAL OFFICE • 451 ATKINSON DRIVE • HONOLULU, HAWAII 96814 • PHONE 949-4161
HAWAII DIVISION: 100 West Lanikaula Street, Hilo, Hawaii 96720 • OAHU DIVISION: 451 Atkinson Drive, Honolulu, Hawaii 96814
MAUI COUNTY DIVISION: 896 Lower Main Street, Wailuku, Hawaii 96793 • KAUAI DIVISION: 4154 Hardy Street, Lihue, Hawaii 96766

LOCAL 142

The House of Representatives
The Twenty-Fifth Legislature
Regular Session of 2009

Committee on Labor and Public Employment
Representative Karl Rhoads, Chair
Representative Kyle Yamashita, Vice Chair

DATE: Friday, March 20, 2009
TIME: 9:30 a.m.
PLACE: Conference Room 309
State Capitol
415 South Beretania Street

TESTIMONY OF THE INTERNATIONAL LONGSHORE & WAREHOUSE UNION LOCAL 142 ON S.B. 1621, S.D. 2 RELATING TO COLLECTIVE BARGAINING

This testimony on S.B. 1621, S.D. 2, is submitted on behalf of the International Longshore and Warehouse Union, Local 142 (ILWU). The ILWU represents approximately 20,000 private sector employees for the purpose of collective bargaining in a number of industries including agriculture, tourism and resorts, health care, and the general trades. We are in favor of Senate Bill No. 1621 which implements and promotes the right to organize for the purpose of collective bargaining as recognized in Article XIII of the Hawaii State Constitution by making certain amendments to the Little Wagner Act (chapter 377), and the Little Norris-LaGuardia Act (chapter 380). These changes are necessary to strengthen and expand the American middle class through restoration of the workers' freedom to organize and collectively bargain under our nation's labor laws.

As you may be aware the U.S. House of Representatives has recognized the critical need for labor law reform in America through the passage of the Employee Free Choice Act of 2007. A copy of Congressional Report No. 110-23 is attached hereto. See attachment 1. The report documents the vital role of labor unions to the creation of the American middle class (see pp. 13-15), the nature of the attacks on worker rights we have experienced in recent decades which has reduced the percentage of organized workers in the private sector to 8% (see pp. 8-10), and the economic consequence of a human rights crisis which has resulted (see pp. 8-13). The majority report also verifies the need for specific changes including increased penalties for violation of worker rights (see pp. 15-19), a majority sign-up certification process (see pp. 19-23), and for first time contract mediation and binding arbitration (see pp. 23-25). During the 2008 legislative session lawmakers in Hawaii also acknowledged the need for labor law reform in House Bill No. 2974, H.D. 2 which was adopted by both the House and Senate but vetoed by our Republican Governor (unfortunately).

Sections 2, 4, and 5 of this bill contain amendments to HRS chapter 377 (the Little Wagner Act) similar to the Employee Free Choice Act which is currently working its way through the U.S. Congress. As you know, chapter 377 was adopted in Hawaii in 1945, was modeled after the Wagner Act of 1935, and was responsible for extending collective bargaining to sugar, pineapple, and other workers in Hawaii who were exempt from the jurisdiction of the National Labor Relations Board (NLRB). See ILWU v. Ackerman, 82 F. Supp. 65, rev'd, 187 F.2d 860 (1948). The ILWU currently represents approximately 1,600 agricultural workers in 10 bargaining units in Hawaii, and chapter 377 applies to many of them and others who work for companies not engaged in interstate commerce sufficient to trigger NLRB

jurisdiction. Hawaii's workers need true freedom to join unions to strengthen and expand the middle class in this state. See attachment 2 (The Facts: What the Freedom to Join Unions Mean to America's Workers and the Middle Class).

Senate Bill No. 1621 also amends Hawaii's Little Norris-LaGuardia Act (HRS chapter 380) to implement and promote the constitutional right to engage in collective bargaining under Article XIII of the State Constitution. In 1950 the framers of Hawaii's constitution decided to afford state constitutional protection for the right to engage in collective bargaining following New York in 1939, Florida in 1944, Missouri in 1945, and New Jersey in 1947. See United Public Workers, AFSCME, Local 646, AFL-CIO v. Yogi, 101 Hawai`i 46, 51, 62 P.3d 189, 194 (2002). This was done, in part, to protect employees against judicial actions which rendered illegal protected concerted activities by employees under the common law. F. Frankfurter & N. Greene, The Labor Injunction at 27.

Sections 3 and 6 of this measure amend the Little Norris-LaGuardia Act to address court and legal developments which interfere and restrain employees from the free exercise of collective bargaining under the developing common law. Employees who join labor organizations need greater protections against judicial and court actions which do not respect the confidentiality of information provided to union negotiators and representatives during the course of negotiations and contract enforcement. Employee organizations must have a means of obtaining civil relief to collect dues from members and agency fee payers equally. We cannot continue to have trespass and nuisance laws enforced against union members and organizers who legitimately exercise their collective bargaining rights. Finally, we need a reasonable measure of protection from threats of law suits based on defamation and tort claims where union

members and officers are merely engaged in lawful collective bargaining activities.

The present draft of the bill contains an effective date of July 1, 2050. ILWU urges the committee to amend the bill to provide the bill will take affect upon its approval.

For the foregoing reasons we urge favorable action from you on Senate Bill No. 1621, S.D. 2.

110TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
110–23

EMPLOYEE FREE CHOICE ACT OF 2007

FEBRUARY 16, 2007.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GEORGE MILLER of California, from the Committee on Education and Labor, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 800]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and Labor, to whom was referred the bill (H.R. 800) to amend the National Labor Relations Act to establish an efficient system to enable employees to form, join, or assist labor organizations, to provide for mandatory injunctions for unfair labor practices during organizing efforts, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Employee Free Choice Act of 2007".

SEC. 2. STREAMLINING UNION CERTIFICATION.

(a) IN GENERAL.—Section 9(c) of the National Labor Relations Act (29 U.S.C. 159(c)) is amended by adding at the end the following:

"(6) Notwithstanding any other provision of this section, whenever a petition shall have been filed by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a majority of employees in a unit appropriate for the purposes of collective bargaining wish to be represented by an individual or labor organization for such purposes, the Board shall investigate the petition. If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative and that no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit, the Board shall not direct

59–006

an election but shall certify the individual or labor organization as the representative described in subsection (a).

"(7) The Board shall develop guidelines and procedures for the designation by employees of a bargaining representative in the manner described in paragraph (6). Such guidelines and procedures shall include—

(A) model collective bargaining authorization language that may be used for purposes of making the designations described in paragraph (6); and

(B) procedures to be used by the Board to establish the validity of signed authorizations designating bargaining representatives.".

(b) CONFORMING AMENDMENTS.—

(1) NATIONAL LABOR RELALTIONS BOARD.—Section 3(b) of the National Labor Relations Act (29 U.S.C. 153(b)) is amended, in the second sentence—

(A) by striking "and to" and inserting "to"; and

(B) by striking "and certify the results thereof," and inserting ", and to issue certifications as provided for in that section,".

(2) UNFAIR LABOR PRACTICES.—Section 8(b) of the National Labor Relations Act (29 U.S.C. 158(b)) is amended—

(A) in paragraph (7)(B) by striking ", or" and inserting "or a petition has been filed under section 9(c)(6), or"; and

(B) in paragraph (7)(C) by striking "when such a petition has been filed" and inserting "when such a petition other than a petition under section 9(c)(6) has been filed".

SEC. 3. FACILITATING INITIAL COLLECTIVE BARGAINING AGREEMENTS.

Section 8 of the National Labor Relations Act (29 U.S.C. 158) is amended by adding at the end the following:

"(h) Whenever collective bargaining is for the purpose of establishing an initial agreement following certification or recognition, the provisions of subsection (d) shall be modified as follows:

"(1) Not later than 10 days after receiving a written request for collective bargaining from an individual or labor organization that has been newly organized or certified as a representative as defined in section 9(a), or within such further period as the parties agree upon, the parties shall meet and commence to bargain collectively and shall make every reasonable effort to conclude and sign a collective bargaining agreement.

"(2) If after the expiration of the 90-day period beginning on the date on which bargaining is commenced, or such additional period as the parties may agree upon, the parties have failed to reach an agreement, either party may notify the Federal Mediation and Conciliation Service of the existence of a dispute and request mediation. Whenever such a request is received, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

"(3) If after the expiration of the 30-day period beginning on the date on which the request for mediation is made under paragraph (2), or such additional period as the parties may agree upon, the Service is not able to bring the parties to agreement by conciliation, the Service shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service. The arbitration panel shall render a decision settling the dispute and such decision shall be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties.".

SEC. 4. STRENGTHENING ENFORCEMENT.

(a) INJUNCTIONS AGAINST UNFAIR LABOR PRACTICES DURING ORGANIZING DRIVES.—

(1) IN GENERAL.—Section 10(l) of the National Labor Relations Act (29 U.S.C. 160(l)) is amended—

(A) in the second sentence, by striking "If, after such" and inserting the following:

"(2) If, after such"; and (B) by striking the first sentence and inserting the following:

"(1) Whenever it is charged—

"(A) that any employer—

"(i) discharged or otherwise discriminated against an employee in violation of subsection (a)(3) of section 8;

"(ii) threatened to discharge or to otherwise discriminate against an employee in violation of subsection (a)(1) of section 8; or

"(iii) engaged in any other unfair labor practice within the meaning of subsection (a)(1) that significantly interferes with, restrains, or coerces employees in the exercise of the rights guaranteed in section 7;

while employees of that employer were seeking representation by a labor organization or during the period after a labor organization was recognized as a representative defined in section 9(a) until the first collective bargaining contract is entered into between the employer and the representative; or

"(B) that any person has engaged in an unfair labor practice within the meaning of subparagraph (A), (B) or (C) of section 8(b)(4), section 8(e), or section 8(b)(7);

the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred.".

(2) CONFORMING AMENDMENT.—Section 10(m) of the National Labor Relations Act (29 U.S.C. 160(m)) is amended by inserting "under circumstances not subject to section 10(l)" after "section 8".

(b) REMEDIES FOR VIOLATIONS.—

(1) BACKPAY.—Section 10(c) of the National Labor Relations Act (29 U.S.C. 160(c)) is amended by striking "*And provided further,*" and inserting "*Provided further,* That if the Board finds that an employer has discriminated against an employee in violation of subsection (a)(3) of section 8 while employees of the employer were seeking representation by a labor organization, or during the period after a labor organization was recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract was entered into between the employer and the representative, the Board in such order shall award the employee back pay and, in addition, 2 times that amount as liquidated damages: *Provided further,*".

(2) CIVIL PENALTIES.—Section 12 of the National Labor Relations Act (29 U.S.C. 162) is amended—

(A) by striking "Any" and inserting "(a) Any"; and

(B) by adding at the end the following:

"(b) Any employer who willfully or repeatedly commits any unfair labor practice within the meaning of subsections (a)(1) or (a)(3) of section 8 while employees of the employer are seeking representation by a labor organization or during the period after a labor organization has been recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract is entered into between the employer and the representative shall, in addition to any make-whole remedy ordered, be subject to a civil penalty of not to exceed $20,000 for each violation. In determining the amount of any penalty under this section, the Board shall consider the gravity of the unfair labor practice and the impact of the unfair labor practice on the charging party, on other persons seeking to exercise rights guaranteed by this Act, or on the public interest.".

PURPOSE

H.R. 800, the Employee Free Choice Act of 2007, seeks to strengthen and expands the American middle class by restoring workers' freedom to organize and collectively bargain under the National Labor Relations Act (NLRA). The bill reforms the NLRA to provide for union certification through simple majority sign-up procedures, first contract mediation and binding arbitration, and tougher penalties for violations of workers' rights during organizing and first contract drives. The Employee Free Choice Act of 2007 furthers the long-standing policy of the United States to encourage the practice of collective bargaining and to protect 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.

COMMITTEE ACTION

108TH CONGRESS

The Employee Free Choice Act was first introduced during the 108th Congress. On November 21, 2003, Representative George Miller (D–CA), then Ranking Member of the Committee, introduced

H.R. 3619. A companion bill, S. 1925, was introduced in the Senate by Senator Edward M. Kennedy (D–MA) at the same time. H.R. 3619 garnered 209 cosponsors, both Democratic and Republican. It was referred to the Committee on Education and the Workforce and the Subcommittee on Employer-Employee Relations.

Neither the full Committee nor the Subcommittee took any direct action on the bill. The Subcommittee, however, conducted several hearings which either featured references to the Employee Free Choice Act or raised issues related to the Employee Free Choice Act—particularly union organizing issues. On April 22, 2004, the Subcommittee conducted a hearing on "Developments in Labor Law: Examining Trends and Tactics in Labor Organization Campaigns." On May 10, 2004, the Subcommittee conducted a field hearing in Round Rock, Texas, on "Examining Union 'Salting' Abuses and Organizing Tactics that Harm the U.S. Economy." And on September 30, 2004, the Subcommittee held a hearing on "H.R. 4343, The Secret Ballot Protection Act of 2004."

109TH CONGRESS

On April 19, 2005, the Employee Free Choice Act was re-introduced in the 109th Congress as H.R. 1696 by Representative George Miller, then Ranking Member of the Committee, joined by Representative Peter King (R–NY) as a lead co-sponsor. At the same time, Senator Kennedy introduced its Senate companion, S. 842, joined by Senator Arlen Specter (R–PA) as a lead co-sponsor. In the House of Representatives, the Employee Free Choice Act garnered 214 co-sponsors, both Democratic and Republican. H.R. 1696 was referred to the Committee on Education and the Workforce and the Subcommittee on Employer-Employee Relations.

Neither the full Committee nor the Subcommittee took any action on the bill. Democratic Members of the Committee, however, conducted field forums on the Employee Free Choice Act. For example, on June 13, 2005, Representative George Miller, then-Ranking Member on the full Committee, joined Representative Rosa DeLauro (D–CT) in New Haven, Connecticut, for a field forum on local organizing issues and the Employee Free Choice Act. On June 27, 2005, Representative Robert Andrews (D–NJ), then-Ranking Member on the Subcommittee on Employer-Employee Relations, conducted a field forum on local organizing issues and the Employee Free Choice Act in Trenton, New Jersey, and was joined by other Members of the New Jersey congressional delegation, including Committee Members Donald Payne (D–NJ) and Rush Holt (D–NJ). On April 20, 2006, Representative George Miller conducted another field forum on the Employee Free Choice Act in Sacramento, California. There, he was joined by Representative Doris Matsui (D–CA). In each of these forums, Members of Congress heard from workers attempting to organize unions and expert witnesses on organizing and collective bargaining rights.

110TH CONGRESS

First Economic Hearing: The State of the Middle Class

On January 31, 2007, the Committee on Education and Labor conducted its first full Committee hearing of the new Congress. This hearing, "Strengthening America's Middle Class: Evaluating

the Economic Squeeze on America's Families," provided the Committee with an overview of the state of the American middle class. The Committee heard testimony describing the scope and causes of the middle class squeeze, i.e., the combination of downward pressures on wages and benefits and the rising costs of basic family necessities, such as energy, housing, health care, and education. Witnesses included Professor Jacob Hacker, a professor and author at Yale University; Ms. Rosemary Miller, a flight attendant and middle class mother; Professor Eileen Appelbaum, the Director of the Center for Women and Work at Rutgers University; Ms. Diana Furchtgott-Roth, the Director of the Center for Employment Policy at the Hudson Institute; Ms. Kellie Johnson, President of ACE Clearwater Enterprises, Inc., and Dr. Christian Weller, a senior economist at the Center for American Progress.

Second Economic Hearing: Economic Solutions to the Middle Class Squeeze

On February 7, 2007, the Committee on Education and Labor conducted its second full Committee hearing of the new Congress. This hearing, "Strengthening America's Middle Class: Finding Economic Solutions to Help America's Families," served as the second part of the January 31 hearing. In this hearing, building on what was learned about the state of the middle class, Members and witnesses explored what could be done to alleviate the middle class squeeze and strengthen and expand the middle class. Witnesses testified about the need for fairer trade policies, stronger protections for workers' fundamental rights, more rigorous training and education for a high skills, high wage economy, and a greater commitment to comprehensive health care reform. These witnesses included Mr. Richard L. Trumka, Executive Vice President of the AFL–CIO; Dr. Judy Feder, Dean of the Georgetown Public Policy Institute at Georgetown University; Mr. William T. Archey, President and Chief Executive Officer of AeA; and Dr. Lynn A. Karoly, senior economist at the RAND Corporation.

Introduction of the Employee Free Choice Act

On February 5, 2007, the Employee Free Choice Act, as H.R. 800, was re-introduced in the 110th Congress by Chairman George Miller, joined by 230 original co-sponsors, including Representative Peter King (R–NY) as a lead co-sponsor. In the following days, the number of co-sponsors increased to 234, including both Democratic and Republican co-sponsors.

Subcommittee Hearing on the Employee Free Choice Act

On February 8, 2007, the Subcommittee on Health, Employment, Labor, and Pensions (HELP), led by Chairman Robert Andrews (D–NJ), conducted a legislative hearing on H.R. 800, "Strengthening America's Middle Class through the Employee Free Choice Act." This hearing featured testimony from two panels of witnesses. The first panel consisted of three workers who have attempted to form unions in their workplaces, namely, Mr. Keith Ludlum, an employee of Smithfield Foods in Tar Heel, North Carolina; Mr. Ivo Camilo, a retired employee of Blue Diamond Growers in Sacramento, California; and Ms. Teresa Joyce, an employee of Cingular Wireless in Lebanon, Virginia; as well as a former union

organizer who is currently a union avoidance consultant for employers, Ms. Jennifer Jason, founder of Six Questions Consulting LLC and formerly with UNITE–HERE. These witnesses discussed their experiences in attempting to organize unions. The second panel consisted of two labor lawyers, a labor economist, and a political scientist, namely, Ms. Nancy Schiffer, associate general counsel at the AFL–CIO; Mr. Charles Cohen, a former member of the National Labor Relations Board, speaking on behalf of the U.S. Chamber of Commerce; Professor Harley Shaiken, a labor economist at the University of California-Berkeley; and Professor Gordon Lafer, a political scientist at the University of Oregon. These witnesses discussed the bill.

Full Committee Mark-Up of the Employee Free Choice Act

On February 14, 2007, the Committee on Education and Labor met to markup H.R. 800, the Employee Free Choice Act. The Committee adopted by voice vote an amendment in the nature of a substitute offered by Mr. Andrews. Thirteen other amendments were offered and debated. None of those amendments were adopted. The Committee voted to favorably report H.R. 800, by a vote of 26–19.

SUMMARY

H.R. 800, the Employee Free Choice Act, consists of three basic provisions:

1. The majority sign-up certification provision provides for certification of a union as the bargaining representative of the National Labor Relations Board finds that a majority of employees in an appropriate unit has signed valid authorizations designating the union as its bargaining representative. This provision requires the Board to develop model authorization language and procedures for establishing the validity of signed authorizations.
2. The first contract mediation and arbitration provision provides that if an employer and a union are engaged in bargaining for their first contract and are unable to reach agreement within 90 days, either party may refer the dispute to the Federal Mediation and Conciliation Service (FMCS) for mediation. If the FMCS has been unable to bring the parties to agreement after 30 days of mediation, the dispute will be referred to arbitration and the results of the arbitration shall be binding on the parties for two years. Time limits may be extended by mutual agreement of the parties.
3. The penalties provision makes the following new provisions applicable to violations of the NLRA committed by employers against employees during any period while employees are attempting to organize a union or negotiate a first contract agreement:
    a. Just as the NLRB is required to seek a federal court injunction against a union whenever there is reasonable cause to believe that the union has violated the secondary boycott prohibitions of the NLRA, the NLRB must seek a federal court injunction against an employer whenever there is reasonable cause to believe that the employer has discharged or discriminated against employees, threatened to discharge or discriminate against employees, or engaged

in conduct that significantly interferes with employee rights during an organizing or first contract drive. Likewise, this provision authorizes the courts to grant temporary restraining orders and other appropriate injunctive relief.

b. An employer must pay three times backpay when an employee is unlawfully discharged or discriminated against during an organizing or first contract drive.

c. The NLRB may impose civil fines of up to $20,000 per violation against employers found to have willfully or repeatedly violated employees' rights during an organizing or first contract drive.

COMMITTEE VIEWS

The Committee on Education and Labor of the 110th Congress is committed to strengthening and expanding the American middle class. The middle class is the backbone of this country's strong economy and vibrant democracy. A strong middle class is critical to the long-term prosperity and stability of the United States.

The Employee Free Choice Act of 2007 is—in the final analysis—about saving the American Dream for millions of hard working families who struggle every day to pay for the basics, pay for health care when there is a family illness, to build a nest egg for their future, and to get their children to college in the face of skyrocketing college costs.

To this challenge, Congress must act decisively on behalf of millions of hard working middle class workers who see the American Dream slipping from their reach.

The Employee Free Choice Act is about giving workers basic dignity and respect in their workplace—a tradition that is deeply rooted in our nation's history. It is about allowing employees to make their own decision about whether they want to bargain together—to advocate for fairer wages, benefits, and working conditions—without the threat or fear of harassment and retribution and fear of losing their livelihood.

A HUMAN RIGHTS CRISIS

H.R. 800 addresses a human rights crisis that is a leading cause of the middle class squeeze. The freedom to form or join a labor union and engage in collective bargaining is an internationally-recognized human right. In the United States, the freedom of association is enshrined in the First Amendment of the Bill of Rights. While this freedom is often associated with political ventures, it is a long-standing American principle and tradition that working people may join together to improve their economic circumstances. The most explicit recognition of this principle for private sector workers in federal law is the 1935 Wagner Act, also known as the National Labor Relations Act (NLRA).[1]

Section 1 of the NLRA declares "it is the policy of the United States" to "encourage the practice and procedure of collective bargaining and to protect the exercise by workers of full freedom of association, self-organizing and designation of representatives of their

[1] 29 U.S.C. 151 et seq.

own choosing, for the purpose of negotiating the terms and conditions of their employment, or other mutual aid or protection."[2]

The NLRA is a relatively straightforward law. Section 7 of the NLRA establishes the fundamental rights of workers to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . ."[3] Section 8 lays out a variety of prohibitions for both employer and union behavior.[4] For example, employers may not interfere with, coerce, intimidate, or discriminate against employees in the exercise of their Section 7 rights. The NLRA also requires employers to bargain in good faith with their employees' exclusive bargaining representative, when a union is voluntarily recognized as such by the employer or certified as such by the National Labor Relations Board (NLRB), the agency which the NLRA establishes to administer and enforce the NLRA.[5]

WORKERS RIGHTS ARE UNDER ATTACK

For more than 70 years, workers' freedom to organize and collectively bargain has depended upon the effectiveness of the NLRA. Today, the NLRA is ineffective, and American workers' freedom to organize and collectively bargain is in peril everyday as a result.

The numbers are staggering. Every 23 minutes, a worker is fired or otherwise discriminated against because of his or her union activity.[6] According to NLRB Annual Reports between 1993 and 2003, an average of 22,633 workers per year received back pay from their employers.[7] In 2005, this number hit 31,358.[8] A recent study by the Center for Economic and Policy Research found that, in 2005, workers engaged in pro-union activism "faced almost a 20 percent chance of being fired during a union-election campaign."[9]

The number of workers awarded backpay by the NLRB also reveals a worsening trend. The NLRB provides backpay to workers who are illegally fired, laid off, demoted, suspended, denied work, or otherwise discriminated against because of their union activity. In 1969 a little over 6,000 workers received backpay because of illegal employer actions.[10] That number has risen by 500 percent although the percentage of the private sector workforce that is unionized has declined over the same time period from nearly 30 percent to just 7.4 percent.[11] In the 1970s, 1-in-100 pro-union workers ac-

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[2] 29 U.S.C. 151.
[3] 29 U.S.C. 157.
[4] 29 U.S.C. 158(a) and (b).
[5] 29 U.S.C. 158(d).
[6] American Rights at Work website, at *http://www.americanrightsatwork.org/resources/23cite.cfm.*
[7] Strengthening America's Middle Class through the Employee Free Choice Act, Hearing Before the Subcommittee on Health, Employment, Labor & Pensions, 110th Cong., 1st Sess. (2007) (written testimony of Harley Shaiken, at 1, n.1) [hereinafter Shaiken Testimony].
[8] Shaiken Testimony, at 1.
[9] John Schmitt & Ben Zipperer, "Dropping the Ax: Illegal Firings During Union Election Campaigns," Center for Economic and Policy Research (January 2007), at 3 [hereinafter Schmitt & Zipperer].
[10] Strengthening America's Middle Class through the Employee Free Choice Act, Hearing Before the Subcommittee on Health, Employment, Labor & Pensions, 110th Cong., 1st Sess. (2007) (written testimony of Nancy Schiffer, at 3) [hereinafter Schiffer Testimony].
[11] Michele Amber, "Union Membership Rates Dropped in 2006 to 12 Percent; Manufacturing Leads the Way," BNA Daily Labor Report (January 26, 2007).

tively involved in an organizing drive was fired. Today, that number has doubled to about 1-in-53.[12]

The anti-union activities of employers have become far more sophisticated and brazen in recent history. Today, 25 percent of employers illegally fire at least one worker for union activity during an organizing campaign.[13] Additionally, 75 percent of employers facing a union organizing drive hire anti-union consultants.[14] During an organizing drive, 78 percent of employers force their employees to attend one-on-one meetings against the union with supervisors, while 92 percent force employees to attend mandatory, captive audience anti-union meetings.[15] More than half of all employers facing an organizing drive threaten to close all or part of their plants.[16]

A 2005 study that focused on organizing campaigns in the Chicago metropolitan area found that 30 percent of employers fired workers engaging in union activities; 49 percent of employers threatened to close or relocate if the union won; and 82 percent of employers hired anti-union consultants to assist with their campaign against the union.[17]

The "union avoidance" industry—comprised of anti-union consultants who help employers defeat organizing drives or encourage the decertification of existing unions—is "worth several hundred million dollars per year."[18] Companies intent on busting organizing drives pay top dollar to anti-union consulting and law firms.[19] These consultants wage highly sophisticated campaigns against workers trying to form a union. These campaigns may include such tactics as "captive speeches, employee interrogations, one-on-one meetings between employees and supervisors, 'vote no' committees, antiunion videos, threats of plant closures, and discriminatory discharges."[20] A rare light was shed on the "union avoidance" industry in a 2004 New York Times expose. According to the article, the battery company EnerSys had paid the anti-union law firm Jackson Lewis $2.7 million for its services—during which time the company, according to a federal complaint containing some 120 unfair labor practices, fired union leaders, assisted the anti-union campaign, improperly withdrew recognition from the union, and moved production to nonunion plants in retaliation for workers' union activity. EnerSys later accused Jackson Lewis of malpractice for its advice, which Jackson Lewis denied.[21]

This human rights crisis in the United States was highlighted in a 2000 Human Rights Watch report entitled "Unfair Advantage:

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[12] Schmitt & Zipperer, at 3.

[13] Kate Bronfenbrenner, "Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages and Union Organizing," (September 6, 2000).

[14] Id.

[15] Id.

[16] Id.

[17] Chirag Mehta & Nik Theodore, "Undermining the Right to Organize: Employer Behavior During Union Representation Campaigns," A Report for American Rights at Work (December 2005), at 5.

[18] John Logan, "The Union Avoidance Industry in the United States," British Journal of Industrial Relations (December 2006), at 651.

[19] For example, the Republican witness, presented as a former UNITE–HERE organizer in the February 8, 2007, HELP Subcommittee hearing on the Employee Free Choice Act, was paid $225,000 in one year, plus expenses, by Cintas, a company she formerly was trying to organize but had since taken on as a client for her union avoidance consulting firm.

[20] John Logan, "The Fine Art of Union Busting," New Labor Forum (Summer 2004), at 78.

[21] Steven Greenhouse, "How Do You Drive Out a Union? South Carolina Factory Provides a Textbook Case," The New York Times (December 14, 2004).

Workers' Freedom of Association in the United States under International Human Rights Standards," Human Rights Watch warned: "Workers' freedom of association is at risk in the United States, with yet untold consequences for societal fairness."[22] According to the report:

> A culture of near-impunity has taken shape in much of U.S. labor law and practice. Any employer intent on resisting workers' self-organization can drag out legal proceedings for years, fearing little more than an order to post a written notice in the workplace promising not to repeat unlawful conduct. Many employers have come to view remedies like back pay for workers fired because of union activity as a routine cost of doing business, well worth it to get rid of organizing leaders and derail workers' organizing efforts.[23]

In her testimony before the HELP Subcommittee on February 8, 2007, union-side labor lawyer Nancy Schiffer echoed this reality:

> At some point in my career . . . I could no longer tell workers that the [NLRA] protects their right to form a union. Because I knew that, despite the wording of the statute, in practice it does not. And I knew that they would have to be heroes to survive their organizing effort, just because they wanted to form a union so that they could bargain for a better life.[24]

The ineffectiveness of the NLRA has put workers' fundamental freedoms at risk. These developments have spurred a human rights crisis with real economic consequences for America's middle class.

THE ECONOMIC CONSEQUENCES OF THE HUMAN RIGHTS CRISIS

The rise of workers' freedom to organize and collectively bargain dramatically expanded the middle class in 20th Century America. The decline of these freedoms has put the middle class at risk. Workers' inability to join together and bargain for something better, or protect what they already have, has in part manifested itself in the middle class squeeze.

The first two full Committee hearings of the 110th Congress examined the middle class squeeze and explored solutions to it. Witnesses in the first hearing, "Strengthening America's Middle Class: Evaluating the Economic Squeeze on America's Families," held on January 31, 2007, described the state of the middle class.

The middle class is less economically secure today than 30 years ago, as economic burdens and risks have shifted from corporate or government insurance programs to individuals and families. Witness Dr. Jacob Hacker, a professor of political science at Yale University and author of The Great Risk Shift, explained: "Over the last generation, we have witnessed a massive transfer of economic risk from broad structures of insurance, whether sponsored by the corporate sector or by government, onto the fragile balance sheets

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[22] "Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards," Human Rights Watch report (August 2000) [hereinafter Human Rights Watch Report].

[23] Id.

[24] Schiffer Testimony, at 1.

of American families."[25] Dr. Hacker presented research revealing a measurable increase in insecurity—not just a "growing gap between the rungs of our economic ladder" but a "growing risk of slipping from the ladder itself." For example, the instability of family incomes has increased dramatically since the late 1960s. "You can be perfectly average—with an average income, an average-sized family, an average likelihood of losing your job or becoming disabled—and you're still two-and-a-half times as likely to see your income plummet as an average person was thirty years ago," explained Dr. Hacker. Personal bankruptcy filings have risen from less than 300,000 in 1980 to more than 2 million in 2005. The share of households seeing foreclosures on their homes has increased 500 percent since the early 1970s. Americans are burdened by personal debt, with the personal savings rate falling from approximately one-tenth of disposable income to virtually zero between the early 1970s and today. Meanwhile, the American middle class has been losing its access to employer-provided health insurance and guaranteed pensions. This insecurity "strikes at the very heart of the American Dream" but also acts as a drag on the economy in general. Individuals who feel insecure in their economic position are less likely to take on additional risks—such as career changes, new training and education, or entrepreneurial endeavors—which could benefit the economy overall.

These points were supported by witness Dr. Christian Weller, a senior economist at the Center for American Progress.[26] He also presented research which found a growing level of financial insecurity among America's middle class families. For example, according to Dr. Weller: "A substantially smaller share of typical dual income couples between the ages of 35 and 54 who earn between $18,500 and $88,030 a year—those in the middle 60 percent of income distribution—were prepared for an emergency in 2004 (the last year complete data was available) than in 2001." Such emergencies might include the sudden unemployment of a breadwinner or the sudden medical emergency of a family member. Dr. Weller also explained: "One of the foremost reasons for the erosion in middle class economic security is that families face a comparatively weak labor market despite a growing economy." His research showed that, for the first time in any economic recovery, the initial stages of the most recent economic "recovery," beginning in November 2001, were marked by a sustained period of job loss. Between 2000 and 2005, the share of people without any health insurance increased from 14.2 percent to 15.9 percent, and the share of people with employer-provided health insurance decreased from 63.6 percent to 59.5 percent. These structural changes pose an increasing threat to the middle class way of life.

Today's economy is imbalanced. Witness Dr. Eileen Appelbaum, Director of the Center for Women and Work at Rutgers University, testified that working people are not receiving their fair share of the wealth that has been created by economic growth and increased

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[25] Strengthening America's Middle Class: Evaluating the Economic Squeeze on America's Families, Hearing Before the Committee on Education & Labor, 110th Cong., 1st Sess. (2007) (written testimony of Jacob Hacker) [hereinafter Hacker Testimony].

[26] Strengthening America's Middle Class: Evaluating the Economic Squeeze on America's Families, Hearing Before the Committee on Education & Labor, 110th Cong., 1st Sess. (2007) (written testimony of Christian Weller) [hereinafter Weller Testimony].

productivity.[27] She explained: "American workers today produce 70 percent more goods and services than they did at the end of the 1970s. . . . The overwhelming majority of American families haven't shared fairly in this bounty. Workers' pay and benefits have lagged far behind the increase in productivity." Her research pointed out that, since the start of 2001, an 18 percent increase in productivity has been accompanied by only a 3 percent increase in the average real hourly wages of workers, an increase "dwarfed by the increases in corporate profits and in the incomes of the very richest Americans." Dr. Appelbaum suggested a number of prescriptions for tackling the middle class squeeze, including the Employee Free Choice Act. She explained: "Workers need a greater voice at work and the right to form unions if they so desire."

Witness Rosemary Miller, a flight attendant and mother, told the Committee her personal story of the middle class squeeze.[28] After her employer declared bankruptcy, she saw "drastic wage and benefit reductions." She said: "I am now working longer and longer days as well as having to spend more and more time away from home. I have had to miss some of my daughters' school events that I vowed I would never miss because now I have to work longer in order to keep food on the table and a roof over our heads. But not only am I working longer; I'm earning less. My pension has been frozen. My benefits have been reduced." She explained: "We are asking for livable wages, a home that we own, affordable health care, comfortable retirement security, and reasonable means to provide for our children's college costs. It is obscene that in this country, among all others, it is such a struggle to simply live decently."

The Committee's second economic hearing, "Strengthening America's Middle Class: Finding Economic Solutions for America's Families," held on February 7, 2007, looked at a number of economic solutions to the middle class squeeze. All of these solutions complemented one another. For example, one solution forwarded at the hearing was the Innovation Agenda. Better training and education to ensure that workers have sufficient skills and knowledge for a higher-tech economy are necessary but not by themselves sufficient for tackling the middle class squeeze. Better training and education via the Innovation Agenda will ensure that qualified workers are available to fill the jobs of today and tomorrow. Without more, however, there is no guarantee that those jobs—whether service, manufacturing, or high-tech sector jobs—will be middle-class family-supporting jobs. To make those jobs good jobs, workers must be given a fair playing field on which to compete globally and a fair playing field on which to bargain for better wages, benefits, and working conditions. In this regard, the Committee heard testimony on the need for fairer trade practices to allow American workers and business to compete on a global scale and stronger enforcement of workers' rights at home. Finally, the middle class squeeze is not fully addressed without solving the health care crisis—both the coverage crisis and the cost crisis. Testimony was also heard on policy proposals in this area.

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[27] Strengthening America's Middle Class: Evaluating the Economic Squeeze on America's Families, Hearing Before the Committee on Education & Labor, 110th Cong., 1st Sess. (2007) (written testimony of Eileen Appelbaum) [hereinafter Appelbaum Testimony].

[28] Strengthening America's Middle Class: Evaluating the Economic Squeeze on America's Families, Hearing Before the Committee on Education & Labor, 110th Cong., 1st Sess. (2007) (written testimony of Rosemary Miller) [hereinafter Miller Testimony].

The Employee Free Choice Act featured prominently as a key solution to the middle class squeeze in this hearing. Witness Richard L. Trumka, Executive Vice President of the AFL–CIO, testified: "The best opportunity for working men and women to get ahead economically is to unite with their co-workers to bargain with their employers for better wages and benefits."[29] He pointed out that unionized workers earn 30 percent more than non-union workers, are 62 percent more likely to have employer-provided health care coverage, and are four times more likely to have guaranteed defined benefit pensions. According to Mr. Trumka, while nearly 60 million workers say they would join a union if they could, the vast majority have not because of a broken system for forming unions and collective bargaining that does not protect workers' fundamental rights. On behalf of the AFL–CIO, Mr. Trumka called specifically for Congress to pass the Employee Free Choice Act. He explained: "This legislation would represent an enormous step toward restoring balance between workers and their employers and helping repair the ruptured productivity-wage relationship."

UNIONS AND THE MIDDLE CLASS

The link between the Employee Free Choice Act and new hope for a more vibrant American middle class is evident in the numbers. By every measure, workers who join together to bargain for better wages, benefits, and working conditions do indeed receive better wages, benefits, and working conditions. This "union difference" is confirmed by the Bureau of Labor Statistics. Unionized workers' median weekly earnings are 30 percent higher than nonunion workers'.[30] This wage advantage is even more pronounced among women (31 percent union wage advantage), African Americans (36 percent union wage advantage), and Latinos (46 percent union wage advantage). Eighty percent of unionized workers have employer-provided health insurance, while only 49 percent of nonunion workers do. Sixty-eight percent of unionized workers have guaranteed pensions under a defined benefit plan, while only 14 percent of nonunion workers do. Sixty-two percent of unionized workers have the protection of short-term disability benefits, while only 35 percent of nonunion workers do. Unionized workers have, on average, 15 days of paid vacation—time that can be taken to spend with family—compared to only 11.75 average days of paid vacation for nonunion employees. Unionized workers also almost invariably have the protection of just cause employment, while nonunion workers are typically at-will employees, open to firing or layoff for any legal reason or no reason at all.

Unions, however, do not only benefit unionized workers. Strong unions set industry-wide standards that benefit workers across an industry, regardless of their union or nonunion status. Moreover, the threat of unionization often leads employers to attempt to match or approach union pay and benefit scales in order to discour-

[29] Strengthening America's Middle Class: Finding Economic Solutions for America's Families, Hearing Before the Committee on Education & Labor, 110th Cong., 1st Sess. (2007) (written testimony of Richard Trumka) [hereinafter Trumka Testimony].

[30] This and subsequent statistics in this paragraph are attributed to the following sources: U.S. Department of Labor, Bureau of Labor Statistics, Union Members in 2006 (January 25, 2007); U.S. Department of Labor, Bureau of Labor Statistics, National Compensation Survey: Employee Benefits in Private Industry in the United States (March 2006); Economic Policy Institute; Employee Benefits Research Institute (May 2005).

age unionization. A recent study found that, for example, a high school graduate who is not even a union worker but whose industry is at least 25 percent unionized will be paid 5 percent more than similar workers in less organized industries.[31] A 2002 study found that "more than half of the decline in the average wage paid to workers with a high school education or less can be accounted for by the decline in union density."[32] A 1999 study found that the drop in union density explained about 20 percent of the decline in the percentage of workers receiving employer-provided health insurance between 1983 and 1997.[33] A 2005 report recently explained that "further erosion of unionization is likely to coincide with an overall erosion in the percentage of workers with employment-based health benefits."[34]

The union difference extends into other areas as well. The rise in wage inequality in the U.S., particularly among men, has been linked to de-unionization.[35] A 2004 study on workplace hazards produced findings suggesting that unions "could reduce job stress by giving workers the voice to cope effectively with job hazards."[36] Unions improve product or service quality. For example, a 2004 paper revealed that "[a]fter controlling for patient and hospital characteristics . . . hospitals with unionized R.N.'s have 5.5% lower heart-attack mortality than do non-union hospitals."[37] Moreover, unions have been found to increase overall productivity.[38]

Unions, as the only organizations explicitly representing workers qua workers, have been instrumental in building and preserving nationwide and statewide systems of social insurance and worker protections, such as workers' compensation and unemployment insurance, occupational safety and health standards, and wage and hour laws such as the minimum wage, the 40-hour workweek, and overtime premium pay.[39] All Americans reap the benefits of these laws and programs, regardless of their union or nonunion status.

Many of these points were laid out in the testimony of Professor Harley Shaiken at the February 8, 2007, HELP Subcommittee hearing on the Employee Free Choice Act. As Professor Shaiken explained: "[D]eclining unions fuel 'the Great Disconnect'—rising productivity decoupled from wages."[40] But Professor Shaiken went a step further. In his analysis, he found that "more robust unions" not only stem the middle class squeeze but "contribute to a 'High

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[31] Lawrence Mishel (with Matthew Walters), "How Unions Help All Workers," Economic Policy Institute Briefing Paper (August 2003), at 1 [hereinafter Mishel].

[32] Henry S. Farber, "Are Unions Still a Threat? Wages and the Decline of Unions, 1973–2001," Princeton University Working Paper (2002), at 1.

[33] Thomas C. Buchmueller, John DiNardo, & Robert G. Valletta, "Union Effects on Health Insurance Provision and Coverage in the United States," San Francisco Federal Reserve Bank (1999).

[34] Paul Fronstin, "Union Status and Employment-Based Benefits," EBRI Notes (May 2005).

[35] David Card, Thomas Lemieux, and W. Craig Riddell, "Unionization and Wage Inequality: A Comparative Study of the U.S., U.K., and Canada," NBER Working Paper (February 2003).

[36] John E. Baugher & J. Timmons Roberts, "Workplace Hazards, Unions & Coping Styles," Labor Studies Journal (Summer 2004).

[37] Michael Ash & Jean Ann Seago, "The Effect of Registered Nurses' Unions on Heart-Attack Mortality," Industrial and Labor Relations Review (April 2004), at 422–442. See also Saul A. Rubenstein, "The Impact of Co-Management on Quality Performance: The Case of the Saturn Corporation," Industrial and Labor Relations Review (January 2000).

[38] Christos Doucouliagos & Patrice Laroche, "The Impact of U.S. Unions on Productivity: A Bootstrap Meta-analysis," Proceedings of the Industrial Relations Research Association (2004); and "What Do Unions Do to Productivity: A Meta-Analysis," Industrial Relations (October 2003). For an earlier study, see Charles Brown & James L. Medoff, "Trade Unions in the Production Process," Journal of Political Economy (June 1978).

[39] Mishel, at 11–14.

[40] Shaiken Testimony, at 2.

Road Competitiveness'—a more broadly shared prosperity that benefits working families as well as consumers and shareholders."[41]

In his testimony, Professor Shaiken cited a number of studies showing how "unionization and productivity often go hand-in-hand." For example, greater fairness on the job and wages that reflect a company's success lead to more motivated employees. Unions foster "greater commitment and information-sharing" between employees and management. A 1984 study found that approximately 20 percent of the union productivity effect resulted from lower turnover in unionized firms. This is not difficult to understand. As Professor Shaiken pointed out: "Lower turnover means lower training costs, and the experience of more seasoned workers translates into higher productivity and quality." On a microeconomic level, Professor Shaiken cited a number of companies as examples of high-road competitiveness, where an employer respected workers' rights, paid higher compensation, and achieved higher levels of productivity and quality. These examples included the New United Motor Manufacturing plant, Costco, Cingular Wireless, and the relationships between Culinary Local 226 and the hospitality industry in Las Vegas.[42]

Professor Shaiken concluded:

> The [Employee Free Choice Act] restores needed balance to a process that has become increasingly dysfunctional. As we have seen, denying workers the right to form a union has important consequences for the economy and the political process. Workers' freedom to form unions is, and should be considered, a fundamental human right. All Americans lose—in fact, democracy itself is weakened—if the right to unionize is formally recognized but undermined in practice. Strengthening free choice in the workplace lays the basis for insuring a more prosperous economy and a healthier society.[43]

On every score, the collective bargaining process has produced better wages, benefits, and quality of life for America's working families. The decline in collective bargaining—in workers' ability to join together to press for a better deal—mirrors the tightening squeeze on the middle class. That decline also mirrors a rising tide of employer disregard for the law and for the fundamental rights of workers.

THE NEED FOR THE EMPLOYEE FREE CHOICE ACT

H.R. 800, the Employee Free Choice Act, will help lift the middle class and help working people get ahead by restoring their freedom to organize and bargain for better wages, benefits, and working conditions. It does so by strengthening the nation's labor law in three fundamental ways.

THE NEED FOR INCREASED PENALTIES FOR VIOLATIONS OF WORKERS' RIGHTS

Current penalties for employers who violate the NLRA are insufficient to enforce compliance with the law. Instead, many employ-

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[41] Id.
[42] Id. at 5–8.
[43] Id. at 8–9.

ers treat those penalties as a mere cost of doing business to prevent their company from being unionized. When an employer fires a worker for his pro-union activities, the employee must file a charge with the NLRB. After what are often many years of appeals by the employer, the employee may finally prevail. Employers are only required to reinstate the employee, post a notice promising to never do it again, and pay the employee back wages minus what the worker earned or should have earned in the interim.[44] In 2003, the average backpay amount was a mere $3800.[45] While nearly cost-free, illegal firings are extremely effective in stopping an organizing drive, sending a chilling effect throughout the workforce. Additionally, for other serious violations, such as illegal threats to close the workplace if the union prevails, employers are merely subjected to a cease and desist order and notice posting. Again, this remedy is often imposed years later, once all appeals are exhausted. By that time, the violation has served its unlawful purpose of intimidating or coercing employees.

The HELP Subcommittee heard from two witnesses in the February 8, 2007, hearing with direct experience in unlawful firings. Keith Ludlum began working at a Smithfield Foods meatpacking plant in Tar Heel, North Carolina, soon after returning from a tour of duty in Iraq during Operation Desert Storm.[46] After experiencing and witnessing poor treatment of workers, Mr. Ludlum began trying to organize a union at the plant in December 1993. He testified that, in 1994, he was fired by the company for attempting to get his co-workers to sign union cards with the United Food and Commercial Workers (UFCW). He explained that supervisors and a deputy sheriff marched him out of the plant in front of his coworkers that day "as an example to intimidate them." After more unlawful worker filings, a string of unfair labor practices, and 12 years of litigation, Mr. Ludlum finally won his job back. In 2006, Smithfield settled to reinstate Mr. Ludlum and pay him backpay after the company was found liable by a U.S. Court of Appeals, for, among other things, assaulting, intimidating, firing, and unlawfully arresting workers who were trying to organize a union. Mr. Ludlum testified: "Smithfield was not fined or indicted for breaking the law and none of its executives were punished." The Smithfield facility in Tar Heel, North Carolina, remains nonunion.

Ivo Camilo worked as an electronic machine operator at the Blue Diamond Growers plant in Sacramento, California, for 35 years.[47] He told the Subcommittee of how he started working with fellow employees on a union organizing drive in October 2004. On April 15, 2005, he and his coworkers presented the company with a letter from the organizing committee, signed by 58 workers, including himself, demanding that their rights under the NLRA be respected. Less than a week later, Mr. Camilo, a leader of the organizing drive, was fired. In addition to firing Mr. Camilo, the company con-

[44] 29 U.S.C. 160(c); NLRB Rules and Regulations, Sections 103.101 and 103.102(a); NLRB Casehandling Manual, Paragraph 10528 (reinstatement) and Paragraphs 10530–10546 (backpay).

[45] Schiffer Testimony, at 6.

[46] Strengthening America's Middle Class through the Employee Free Choice Act, Hearing Before the Subcommittee on Health, Employment, Labor & Pensions, 110th Cong., 1st Sess. (2007) (written testimony of Keith Ludlum) [hereinafter Ludlum Testimony].

[47] Strengthening America's Middle Class through the Employee Free Choice Act, Hearing Before the Subcommittee on Health, Employment, Labor & Pensions, 110th Cong., 1st Sess. (2007) (written testimony of Ivo Camilo) [hereinafter Camilo Testimony].

ducted group captive audience meetings and one-on-one meetings between employees and their supervisors, where management threatened that, if the union won, workers could lose pensions and other benefits. They also threatened to close the plant if it unionized. Soon, two more workers were fired. In March 2006, an NLRB Administrative Law Judge issued a decision finding more than 20 labor law violations by the company, including unlawfully firing Mr. Camilo and another worker. Under threat of a discretionary NLRA Section 10(j) injunction which could have put Mr. Camilo and his coworker back to work pending any appeal, the company relented and reinstated Mr. Camilo in May 2006. However, two more pro-union workers were fired in September 2006 soon after Mr. Camilo's reinstatement. These unfair labor practice charges are awaiting decisions from the NLRB. In the end, compared to Mr. Ludlum and countless other workers fired for organizing a union, Mr. Camilo was one of the lucky ones—he was only out of his job for a little over a year. But, as Mr. Camilo put it, even under such circumstances: "Getting a union shouldn't be so hard. We shouldn't have to pay such a high price in hardship when our employers break the law." The Blue Diamond Grower plant in Sacramento remains nonunion.

Stories like Mr. Ludlum's and Mr. Camilo's are far too common in the United States and are unacceptable in a democracy that respects fundamental human rights, including workers' freedom of association. While the hardship imposed by an unlawful firing on these individuals and their families is enough to demand action, these firings do not happen in a vacuum. The human rights violation is compounded by the fear and intimidation—fully intended by these unlawful acts—that spreads through the workplace when coworkers see pro-union activists fired or disciplined for speaking up. The firings have a chilling effect on any attempts to exercise workers' basic, federally-protected right to organize.

The remedies for unlawful employer activity during organizing and first contract drives, when workers are just beginning to understand and exercise their rights, are simply insufficient to deter unlawful behavior. This problem was apparent to the Congress three decades ago when the U.S. House of Representatives passed H.R. 8410, the Labor Reform Act of 1977, and the Senate came just two votes short of ending debate and passing the bill. The Labor Reform Act of 1977, like the Employee Free Choice Act, also stiffened penalties for workers' rights violations. In the years since, numerous studies have drawn similar conclusions. The 1994 Dunlop Commission, for example, found that unlawful employer activity had increased five-fold since the 1950s, affecting 1-in-20 union election campaigns in 1951–55 and 1-in-4 union election campaigns in 1986–90.[48] In 2000, Human Rights Watch pointed out: "Many employers have come to view remedies like backpay for workers fired because of union activity as a routine cost of doing business, well worth it to get rid of organizing leaders and derail workers' organizing efforts."[49]

In protecting fundamental human rights of workers, the NLRA's remedial scheme fails miserably. Its offer of reinstatement and

[48] Commission of the Future of Worker-Management Relations ("the Dunlop Commission"), Fact Finding Report (1994), at 70 [hereinafter Dunlop Fact Finding].
[49] Human Rights Watch Report.

backpay, minus interim earnings, to workers whose Section 7 rights have been violated stands in stark contrast to other federal labor laws. The Fair Labor Standards Act, for instance, provides for double backpay to workers who are not paid proper overtime. Anti-discrimination statutes, such as Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act, provide for further compensatory damages, such as for emotional distress and inconvenience, as well as punitive damages. The remedial or punitive differences between the NLRA and these other statutes sends a disturbing message about the seriousness with which federal law treats workers' organizing and collective bargaining rights violations. This lack of serious treatment has resulted in employers running roughshod over workers' rights. It is time for the NLRA to be updated and strengthened.

In the case of firings, it should be pointed out that, in addition to the problem of weak monetary penalties under the NLRA, the affirmative order of reinstatement is weakened by long delays. By the time the order is issued, the employee has likely moved on to other work or simply does not wish to return to the employer who treated him so unfairly.[50] Under current law, the NLRB has the option—but not the requirement—to seek an injunction in federal court against unlawful employer activity.[51] Such an injunction—known as a 10(j) injunction—might order a fired worker reinstated pending the outcome of her unfair labor practice charge. That option is rarely utilized by the NLRB and is today more rarely utilized than ever before. In the first four years of the George W. Bush Administration, for example, the NLRB filed just 69 injunctions, compared to 219 in President Clinton's first term and 142 in President Clinton's second term.[52] By contrast, under current law, the NLRB is required to seek an injunction where there is reasonable cause to believe that a union has violated the NLRA's secondary boycott prohibitions.[53] In other words, while the NLRA currently mandates that the NLRB seek an injunction when a business fears negative economic repercussions from an allegedly unlawful picketing, it does not mandate an injunction request when a working family fears negative economic repercussions from an allegedly unlawful firing. This imbalance is in need of correction.

Firings themselves are not the only labor law violations that anti-union employers find effective in battling organizing drives. Forms of fear and intimidation which fall short of firings or discipline are also frequently used. Although employers often illegally threaten to close plants, or unlawfully fire or discipline workers, the remedies under current law for such threats inadequate. Under current law, threats of that nature are punished merely with a cease and desist order and an order to post a notice in the workplace that the employer will not engage in those activities again. By the time the decision is issued and the order enforced—sometimes years later—the damage to workers' organizing rights has

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[50] The Dunlop Commission found that most illegally discharged workers do not take up the offer of reinstatement. Dunlop Fact Finding, 71–72.

[51] 29 U.S.C. 160(j).

[52] 42nd through 69th NLRB Annual Reports (fiscal years 1977–2004); "Workers Rights Under Attack by Bush Administration: President Bush's National Labor Relations Board Rolls Back Labor Protections," Report by Honorable George Miller, Senior Democratic Member, Committee on Education and the Workforce, U.S. House of Representatives (July 13, 2006), at 18–19.

[53] 29 U.S.C. 160(l).

been long done. There is no fine. No backpay is awarded unless a worker was actually fired or disciplined in some manner that resulted in a loss of pay.

Penalties for employers' labor law violations must be enhanced and rendered more effective in deterring unlawful behavior. Even outright opponents of the Employee Free Choice Act have admitted as much. Lawrence B. Lindsey, an opponent of H.R. 800 and a visiting scholar at the American Enterprise Institute, wrote on February 2, 2007, that "it would be reasonable to stiffen the penalties for employers who break the law." [54]

Accordingly, as explained in more detail in the Section-by-Section Analysis of this Report, the Employee Free Choice Act increases the monetary penalty and injunctive remedies for illegal firings and discrimination against employees during any period while employees are attempting to organize a union or bargain a first contract. The Committee finds that seriously stiffening the penalties for violations of workers' fundamental human rights is absolutely necessary to restore workers' freedom to organize and collectively bargain.

THE NEED FOR MAJORITY SIGN-UP CERTIFICATION

Under current law, employees generally have two means to obtain union representation. The employer, however, decides which means will be used:

1. NLRB Election Process. If 30% of the workforce signs a petition or cards asking for union representation or an election, the NLRB will conduct an election. If a majority of those voting favor union representation, the NLRB certifies the union, and the employer must recognize and bargain with the union. This election process sets up the union and the employer as adversaries and is tilted dramatically in favor of the employer.

2. Voluntary recognition (card check or majority sign-up). If a majority of the workforce signs cards asking for union representation, the employer may recognize the union and begin bargaining. The employer, however, is not required to recognize a union when a majority signs cards. Instead, the employer may insist that the employees undergo the NLRB election process described above. Given the advantages afforded in that election process, many employers do insist on an election,. Under majority sign-up, a union is formed only if a majority of all employees signs written authorization forms (compared to a majority of those who actually vote in an NLRB election). A worker who does not sign a card is presumed to not support the union.

Majority-sign up has always been allowed under the NLRA. Indeed, the original framers of the NLRA viewed NLRB secret ballot elections as a tool for deciding between unions (given both the phenomenon of company unions and the rivalry between the American Federation of Labor and the Congress of Industrial Organizations),

[54] Lawrence B. Lindsey, "Abrogating Workers' Rights," Wall Street Journal (February 2, 2007).

not as a tool for deciding whether there would be collective bargaining in the workplace or not.[55]

Today, many employers insist on NLRB elections because they are a tool for killing an organizing drive. In short, this election process is broken and undemocratic. In the NLRB election process, delays of months and even years are common in obtaining and certifying election results. Management has almost unlimited and mandatory access to employees, while union supporters have almost none. Management has total access to a complete and accurate list of employees at all times, while union supporters may have access very late in the process to a list that is often intentionally inaccurate. Under the NLRB election process, the union and employer are pitted against one another as campaign adversaries. One party—the employer—has inherently coercive power over those voters, controlling their work lives and having the authority to reward, punish, promote, or fire the voters.

At the HELP Subcommittee hearing on February 8, 2007, Professor Lafer presented his research on the nature of NLRB elections and how they measure up to American standards for free, fair, and democratic elections. He testified: "Unfortunately, I must report that NLRB elections look more like the discredited practices of rogue regimes abroad than like anything we would call American."[56]

As Professor Lafer pointed out, American democratic elections involve, as a first step, obtaining a list of eligible voters. Under U.S. election law, both parties have equal access to the voter rolls. In NLRB elections, on the other hand, "management has a complete list of employee contact information, and can use this for campaigning against unionization at any time—while employees have no equal right to such lists." Once an election petition is filed and an election scheduled, the union is entitled to an "Excelsior List"—with employee names and addresses—with no right to apartment numbers, zip codes, or telephone numbers. On average, the Excelsior list is received less than 20 days before an election, even though the employer had total access to every employee for the entire period of the organizing drive.[57]

Professor Lafer also made the point that economic coercion is the hallmark of NLRB elections but entirely forbidden under American democratic standards. He quoted Alexander Hamilton, who warned that "power over a man's purse is power over his will." Accordingly, under U.S. election law, it is unlawful for an employer to tell employees how to vote or suggest that the victory or loss of a particular candidate would result in job or business loss. In NLRB elections, however, the employer is free to tell its employees how to vote—and often does so in perfectly legal, mandatory captive audience meetings and what are termed "eyeball to eyeball" or one-on-one supervisor meetings with employees. Under the NLRA, an employer can "predict" that a plant will close if the workers

[55] David Brody, "Why U.S. Labor Law Has Become a Paper Tiger," New Labor Forum (Spring 2004).

[56] Strengthening America's Middle Class through the Employee Free Choice Act, Hearing Before the Subcommittee on Health, Employment, Labor & Pensions, 110th Cong., 1st Sess. (2007) (written testimony of Gordon Lafer, at 1) [hereinafter Lafer Testimony].

[57] Id. at 2.

unionize, so long as it does not cross the line into "threatening" closure if they unionize.[58]

In NLRB elections, there is no such thing as free speech or equal access to the media, as American democracy understands them. Employers have total access to the eligible voters, as they convene everyday in the workplace. The union would be trespassing if it attempted to access the voters in the workplace. Relegated to standing on public sidewalks outside a worksite or making house calls, the union obviously would be trespassing if it attempted to access a voter at home—the only other place a voter is certain to be—when the voter tells a union organizer to leave. Pro-union workers also find their speech and access to the media circumscribed. Management can plaster a workplace with anti-union propaganda, wherever and whenever it wants. Pro-union workers cannot. Management can hand out leaflets and talk to employees whenever and wherever it wants. Pro-union workers can only talk about the union on non-work time. Management can force employees to attend mass captive audience meetings or one-on-one supervisory meetings against the union, under threat of discipline if they do not attend—and even under threat of discipline if they speak up during the meeting. Unions have no such ability to force workers to attend meetings—and certainly have no right to equal time at a company-sponsored captive audience meeting. According to Professor Lafer, "in a typical campaign, most employees never even have a single conversation with a union representative."[59]

While much is made of the "secret ballot" in NLRB elections, these elections are fundamentally undemocratic. Moreover, the "secret ballot" is often not secret at all. As Professor Lafer explained in response to Congresswoman Linda Sanchez at the HELP Subcommittee hearing, employers often know how every employee is voting on election day. They engage in eyeball-to-eyeball or one-on-one supervisor meetings with employees to discern their union sentiments. They conduct interrogations of employees. They conduct surveillance of employees—which is perfectly legal, so long as it is not overt. In short, employers keep count of the votes.

In recent years, because of increased anti-union activity—both illegal and perfectly legal—by employers in the context of NLRB elections, unions have turned more and more to majority sign-up or card check agreements as a means to gain recognition. Many cutting-edge employers, such as Cingular Wireless, Kaiser Health, Marriott, and the National Linen Company, have embraced these agreements. Majority sign-up procedures have been shown to reduce conflict between workers and management, reduce employer coercion and interference, and allow workers to freely choose for themselves, whether to bargain with their employer for better wages and benefits.[60]

A recent survey of employees at worksites that had undergone organizing drives found that, across the board, coercion and pres-

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[58] Id. at 2–3.

[59] Id. at 3–4.

[60] See e.g., "Partnerships that Work, In Focus: Cingular Wireless," American Rights at Work, Socially Responsible Business Program (2006) (quoting Rick Bradley, Executive Vice President of Human Resources at Cingular Wireless, regarding its majority sign-up agreement with the Communications Workers of America, "We believe that employees should have a choice. . . . Making that choice available to them results, in part, in employees who are engaged in the business and who have a passion for customers.").

sure (both anti-union and pro-union) drop under majority sign-up or card check procedures, compared to the NLRB election process. Specifically, the survey revealed that "NLRB elections invite far more exposure to coercion than card check campaigns." In NLRB elections, 46 percent of workers reported that management coerced them to oppose the union, compared to 23 percent of workers in card check campaigns. In NLRB elections, 22 percent of workers reported that they felt peer pressure from coworkers to support the union, compared to 17 percent in card check campaigns. In short, the majority sign-up process reduces both pressure and coercion, compared to NLRB elections.[61]

The HELP Subcommittee heard testimony on February 8, 2007, that affirmed these findings. Cingular Wireless employee Teresa Joyce testified about the differences between AT&T Wireless and Cingular Wireless, which signed a card check and neutrality agreement.[62] When her worksite was owned by AT&T Wireless, management "did everything they could to stop us from exercising our right to form a union. Our supervisors constantly threatened that AT&T Wireless would leave our town and that we would lose our jobs," she explained. When she and her coworkers tried to distribute union flyers in the break room, supervisors "would immediately gather the information and dispose of it." She described efforts by management to keep employees uninformed or misinformed about the union and to "instill fear through constant threats and lies about the union." When Cingular Wireless bought AT&T Wireless and brought the facility under a card check agreement, however, "the harassment and intimidation stopped." Employees were allowed to distribute literature in the break room and even set up a table with literature about the union, the Communications Workers of America (CWA). Then, in 2005, a majority of the employees signed union authorization cards. Cingular Wireless recognized their union and soon bargained a contract with them. Ms. Joyce argued that all workers should be given the same free and fair opportunity she received with Cingular Wireless:

> Cases such as mine, where the employer agrees to take no position and allow their workers to freely choose whether or not they want a union, are few and far between . . . I had two uncles sacrifice their lives for this great country during World War II. I lost a cousin in the war in Iraq. I have another cousin in Afghanistan and my daughter, Laura, and her husband serve in the U.S. Navy. Every day they risk their lives to protect our freedoms. Every day they work to spread democratic principles and values to audiences abroad. It's outrageous and it's shameful when the very freedoms they fight to preserve are the very freedoms that are routinely trampled on, here, at home.[63]

Not all workers enjoy the same freedoms that Ms. Joyce has had as an employee at Cingular Wireless. Current law allows workers to organize via majority sign-up only where the employer agrees to

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[61] Adrienne Eaton & Jill Kriesky, "Fact Over Fiction: Opposition to Card Check Doesn't Add Up," American Rights at Work Issue Brief (March 2006).

[62] Strengthening America's Middle Class through the Employee Free Choice Act, Hearing Before the Subcommittee on Health, Employment, Labor & Pensions, 110th Cong., 1st Sess. (2007) (written testimony of Teresa Joyce) [hereinafter Joyce Testimony].

[63] Joyce Testimony, at 6.

it. The critical change that the Employee Free Choice Act makes is providing the option of majority sign-up to all workers. The bill would amend the NLRA by providing that if the NLRB finds that a majority of the employees in the proposed bargaining unit have signed union authorization cards, then the Board will certify the bargaining unit. In other words, the employer may not refuse to recognize the union and insist on an NLRB election when a majority of workers sign cards saying they want a union.

H.R. 800 does not eliminate the NLRB election process, as some critics incorrectly claim. The election process would remain available as an option. If 30 percent of the bargaining unit signed cards or a petition asking for an NLRB election, they would have one. If, however, 50 percent plus one of the bargaining unit signed authorization cards asking for recognition of their union, and the NLRB verified their validity, their union would be certified and recognized. Instead of the employer having the authority to veto that majority employee choice, the choice of the employee majority would rule. More details on how this majority sign-up process works under the Employee Free Choice Act are provided in the Section-by-Section Analysis.

It is also important to note that H.R. 800 does not change the process for decertifying or withdrawing recognition from a union. Under current law, majority sign-up is effectively already available to workers seeking to decertify or disband their union. In fact, the withdrawal of recognition doctrine requires an employer to withdraw recognition from a union—which has the same effect as a decertification—when the employer has objective evidence that the union has in fact lost majority support. Such evidence might come in the form of cards or a petition against the union. In those cases, unless an election is pending, the employer is obligated to withdraw recognition.[64] H.R. 800 does nothing to alter this doctrine.

Finally, it is important to note that the signed authorization cards in H.R. 800's majority sign-up process are not "publicly signed," as some critics claim. These cards are treated no differently than signed authorization cards under the majority sign-up agreements that have been in existence since the NLRA's inception. And they are treated no differently than the cards or petitions that have been used to obtain an NLRB election.

THE NEED FOR FIRST CONTRACT MEDIATION AND BINDING ARBITRATION

Even when workers, against all odds, manage to win recognition of their union, the victory often proves a hollow one. For workers, the entire point of organizing is often to negotiate and adopt a collective bargaining agreement with the employer. But rather than bargaining in good faith with the intention of reaching a final contract, many employers delay and undermine the collective bargaining process to frustrate employee aspirations for a contract and ultimately bust the union.

A 2001 report on the status of first contract negotiations following union election victories in 1998 and 1999 found that 34 percent of those victories still had not resulted in a collective bargaining agreement—in some cases three years after the union's cer-

[64] See Levitz Furniture Company of the Pacific, 333 NLRB No. 105 (2001).

tification.[65] While the parties have an obligation to bargain in good faith, this obligation is difficult to enforce. Employers easily drag their feet in negotiations in order to avoid reaching a contract. Employers do so to run out the clock because, after a year of bargaining without a contract, employees may decertify the union or the employer may unilaterally withdraw recognition, if there is a showing of lack of majority support for the union. As Human Rights Watch pointed out: "The problem is especially acute in newly organized workplaces where the employer has fiercely resisted employee self-organization and resents their success."[66]

First contract negotiations often become part and parcel of an employer's anti-union campaign. Rather than bargaining in good faith to reach an agreement, as one scholar points out:

> Consultants advise management on how to stall or prolong the bargaining process, almost indefinitely—"bargaining to the point of boredom," in consultant parlance. Delays in bargaining allow more time for labor turnover, create employee dissatisfaction with the union and prevent the signing of a contract. Without a contract, the union is unable to improve working conditions, negotiate wage increases or represent workers effectively with grievances; and by exhausting every conceivable legal maneuver, certain firms have successfully avoided signing contracts with certified unions for several decades.[67]

Even the current Bush II National Labor Relations Board recognizes that "[i]nitial contract bargaining constitutes a critical stage of the negotiation process because it forms the foundation for the parties' future labor-management relationship."[68] In a memorandum, Bush II General Counsel Meisburg wrote in April 2006 that, "when employees are bargaining for their first collective bargaining agreement, they are highly susceptible to unfair labor practices intended to undermine support for their bargaining representative." According to General Counsel Meisburg, "our records indicate that in the initial period after election and certification, charges alleging that employers have refused to bargain are meritorious in more than a quarter of all newly-certified units (28%). Moreover, of all charges alleging employer refusals to bargain, almost half occur in initial contract bargaining situations (49.65%)." These statistics are high despite the fact that proving a lack of good faith in bargaining is notoriously difficult.

Under existing law, the Federal Mediation and Conciliation Service (FMCS) may provide mediation and conciliation services upon its own motion or upon request of one or more of the parties to the dispute, whenever it believes that the dispute threatens a substantial interruption to commerce. The NLRA currently does not provide for the use of binding arbitration to resolve disputes. When an employer bargains in bad faith or otherwise unlawfully refuses to

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[65] Kate Bronfenbrenner, "Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing, Part II: First Contract Supplement," Submitted to the U.S. Trade Deficit Review Commission (June 1, 2001), at 7. The Dunlop Commission also found high rates of first contract failures. See Dunlop Fact Finding Report, at 73.

[66] Human Rights Watch Report.

[67] John Logan, "Consultants, Lawyers and the 'Union Free' Movement in the USA Since the 1970s," 33 Industrial Relations Journal 197 (August 2002).

[68] Ronald Meisburg, "First Contract Bargaining Cases," General Counsel Memorandum, GC 06–05 (April 19, 2006).

bargain, the NLRA's remedy is merely an order from the NLRB to resume bargaining.

The Employee Free Choice Act would provide for more meaningful good faith bargaining in first contract cases. As detailed in the Section-by-Section analysis, it would provide that the parties must begin bargaining within 10 days of receiving a written request to begin. Either party may request mediation of a first contract after 90 days of bargaining. If the mediation does not result in a contract within 30 days, the parties then go to binding arbitration. This process would only be available during the highly sensitive first contract negotiation. It would not be available for subsequent contracts. And the time frames are extendable by mutual agreement of the parties.

To effectuate a fundamental purpose of the NLRA—encouraging collective bargaining—it is critical that the law facilitate bargaining particularly in first contract situations. This stage serves as "the foundation for the parties' future labor-management relationship," as NLRB General Counsel Meisburg has pointed out. Achieving a first contract fosters a productive and cooperative collective bargaining relationship.

Binding contract arbitration has a proven track record. It has long been available for postal service union contracts. In Canadian provinces where binding contract arbitration is available, it has served to encourage labor and management to settle their agreement on their own terms, "knowing that the alternative may be an imposed agreement."[69] For example, in 2002, Ontario saw a total of nine applications for first contract arbitration, and eight of those were withdrawn or settled. British Columbia saw a total of 16 applications, and 15 were withdrawn or settled.[70]

SECTION-BY-SECTION ANALYSIS

Section 1. Provides that the short title of H.R. 800 is the "Employee Free Choice Act."

Section 2(a). Provides that Section 9(c) of the NLRA is amended to provide for a majority sign-up certification process for gaining union recognition.

Specifically, whenever any employee, group of employees, individual, or labor organization files a petition alleging that a majority of employees in an appropriate bargaining unit wish to be represented by an individual or labor organization for collective bargaining purposes, the NLRB shall conduct an investigation. Such investigation shall involve determining whether a majority of employees in an appropriate bargaining unit have signed valid authorization cards. If the NLRB finds that they have, the NLRB shall certify their designated representative as their exclusive bargaining representative.

Section 2(a) eliminates the employer's prerogative to deny recognition on the basis of a majority sign-up with cards and eliminates the employer's right to insist upon an NLRB election before recognizing a union. This Section does not eliminate the NLRB election process, which remains an option for employees as it is

[69] Alberta Federation of Labour Backgrounder—First Contract Arbitration (November 9, 2005), at 1.

[70] Id. at 2.

under current law. However, employees, individuals, or labor organizations may submit signed authorization cards to the NLRB, as part of a petition for certification, and gain recognition without undergoing the NLRB election process. Indeed, if a majority sign and submit valid authorization cards to the NLRB, notwithstanding any other provision in the NLRA, the NLRB must certify their union.

Section 2(a) also directs the NLRB to establish guidelines and procedures for the designation of a bargaining representative under the majority sign-up process. Such guidelines and procedures must include model language for the authorization card to ensure that the purpose of the card will be clearly understood by employees, making clear, for example, that the card may be used to gain recognition of an exclusive bargaining representative without conducting an NLRB election. Such guidelines and procedures must also include procedures that the NLRB shall use to determine the validity of signed authorization cards. The Committee envisions that the NLRB will establish procedures similar to those currently used to hear election objections. Importantly, the Employee Free Choice Act of 2007, as introduced in the 110th, makes clear that the cards must be valid. An invalid card would be any card that is coerced, obtained by fraud, or inauthentic. Such invalid cards may not be counted toward a showing of majority support.

Section 2(a) also makes clear that the NLRB cannot certify an exclusive bargaining representative via the majority sign-up process in cases where the employees in question already have a certified or otherwise already recognized exclusive bargaining representative. In those cases, where one union seeks to replace an existing union, the appropriate determination of employees' wishes is via an NLRB election under current rules. Indeed, conducting elections in cases of competing unions was the original intent of the NLRA's election process.[71] This section does not change current law on decertification or the withdrawal of recognition doctrine.

Section 2(b). Provides for conforming amendments in light of the new majority sign-up certification process. Specifically, under this Section, regional directors of the NLRB may be authorized to conduct majority sign-up processes, just as they are currently authorized to conduct NLRB elections. Also, under this Section, the prohibitions on recognitional picketing are adjusted to conform with the availability of the majority sign-up process for NLRB union certification.

Section 3. Provides for the mediation and binding arbitration of initial collective bargaining agreements in order to facilitate a good faith bargaining relationship from the very beginning between the parties. This Section only applies in cases involving a newly certified or otherwise newly recognized exclusive bargaining representative and an employer negotiating an initial collective bargaining agreement. Under this Section, the parties must begin good faith collective bargaining within 10 days of receiving a request for bargaining from the other party. If the parties do not execute a col-

[71] This long-standing rule, preserved by the Employee Free Choice Act, is consistent with the call for "secret ballot elections" in Mexico, made in 2001 by Members of Congress, in the unique context of Mexican labor law and in a situation where the workers were attempting to abandon an allegedly sham union controlled by the government and company and replace it with their own independent union.

lective bargaining agreement within 90 days of the start of bargaining, either party may request mediation from the FMCS. The FMCS is directed to use its best efforts, via mediation and conciliation, to then bring the parties to agreement. If, 30 days after mediation request is made, there is still no first contract, the FMCS is directed to refer the contract negotiations to an arbitration board, under regulations as may be prescribed by the FMCS. The arbitration board must issue a decision settling the negotiations, binding on the parties for two years. The parties may amend the binding, arbitrated settlement agreement by written consent during that two year period. All time frames within this section may be extended by mutual agreement of the parties.

Section 4(a)(1). Provides for mandatory requests for injunctions against employer unfair labor practices during organizing and first contract drives. Specifically, in cases where an employer is charged to have fired or otherwise discriminated against an employee in violation of the employee's Section 7 rights, or threatened to do so, or engaged in activities that significantly interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, during an organizing or first contract drive, if the NLRB finds that there is reasonable cause to believe that the charge is true and a complaint should issue, the NLRB must petition the appropriate United States District Court and seek appropriate injunctive relief pending final adjudication of the matter.

Section 4(a)(2). Provides for a conforming amendment to ensure that investigating and pursuing such unfair labor practice charges are given top priority at the NLRB, just as was required for other charges subject to mandatory injunctions, such as unlawful secondary boycott charges.

Section 4(b)(1). Provides for treble backpay for employees discriminated against by an employer during an organizing or first contract drive. Specifically, an employee who lost pay under such circumstances is entitled to receive their backpay, plus two times that amount, as liquidated damages.

Section 4(b)(2). Provides for civil penalties for employer unfair labor practices during organizing and first contract drives. Specifically, this Section subjects employers during organizing and first contract drives to civil penalties of up to $20,000 for each willful or repeated unfair labor practice, so long as those unfair labor practices constitute interfering, restraining, coercing, or discriminating against employees in the exercise of their Section 7 rights. The NLRB is directed to consider the gravity of the unfair labor practice and its impact on the charging party, other persons seeking to exercise rights under the NLRA, or the public interest when determining the amount of the civil penalty.

Under this formulation, for example, the civil penalty should be larger for larger employers and smaller for smaller employers in order to act as an appropriate deterrent to unlawful behavior, i.e., to ensure the civil penalty has a positive impact on the exercise of Section 7 rights by other persons. In any event, these civil penalties are punitive in nature, not remedial, and are intended to serve as a deterrent to unlawful behavior.

EXPLANATION OF AMENDMENTS

The Amendment in the Nature of a Substitute is explained in the body of this report.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch. The purpose of H.R. 800 is to strengthen and expand the middle class. The bill reforms the National Labor Relations Act to provide for union certification through simple majority sign-up procedures, first contract mediation and binding arbitration, and tougher penalties for violation of workers' rights during organizing and first contract drives. As the Congressional Accountability Act provides for the application of the Federal Labor Relations Act but not the application of the National Labor Relations Act, 29 U.S.C. 151 et seq., to the legislative branch, H.R. 800 has no application to the legislative branch.

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement of whether the provisions of the reported bill include unfunded mandates. CBO has determined that the requirement would increase the costs of an existing mandate and would thereby impose a mandate under the Unfunded Mandates Reform Act (UMRA). CBO estimates, however, that the direct cost of complying with the new requirements would be negligible. H.R. 800 contains no governmental mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

EARMARK STATEMENT

H.R. 800 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e) or 9(f) of rule XXI.

ROLLCALL VOTES

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 1 **BILL: H.R. 800** **DATE: 2/14/2007**
AMENDMENT NUMBER: 2 **DEFEATED**
SPONSOR/AMENDMENT: McKEON – SECRET BALLOT PROTECTION ACT

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE		X		
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY				X
Mr. HINOJOSA		X		
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. SUSAN DAVIS		X		
Mr. DANNY DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Ms. SANCHEZ		X		
Mr. SARBANES		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE		X		
Mr. YARMUTH		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER		X		
Mr. McKEON	X			
Mr. PETRI	X			
Mr. HOEKSTRA	X			
Mr. CASTLE		X		
Mr. SOUDER	X			
Mr. EHLERS	X			
Mrs. BIGGERT	X			
Mr. PLATTS				X
Mr. KELLER	X			
Mr. WILSON	X			
Mr. KLINE	X			
Mr. INGLIS				X
Mrs. McMORRIS RODGERS	X			
Mr. MARCHANT	X			
Mr. PRICE	X			
Mr. FORTUNO	X			
Mr. BOUSTANY	X			
Mrs. FOXX	X			
Mr. KUHL	X			
Mr. ROB BISHOP	X			
Mr. DAVID DAVIS	X			
Mr. WALBERG	X			
TOTALS	**19**	**27**		**3**

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 2 **BILL: H.R. 800** **DATE: 2/14/2007**
AMENDMENT NUMBER: 3 **DEFEATED**
SPONSOR/AMENDMENT: KLINE – CARD CHECK FOR DECERTIFICATION

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE		X		
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA		X		
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. SUSAN DAVIS		X		
Mr. DANNY DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Ms. SANCHEZ		X		
Mr. SARBANES		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE		X		
Mr. YARMUTH		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER		X		
Mr. McKEON	X			
Mr. PETRI		X		
Mr. HOEKSTRA	X			
Mr. CASTLE	X			
Mr. SOUDER	X			
Mr. EHLERS	X			
Mrs. BIGGERT	X			
Mr. PLATTS				X
Mr. KELLER	X			
Mr. WILSON	X			
Mr. KLINE	X			
Mr. INGLIS				X
Mrs. McMORRIS RODGERS	X			
Mr. MARCHANT	X			
Mr. PRICE	X			
Mr. FORTUNO	X			
Mr. BOUSTANY	X			
Mrs. FOXX	X			
Mr. KUHL	X			
Mr. ROB BISHOP	X			
Mr. DAVID DAVIS	X			
Mr. WALBERG	X			
TOTALS	**19**	**28**		**2**

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 3 **BILL: H.R. 800** **DATE: 2/14/2007**
AMENDMENT NUMBER: 4 **DEFEATED**
SPONSOR/AMENDMENT: BOUSTANY – NLRB REPRESENTATIVE PRESENT

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE		X		
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA		X		
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. SUSAN DAVIS		X		
Mr. DANNY DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Ms. SANCHEZ		X		
Mr. SARBANES		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE		X		
Mr. YARMUTH		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER		X		
Mr. McKEON	X			
Mr. PETRI	X			
Mr. HOEKSTRA	X			
Mr. CASTLE	X			
Mr. SOUDER		X		
Mr. EHLERS	X			
Mrs. BIGGERT	X			
Mr. PLATTS				X
Mr. KELLER	X			
Mr. WILSON	X			
Mr. KLINE	X			
Mr. INGLIS				X
Mrs. McMORRIS RODGERS	X			
Mr. MARCHANT	X			
Mr. PRICE	X			
Mr. FORTUNO	X			
Mr. BOUSTANY	X			
Mrs. FOXX	X			
Mr. KUHL	X			
Mr. ROB BISHOP	X			
Mr. DAVID DAVIS	X			
Mr. WALBERG	X			
TOTALS	**19**	**28**		**2**

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 4 **BILL: H.R. 800** **DATE: 2/14/2007**
AMENDMENT NUMBER: 5 **DEFEATED**
SPONSOR/AMENDMENT: DAVIS (TN) – CIVIL PENALTIES

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE		X		
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA		X		
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. SUSAN DAVIS		X		
Mr. DANNY DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Ms. SANCHEZ		X		
Mr. SARBANES		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE		X		
Mr. YARMUTH		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER		X		
Mr. McKEON	X			
Mr. PETRI	X			
Mr. HOEKSTRA	X			
Mr. CASTLE	X			
Mr. SOUDER	X			
Mr. EHLERS	X			
Mrs. BIGGERT	X			
Mr. PLATTS				X
Mr. KELLER	X			
Mr. WILSON	X			
Mr. KLINE	X			
Mr. INGLIS				X
Mrs. McMORRIS RODGERS	X			
Mr. MARCHANT	X			
Mr. PRICE	X			
Mr. FORTUNO	X			
Mr. BOUSTANY	X			
Mrs. FOXX	X			
Mr. KUHL	X			
Mr. ROB BISHOP	X			
Mr. DAVID DAVIS	X			
Mr. WALBERG	X			
TOTALS	**20**	**27**		**2**

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 5 **BILL: H.R. 800** **DATE: 2/14/2007**
AMENDMENT NUMBER: 6 **DEFEATED**
SPONSOR/AMENDMENT: WALBERG – RIGHT TO VOTE ON CONTRACT

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE		X		
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA		X		
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. SUSAN DAVIS		X		
Mr. DANNY DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Ms. SANCHEZ		X		
Mr. SARBANES		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE		X		
Mr. YARMUTH		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER		X		
Mr. McKEON	X			
Mr. PETRI	X			
Mr. HOEKSTRA	X			
Mr. CASTLE	X			
Mr. SOUDER	X			
Mr. EHLERS	X			
Mrs. BIGGERT		X		
Mr. PLATTS				X
Mr. KELLER	X			
Mr. WILSON	X			
Mr. KLINE	X			
Mr. INGLIS				X
Mrs. McMORRIS RODGERS	X			
Mr. MARCHANT	X			
Mr. PRICE	X			
Mr. FORTUNO	X			
Mr. BOUSTANY	X			
Mrs. FOXX	X			
Mr. KUHL	X			
Mr. ROB BISHOP	X			
Mr. DAVID DAVIS	X			
Mr. WALBERG	X			
TOTALS	**19**	**28**		**2**

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 6 **BILL: H.R. 800** **DATE: 2/14/2007**
AMENDMENT NUMBER: 7 **DEFEATED**
SPONSOR/AMENDMENT: FOXX – DO NOT CONTACT LIST

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE		X		
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA				X
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. SUSAN DAVIS				X
Mr. DANNY DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Ms. SANCHEZ		X		
Mr. SARBANES		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE		X		
Mr. YARMUTH		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER		X		
Mr. McKEON	X			
Mr. PETRI				X
Mr. HOEKSTRA	X			
Mr. CASTLE	X			
Mr. SOUDER	X			
Mr. EHLERS	X			
Mrs. BIGGERT	X			
Mr. PLATTS				X
Mr. KELLER	X			
Mr. WILSON	X			
Mr. KLINE	X			
Mr. INGLIS				X
Mrs. McMORRIS RODGERS	X			
Mr. MARCHANT	X			
Mr. PRICE	X			
Mr. FORTUNO	X			
Mr. BOUSTANY	X			
Mrs. FOXX	X			
Mr. KUHL	X			
Mr. ROB BISHOP				X
Mr. DAVID DAVIS	X			
Mr. WALBERG	X			
TOTALS	**18**	**25**		**6**

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 7 **BILL: H.R. 800** **DATE: 2/14/2007**
AMENDMENT NUMBER: 8 **DEFEATED**
SPONSOR/AMENDMENT: PRICE – RETURN OF CARD

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE		X		
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA				X
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. SUSAN DAVIS		X		
Mr. DANNY DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Ms. SANCHEZ		X		
Mr. SARBANES		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE		X		
Mr. YARMUTH		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER		X		
Mr. McKEON	X			
Mr. PETRI				X
Mr. HOEKSTRA	X			
Mr. CASTLE	X			
Mr. SOUDER	X			
Mr. EHLERS	X			
Mrs. BIGGERT	X			
Mr. PLATTS				X
Mr. KELLER	X			
Mr. WILSON	X			
Mr. KLINE	X			
Mr. INGLIS				X
Mrs. McMORRIS RODGERS	X			
Mr. MARCHANT	X			
Mr. PRICE	X			
Mr. FORTUNO	X			
Mr. BOUSTANY	X			
Mrs. FOXX	X			
Mr. KUHL	X			
Mr. ROB BISHOP	X			
Mr. DAVID DAVIS	X			
Mr. WALBERG	X			
TOTALS	**19**	**26**		**4**

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 8 **BILL: H.R. 800** **DATE: 2/14/2007**
AMENDMENT NUMBER: 9 **DEFEATED**
SPONSOR/AMENDMENT: EHLERS – BONA FIDE WORKERS ONLY

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE				X
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA		X		
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. SUSAN DAVIS		X		
Mr. DANNY DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Ms. SANCHEZ		X		
Mr. SARBANES		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE		X		
Mr. YARMUTH		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER		X		
Mr. McKEON	X			
Mr. PETRI				X
Mr. HOEKSTRA				X
Mr. CASTLE	X			
Mr. SOUDER	X			
Mr. EHLERS	X			
Mrs. BIGGERT	X			
Mr. PLATTS				X
Mr. KELLER	X			
Mr. WILSON	X			
Mr. KLINE	X			
Mr. INGLIS				X
Mrs. McMORRIS RODGERS	X			
Mr. MARCHANT	X			
Mr. PRICE	X			
Mr. FORTUNO	X			
Mr. BOUSTANY	X			
Mrs. FOXX	X			
Mr. KUHL	X			
Mr. ROB BISHOP	X			
Mr. DAVID DAVIS	X			
Mr. WALBERG	X			
TOTALS	**18**	**26**		**5**

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 9 **BILL: H.R. 800** **DATE: 2/14/2007**
AMENDMENT NUMBER: 10 **DEFEATED**
SPONSOR/AMENDMENT: MARCHANT – IMMIGRATION STATUS ON CARD CHECK

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE				X
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA		X		
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. SUSAN DAVIS		X		
Mr. DANNY DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Ms. SANCHEZ		X		
Mr. SARBANES		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE		X		
Mr. YARMUTH		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER		X		
Mr. McKEON	X			
Mr. PETRI				X
Mr. HOEKSTRA				X
Mr. CASTLE	X			
Mr. SOUDER	X			
Mr. EHLERS	X			
Mrs. BIGGERT	X			
Mr. PLATTS				X
Mr. KELLER	X			
Mr. WILSON	X			
Mr. KLINE	X			
Mr. INGLIS				X
Mrs. McMORRIS RODGERS	X			
Mr. MARCHANT	X			
Mr. PRICE	X			
Mr. FORTUNO				X
Mr. BOUSTANY	X			
Mrs. FOXX	X			
Mr. KUHL	X			
Mr. ROB BISHOP	X			
Mr. DAVID DAVIS	X			
Mr. WALBERG	X			
TOTALS	**17**	**26**		**6**

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 10 **BILL: H.R. 800** **DATE: 2/14/2007**
AMENDMENT NUMBER: 11 **DEFEATED**
SPONSOR/AMENDMENT: WILSON – UNION VIOLENCE

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE				X
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA		X		
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. SUSAN DAVIS		X		
Mr. DANNY DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Ms. SANCHEZ		X		
Mr. SARBANES		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE		X		
Mr. YARMUTH		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER		X		
Mr. McKEON	X			
Mr. PETRI				X
Mr. HOEKSTRA				X
Mr. CASTLE	X			
Mr. SOUDER	X			
Mr. EHLERS	X			
Mrs. BIGGERT	X			
Mr. PLATTS				X
Mr. KELLER	X			
Mr. WILSON	X			
Mr. KLINE	X			
Mr. INGLIS				X
Mrs. McMORRIS RODGERS	X			
Mr. MARCHANT	X			
Mr. PRICE	X			
Mr. FORTUNO	X			
Mr. BOUSTANY	X			
Mrs. FOXX	X			
Mr. KUHL	X			
Mr. ROB BISHOP	X			
Mr. DAVID DAVIS	X			
Mr. WALBERG	X			
TOTALS	**18**	**26**		**5**

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 11 **BILL: H.R. 800** **DATE: 2/14/2007**
AMENDMENT NUMBER: 12 **DEFEATED**
SPONSOR/AMENDMENT: KLINE – TRIBAL LANDS

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE				X
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA		X		
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. SUSAN DAVIS		X		
Mr. DANNY DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Ms. SANCHEZ		X		
Mr. SARBANES		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE		X		
Mr. YARMUTH		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER		X		
Mr. McKEON	X			
Mr. PETRI				X
Mr. HOEKSTRA				X
Mr. CASTLE	X			
Mr. SOUDER	X			
Mr. EHLERS		X		
Mrs. BIGGERT	X			
Mr. PLATTS				X
Mr. KELLER	X			
Mr. WILSON	X			
Mr. KLINE	X			
Mr. INGLIS				X
Mrs. McMORRIS RODGERS	X			
Mr. MARCHANT	X			
Mr. PRICE	X			
Mr. FORTUNO	X			
Mr. BOUSTANY	X			
Mrs. FOXX	X			
Mr. KUHL	X			
Mr. ROB BISHOP	X			
Mr. DAVID DAVIS	X			
Mr. WALBERG	X			
TOTALS	**17**	**27**		**5**

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 12 **BILL: H.R. 800** **DATE: 2/14/2007**
AMENDMENT NUMBER: 13 **DEFEATED**
SPONSOR/AMENDMENT: WILSON – NATIONAL RIGHT TO WORK ACT

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE				X
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA		X		
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. SUSAN DAVIS		X		
Mr. DANNY DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Ms. SANCHEZ		X		
Mr. SARBANES		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE		X		
Mr. YARMUTH		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER		X		
Mr. McKEON	X			
Mr. PETRI				X
Mr. HOEKSTRA				X
Mr. CASTLE				X
Mr. SOUDER	X			
Mr. EHLERS	X			
Mrs. BIGGERT				X
Mr. PLATTS				X
Mr. KELLER	X			
Mr. WILSON	X			
Mr. KLINE	X			
Mr. INGLIS				X
Mrs. McMORRIS RODGERS	X			
Mr. MARCHANT	X			
Mr. PRICE	X			
Mr. FORTUNO	X			
Mr. BOUSTANY	X			
Mrs. FOXX	X			
Mr. KUHL	X			
Mr. ROB BISHOP	X			
Mr. DAVID DAVIS	X			
Mr. WALBERG	X			
TOTALS	**16**	**26**		**7**

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 13 BILL: H.R. 800 DATE: 2/14/2007
AMENDMENT NUMBER: 14 DEFEATED
SPONSOR/AMENDMENT: BIGGERT – STRIKE MANDATORY ARBITRATION SECTION

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman		X		
Mr. KILDEE, Vice Chairman		X		
Mr. PAYNE				X
Mr. ANDREWS		X		
Mr. SCOTT		X		
Ms. WOOLSEY		X		
Mr. HINOJOSA		X		
Mrs. McCARTHY		X		
Mr. TIERNEY		X		
Mr. KUCINICH		X		
Mr. WU		X		
Mr. HOLT		X		
Mrs. SUSAN DAVIS		X		
Mr. DANNY DAVIS		X		
Mr. GRIJALVA		X		
Mr. TIMOTHY BISHOP		X		
Ms. SANCHEZ		X		
Mr. SARBANES		X		
Mr. SESTAK		X		
Mr. LOEBSACK		X		
Ms. HIRONO		X		
Mr. ALTMIRE		X		
Mr. YARMUTH		X		
Mr. HARE		X		
Ms. CLARKE		X		
Mr. COURTNEY		X		
Ms. SHEA-PORTER		X		
Mr. McKEON	X			
Mr. PETRI				X
Mr. HOEKSTRA	X			
Mr. CASTLE	X			
Mr. SOUDER	X			
Mr. EHLERS	X			
Mrs. BIGGERT	X			
Mr. PLATTS				X
Mr. KELLER	X			
Mr. WILSON	X			
Mr. KLINE	X			
Mr. INGLIS				X
Mrs. McMORRIS RODGERS	X			
Mr. MARCHANT	X			
Mr. PRICE	X			
Mr. FORTUNO	X			
Mr. BOUSTANY	X			
Mrs. FOXX	X			
Mr. KUHL	X			
Mr. ROB BISHOP	X			
Mr. DAVID DAVIS	X			
Mr. WALBERG	X			
TOTALS	**19**	**26**		**4**

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 14 BILL: H.R. 800 DATE: 2/14/2007 PASSED 26Y/19N
SPONSOR/AMENDMENT: ANDREWS MOTION TO FAVORABLY REPORT THE BILL TO THE HOUSE

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman	X			
Mr. KILDEE, Vice Chairman	X			
Mr. PAYNE				X
Mr. ANDREWS	X			
Mr. SCOTT	X			
Ms. WOOLSEY	X			
Mr. HINOJOSA	X			
Mrs. McCARTHY	X			
Mr. TIERNEY	X			
Mr. KUCINICH	X			
Mr. WU	X			
Mr. HOLT	X			
Mrs. SUSAN DAVIS	X			
Mr. DANNY DAVIS	X			
Mr. GRIJALVA	X			
Mr. TIMOTHY BISHOP	X			
Ms. SANCHEZ	X			
Mr. SARBANES	X			
Mr. SESTAK	X			
Mr. LOEBSACK	X			
Ms. HIRONO	X			
Mr. ALTMIRE	X			
Mr. YARMUTH	X			
Mr. HARE	X			
Ms. CLARKE	X			
Mr. COURTNEY	X			
Ms. SHEA-PORTER	X			
Mr. McKEON		X		
Mr. PETRI				X
Mr. HOEKSTRA		X		
Mr. CASTLE		X		
Mr. SOUDER		X		
Mr. EHLERS		X		
Mrs. BIGGERT		X		
Mr. PLATTS				X
Mr. KELLER		X		
Mr. WILSON		X		
Mr. KLINE		X		
Mr. INGLIS				X
Mrs. McMORRIS RODGERS		X		
Mr. MARCHANT		X		
Mr. PRICE		X		
Mr. FORTUNO		X		
Mr. BOUSTANY		X		
Mrs. FOXX		X		
Mr. KUHL		X		
Mr. ROB BISHOP		X		
Mr. DAVID DAVIS		X		
Mr. WALBERG		X		
TOTALS	**26**	**19**		**4**

COMMITTEE CORRESPONDENCE

None.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the body of this report.

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of 3(c)(3) of rule XIII of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following estimate for H.R. 800 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 16, 2007.

Hon. GEORGE MILLER,
Chairman, Committee on Education and Labor,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 800, the Employee Free Choice Act of 2007.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Christina Hawley Anthony.

Sincerely,

PETER R. ORSZAG,
Director.

Enclosure.

H.R. 800—Employee Free Choice Act of 2007

H.R. 800 would amend the National Labor Relations Act to allow workers to unionize by signing a card or petition, in lieu of a secret-ballot election. The bill also would provide a time frame for employers to begin discussions with the workers' union. In addition, the bill would impose civil monetary penalties of up to $20,000 for repeated violations of fair labor practices. Enacting H.R. 800 could increase revenues from those penalties. However, CBO estimates that the amount is likely to be less than $500,000 annually.

H.R. 800 would impose a mandate on private-sector employers by adding requirements under the National Labor Relations Act, including requiring that employers commence an initial agreement for collective bargaining no later than 10 days after receiving a request from an individual or a labor organization that has been newly organized or certified. CBO has determined that the requirement would increase the costs of an existing mandate and would

thereby impose a mandate under the Unfunded Mandates Reform Act (UMRA). CBO estimates, however, that the direct cost of complying with the new requirements would be negligible. H.R. 800 contains no intergovernmental mandates as defined in UMRA, and would not affect the budgets of state, local, or tribal governments.

The CBO staff contacts for this estimate are Christina Hawley Anthony (for federal costs) and Paige Shevlin (for private-sector mandates). This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c) of House rule XIII, the goal of H.R. 800 is to strengthen and expand America's middle class by restoring workers' freedom to organize and collectively bargain under the National Labor Relations Act. The bill reforms the National Labor Relations Act to provide for union certification through simple majority sign-up procedures, first contract mediation and binding arbitration, and tougher penalties for violation of workers' rights during organizing and first contract drives. The Employee Free Choice Act of 2007 furthers the long-standing policy of the United States to encourage the practice and procedure of collective bargaining and to protect 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.

CONSTITUTIONAL AUTHORITY STATEMENT

Under clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee must include a statement citing the specific powers granted to Congress in the Constitution to enact the law proposed by H.R. 800. The Committee believes that the amendments made by this bill, which amend the National Labor Relations Act, are within Congress' authority under Article I, section 8, clause 1 and clause 3.

COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 800. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

NATIONAL LABOR RELATIONS ACT

* * * * * * *

NATIONAL LABOR RELATIONS BOARD

SEC. 3. (a) * * *

(b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, [and] to direct an election or take a secret ballot under subsection (c) or (e) of section 9 [and certify the results thereof,], *and to issue certifications as provided for in that section,* except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

* * * * * * *

UNFAIR LABOR PRACTICES

SEC. 8. (a) * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) * * *

* * * * * * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) * * *

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted *or a petition has been filed under section 9(c)(6)*, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That [when such a petition has been filed] *when such a petition other than a petition under section 9(c)(6) has been filed* the Board shall forthwith, without regard to the provisions of section

9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

* * * * * * *

(h) Whenever collective bargaining is for the purpose of establishing an initial agreement following certification or recognition, the provisions of subsection (d) shall be modified as follows:

(1) Not later than 10 days after receiving a written request for collective bargaining from an individual or labor organization that has been newly organized or certified as a representative as defined in section 9(a), or within such further period as the parties agree upon, the parties shall meet and commence to bargain collectively and shall make every reasonable effort to conclude and sign a collective bargaining agreement.

(2) If after the expiration of the 90-day period beginning on the date on which bargaining is commenced, or such additional period as the parties may agree upon, the parties have failed to reach an agreement, either party may notify the Federal Mediation and Conciliation Service of the existence of a dispute and request mediation. Whenever such a request is received, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(3) If after the expiration of the 30-day period beginning on the date on which the request for mediation is made under paragraph (2), or such additional period as the parties may agree upon, the Service is not able to bring the parties to agreement by conciliation, the Service shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service. The arbitration panel shall render a decision settling the dispute and such decision shall be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties.

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) * * *

* * * * * * *

(c)(1) * * *

* * * * * * *

(6) Notwithstanding any other provision of this section, whenever a petition shall have been filed by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a majority of employees in a unit appropriate for the purposes of collective bargaining wish to be represented by an indi-

vidual or labor organization for such purposes, the Board shall investigate the petition. If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative and that no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit, the Board shall not direct an election but shall certify the individual or labor organization as the representative described in subsection (a).

(7) The Board shall develop guidelines and procedures for the designation by employees of a bargaining representative in the manner described in paragraph (6). Such guidelines and procedures shall include—

(A) model collective bargaining authorization language that may be used for purposes of making the designations described in paragraph (6); and

(B) procedures to be used by the Board to establish the validity of signed authorizations designating bargaining representatives.

* * * * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) * * *

* * * * * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: [*And provided further,*] *Provided further, That if the Board finds that an employer has discriminated against an employee in violation of subsection (a)(3) of section 8 while employees of the employer were seeking representation by a labor organization, or during the period after a labor organization was recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract was entered into between the employer and the representative, the Board in such order shall award the employee back pay and, in addition, 2 times that amount as liquidated damages: Provided further,* That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decisions shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order

may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * * * *

(l) [Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred.] *(1) Whenever it is charged—*

(A) that any employer—

(i) discharged or otherwise discriminated against an employee in violation of subsection (a)(3) of section 8;

(ii) threatened to discharge or to otherwise discriminate against an employee in violation of subsection (a)(1) of section 8; or

(iii) engaged in any other unfair labor practice within the meaning of subsection (a)(1) that significantly interferes with, restrains, or coerces employees in the exercise of the rights guaranteed in section 7;

while employees of that employer were seeking representation by a labor organization or during the period after a labor organization was recognized as a representative defined in section 9(a) until the first collective bargaining contract is entered into between the employer and the representative; or

(B) that any person has engaged in an unfair labor practice within the meaning of subparagraph (A), (B) or (C) of section 8(b)(4), section 8(e), or section 8(b)(7);

the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred.

(2) If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the United States District Court for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such per-

son resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restaining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further,* That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition other courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D).

(m) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 8 *under circumstances not subject to section 10(l),* such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (i).

* * * * * * *

SEC. 12. [Any] *(a) Any* person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.

(b) Any employer who willfully or repeatedly commits any unfair labor practice within the meaning of subsections (a)(1) or (a)(3) of section 8 while employees of the employer are seeking representation by a labor organization or during the period after a labor organization has been recognized as a representative defined in subsection (a) of section 9 until the first collective bargaining contract is entered into between the employer and the representative shall, in addition to any make-whole remedy ordered, be subject to a civil penalty of not to exceed $20,000 for each violation. In determining the amount of any penalty under this section, the Board shall consider the gravity of the unfair labor practice and the impact of the unfair

labor practice on the charging party, on other persons seeking to exercise rights guaranteed by this Act, or on the public interest.

* * * * * * *

MINORITY VIEWS

INTRODUCTION

The right to a private ballot is the cornerstone of our democracy. For centuries, Americans—regardless of race, creed, or gender—have fought for the right to vote, and the right to keep that vote to themselves. In the context of the question of whether employees wish to form and join a union, the right to vote on that question—free of harassment, coercion, or intimidation—and the right to have one's vote known only to oneself—not an employer, not a coworker, and not a union—has been among the most vital protections our federal labor law provides to workers.

H.R. 800, the deceptively-named "Employee Free Choice Act," would strip that right from every American worker. Moreover, the bill makes changes to federal labor law's scheme of penalties and remedies that are one-sided, unnecessary, and unprecedented. Finally, H.R. 800, for the first time in labor law's history, imposes a one-size-fits-all scheme of mandatory, binding interest arbitration with respect to initial contracts, on bargaining parties, again stripping American workers of the right to vote on the terms and conditions of their employment. For these reasons, we oppose this legislation.

THE "EMPLOYEE FREE CHOICE ACT"

H.R. 800 represents a three-pronged attack on worker rights, each prong of which should be rejected. Specifically, the bill:

Strips Workers of the Right to Private Ballot Elections. Current law protects employees from harassment, intimidation, and coercion, and ensures that their voices are heard on the vital question of whether to form and join a union, by providing for a federally-supervised private ballot election conducted and supervised with rigorous scrutiny by the National Labor Relations Board (the "NLRB" or the "Board"). Simply put, H.R. 800 would strip American workers of this right. Although bill supporters have attempted to dissemble and characterize mandatory "card check recognition" as something that has been in the law for 60 years, that is simply not the case. As noted in the Majority's own views, supra, H.R. 800 provides that if a union presents a majority of signed union authorization cards to the Board, the union must be certified, and the right of employees to a private ballot election is immediately and absolutely extinguished. This change in the law is unprecedented, unwise, and unsupportable.

Strips Workers of the Right to Vote on Their Collective Bargaining Agreement. H.R. 800, for the first time in the history of federal labor law, provides that if an employer and a union are unable to reach agreement on a first contract within 90 days, the Federal Mediation and Conciliation Service is provided 30 additional

days to do so. If the parties cannot reach agreement, the matter is removed entirely from the hands of the employer and the union and a federal arbitrator is charged to set the terms and conditions of employment for all covered employees for two years. Wholly missing from this equation is the voice of workers, and the ability of the men and women who will be forced to live with this contract for two years, to express their views. This provision rewards bad behavior, and allows parties to overpromise, posture, and bargain in bad faith, while devolving all responsibility for the outcome onto a federal bureaucrat. Employers lose, unions lose, but most importantly, workers lose.

Imposes One-Sided and Unwarranted Penalties on Employers, but Not Unions. Federal labor law embodied in the National Labor Relations Act ("NLRA" or the "Act") is a balanced system of rights, responsibilities, and penalties that mete out justice to employers and unions on a fair and level basis. H.R. 800's provisions regarding remedies would, for the first time, require the NLRB to seek mandatory injunctive relief, and impose triple backpay and civil penalties, on employers who violate specified sections of the NLRA. Wholly missing from the bill's proposal is any provision applying these same penalties to unions who violate the Act. Put more simply, under the bill, an employer who violates the rights of an employee faces harsh and immediate punishment, while unions who engage in exactly the same behavior are not. These provisions unfairly tip the balance of law in favor of one side, and should be rejected.

REPUBLICAN VIEWS

The right to a secret ballot is sacrosanct

Republican Members of the Committee could not be more clear or resolute on this point: the right to a federally-supervised private ballot election represents perhaps the greatest protection American workers are afforded under federal labor law. We cannot and will not support efforts to strip workers of this right. Nor, would it appear, do American workers want us to. They too recognize the importance of this right, and in overwhelming numbers reject efforts for it to be eliminated. A January 2007 polling[1] of likely voters in all fifty states makes their views on this clear:

- Almost 9 in 10 voters (87 percent) agree that "every worker should continue to have the right to a federally supervised secret ballot election when deciding whether to organize a union";
- Four in five voters (79 percent) oppose the Employee Free Choice Act;
- When asked to make a choice as to whether a worker's vote to organize a union should remain private or be public information, 9 in 10 voters (89 percent) say it should remain private; and
- Nine in ten voters (89 percent) believe having a federally-supervised secret ballot election is the best way to protect the

[1] Polling conducted by McLaughlin & Associates of Alexandria, Virginia, of 1,000 likely general election voters in the United States, January 28–31, 2007.

individual rights of workers. Only 6 percent think that the Employee Free Choice Act's card signing process is better.

The American public recognizes that the private ballot should be sacred, and that a federally-supervised private ballot election conducted by the NLRB is the best way to ensure that the rights of all workers are protected, and that the outcome reflects an employee's true sentiments with respect to the question of unionization. They are not alone. The Supreme Court, federal appeals courts, and the National Labor Relations Board itself each recognize that a federally-monitored private ballot election provides workers with the most protection, and is the only true way to ascertain whether a majority of workers support unionization:

> [A secret ballot election is the] "most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." Gissel Packing, 395 U.S. 395 U.S. 575, 602 (1969).
>
> [Card checks are] "admittedly inferior to the election process." Id.
>
> "[I]t is beyond dispute that secret election is a more accurate reflection of the employees' true desires than a check of authorization cards collected at the behest of a union organizer." *NLRB* v. *Flomatic Corp.*, 347 F.2d 74, 78 (2d Cir. 1965).
>
> "It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check,' unless it were an employer's request for an open show of hands." *NLRB* v. *S. S. Logan Packing Co.*, 386 F.2d 562,565 (4th Cir. 1967).
>
> "An election is the preferred method of determining the choice by employees of a collective bargaining representative." *United Services for the Handicapped* v. *NLRB*, 678 F.2d 661, 664 (6th Cir. 1982).
>
> "Workers sometimes sign union authorization cards not because they intend to vote for the union in the election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back, since signing commits the worker to nothing (except that if enough workers sign, the employer may decide to recognize the union without an election)." *NLRB* v. *Village IX, Inc.*, 723 F.2d 1360, 1371 (7th Cir. 1983).
>
> "Freedom of choice is 'a matter at the very center of our national labor relations policy,' . . . and a secret election is the preferred method of gauging choice." *Avecor, Inc.* v. *NLRB*, 931 F.2d 924, 934 (D.C. Cir. 1991) (citations omitted).

Unions themselves appear to recognize the importance of the private ballot, and the critical protections they provide for worker rights—at least when the issue is a question of whether to decertify a union. The United Food and Commercial Workers were direct and succinct in their assertion that secret ballot elections run by the National Labor Relations Board are far superior to "card check" schemes:

> "Board elections are the preferred means of testing employees' support." Brief of United Food and Commercial Workers (UFCW), Levitz Furniture Co. of the Pacific, 333 NLRB 717, 725 (2001).

In the 109th Congress, former NLRB Member John Raudabaugh testified at length as to the superiority of the secret ballot election, its recognition by courts as the preferred means of testing employee support, and perhaps most important, the rigorous and scrupulous regulation of these elections by the federal labor board. As Mr. Raudabaugh explained,

> Under current law, employee designation or selection may be by a Board supervised secret-ballot election or by voluntary recognition based on polls, petitions, or union authorization cards. 29 U.S.C. δδ 159 (a), (c) (2004). *Of these various methods, the United States Supreme Court and the Board have long recognized that a Board conducted secret-ballot election is the most satisfactory, indeed preferred method of ascertaining employee support for a union.* (emphasis added).

Mr. Raudabaugh continued:

> As the Board announced in General Shoe Corp., 77 NLRB 124 (1948), "In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. . . .Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice. An election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammeled choice for or against a bargaining representative."
>
> The Board's "laboratory conditions" doctrine sets a considerably more restrictive standard for monitoring election related misconduct impairing free choice than the unfair labor practice prohibitions of interference, restraint and/or coercion. Over many years, the Board has developed specific rules and multi-factored tests to evaluate and rule on election objections. *In contrast, recognition based on methods other than a Board conducted secret-ballot election is without these "laboratory conditions" protections and unless the interfering conduct amounts to an unfair labor practice, there is no remedy for compromising employee free choice* (emphasis added; citations omitted).

Very few points of labor law are black and white. This is one of those few. Courts, agencies, experts, lawmakers, and most important, American workers, recognize that the secret ballot election process is the only way to ensure that workers are given true "choice" in determining whether to form and join a union. Again, in the very words of organized labor:

> [A representation election] "is a solemn . . . occasion, conducted under safeguards to voluntary choice," . . .

> [Other means of decision-making] are "not comparable to the privacy and independence of the voting booth," and [the secret ballot] election system provides the surest means of avoiding decisions which are "the result of group pressures and not individual decision[s]." Joint Brief of the United Automobile, Aerospace, and Agricultural Implement Workers of America, the United Food and Commercial Workers, and the AFL–CIO, Chelsea Industries and Levitz Furniture Co. of the Pacific, Inc., Nos. 7–CA–36846, 7–CA–37016 and 20–CA–26596 (NLRB) at 13 (May 18, 1998) (citations omitted).

Finally, it bears note that some of the very same Members of Congress who support this bill have made clear their belief that the right to a secret ballot ought to be protected in other countries—but not here. No amount of contextualizing, pigeonholing, or explanation can deny the inconsistency in these Members arguments. As they wrote:

AUGUST 29, 2001.

Junta Local de Conciliacion y Arbitraje del Estado de Puebla,
Lic. Armando Poxqui Quintero, 7 Norte, Numero 1006 Altos, Colonia Centro, Puebla, Mexico C.P.

DEAR MEMBERS OF THE JUNTA LOCAL DE CONCILIACION Y ARBITRAJE OF THE STATE OF PUEBLA: As members of Congress of the United States who are deeply concerned with international labor standards and the role of labor rights in international trade agreements, *we are writing to encourage you to use the secret ballot in all union recognition elections.*

We understand that the secret ballot is allowed for, but not required by, Mexican labor law. However, *we feel that the secret ballot is absolutely necessary in order to ensure that workers are not intimidated into voting for a union they might not otherwise choose.*

We respect Mexico as an important neighbor and trading partner, and we feel that *the increased use of the secret ballot in union recognition elections will help bring real democracy to the Mexican workplace.*

Sincerely,

George Miller, Marcy Kaptur, Bernard Sanders, William J. Coyne, Lane Evans, Bob Filner, Martin Olav Sabo, Barney Frank, Joe Baca, Zoe Lofgren, Dennis J. Kucinich, Calvin M. Dooley, Fortney Peter Stark, Barbara Lee, James P. McGovern, Lloyd Doggett.

(Emphasis added).

The Republican Members of the Committee could not say it better.

The One-Sided Penalty Provisions of the Bill Are Unjust and Unwarranted, and Its Mandatory Arbitration Provisions Further Strip Workers of Rights

Extended discussion of the other flaws in this bill is not necessary. As noted above, the bill's penalty provisions are, simply put, a one-sided swipe at only one side of the bargaining equation, namely, employers. Neither the bill nor its supporters attempt to

disguise this fact. Indeed, as detailed below, Committee Democrats unanimously opposed an effort to bring some fairness to this provision in rejecting an amendment that would have provided that the enhanced penalties contained in the bill would apply to union violations as well as employer violations of the Act. Under H.R. 800, if an employer engages in a variety of specified behavior, it is immediately subject to new and severe labor law penalties. A union engaging in exactly the same behavior is exempted. That's not fair, that's not right, and that's not good policy.

Nor do Republicans support the bill's effort to take away a worker's right to vote on his or her contract. As the Supreme Court has noted, the Act is founded on the notion that the parties, not the government, should determine the applicable terms and conditions of employment:

> The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employer and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. But it was recognized from the beginning that agreement might in some cases be impossible, and *it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement. H K. Porter* v. *NLRB*, 397 U.S. 99, 103–04 (1970) (emphasis added).

Current law embodies a delicate balance with respect to the parameters within which unions and employers negotiate the terms and conditions of employment for workers in a particular bargaining unit. H.R. 800 would dramatically upset that balance by imposing, via government fiat, mandatory binding arbitration—essentially rendering the collective bargaining process nearly useless.

As federal labor law expert and former NLRB Member Charles Cohen testified:

> [T]his interest arbitration requirement is unwise public policy. With respect to employees, it would parlay the taking away of a vote on representation with the taking away of a vote on ratification. This is because the contract mandated by the interest arbitrator renders moot employee endorsement. Likewise, it is the employer that must run the business, remain competitive, and pay the employees each week. The union has the opportunity to influence the employer's thinking by engaging in economic warfare. But, the actual agreement is forged in the crucible of what the business can sustain.

Testimony of Charles Cohen, Subcommittee on Health, Employment, Labor, and Pensions Hearing "Strengthening the Middle Class Through the Employee Free Choice Act" (February 8, 2007).

Apart from eliminating their right to vote with a secret ballot on the question of unionization, it is hard to imagine a more undemo-

cratic provision, or a rule that provides employees with less "choice."

For all of these reasons, we oppose this legislation.

COMMITTEE CONSIDERATION OF H.R. 800

In light of the significant problems in H.R. 800 discussed above, during the Committee's consideration of the legislation on February 14, 2007, Committee Republicans offered a series of amendments designed to protect the rights of workers and ensure that federal labor law remains fair, balanced, and equitable with respect to all parties. Despite the Majority's rhetorical flourishes about protecting the rights of workers, each of these amendments met with unanimous Democrat opposition.

The Committee's Senior Republican Member, Mr. McKeon, offered an amendment in the nature of a substitute which would have ensured that employees remain free of harassment, intimidation, or coercion by any party—union, employer, or co-worker—by affirmatively prohibiting the use of card check recognition, and providing that a union may only be recognized and certified after a secret ballot election conducted by the NLRB. The McKeon Amendment embodied the text of H.R. 866, the Secret Ballot Protection Act, sponsored by the late Honorable Charlie Norwood, who chaired the Education and Workforce Subcommittee on Workforce Protections in the 107th, 108th, and 109th Congresses. All Committee Democrats voted against this proposal.

Health, Education, Labor and Pensions Subcommittee Ranking Republican Mr. Kline offered an amendment that would have provided equity and fairness to the card check process by allowing employees who wish to decertify a union as their bargaining agent to do so by way of a card check decertification. All Committee Democrats voted against this proposal.

Dr. Boustany offered an amendment to ensure that workers are afforded the opportunity to sign cards free of harassment and coercion, and that they have a neutral party from whom to seek information, by requiring that an authorization card is not valid unless signed in the presence of an NLRB representative. All Committee Democrats voted against this proposal.

Mr. Davis of Tennessee offered an amendment to provide fairness and equity in H.R. 800's remedial scheme, by ensuring that the bill's new civil penalty provisions would apply equally to employers and unions who violate the National Labor Relations Act. All Committee Democrats voted against this proposal.

Mr. Walberg offered an amendment designed to ensure that workers—whose economic livelihood and survival bear the greatest risk when union leadership calls a strike—are able to choose for themselves whether to strike, by providing that a union may not commence strike unless its members voted on management's last, best contract offer. All Committee Democrats voted against this proposal.

In light of the evidence the Subcommittee heard at its hearing on February 8, 2007 on H.R. 800 from employees who had been badgered and harassed by union organizers, Ms. Foxx offered an amendment to ensure that workers are free of intimidation, harassment, and coercion by allowing workers to notify a union that they

did not wish to be contacted in connection with a recognition drive and requiring the union to honor the worker's request. All Committee Democrats voted against this proposal.

At that same hearing, the Subcommittee also heard testimony that union organizers are routinely trained to ignore requests from employees to return signed authorization cards, despite employees' requests to do so, and that thereafter unions use these cards to seek recognition as a bargaining representative of these employees. See Testimony of Jennifer Jason, Subcommittee on Health, Employment, Labor, and Pensions Hearing "Strengthening the Middle Class Through the Employee Free Choice Act" (February 8, 2007) ("I know many workers who later, upon reflection, knew that they had been manipulated and asked for their card to be returned to them. The union's strategy, of course, was never to return or destroy such cards, but to include them in the official count towards the majority. This is why it is imperative that workers have the time and the space to make a reasoned decision based on the facts and their true feelings."). In light of this testimony, Dr. Price offered an amendment which would have made it an unfair labor practice for a union to fail to return a signed authorization card within five days of an employee's request, and prohibited the union from using them to establish a card check majority or for any other purpose. All Committee Democrats voted against the proposal.

Over the years, the Committee has heard ample testimony as to the union practice of "salting" a workforce. To ensure that newly-hired union organizers who have no interest in the long-term well-being of a company and no vested interest in their employment could not bind their bona fide coworkers to union representation, Mr. Ehlers offered an amendment to protect the right of bona fide workers. The Ehlers Amendment would simply have provided that a worker be employed with a company for 180 days before being eligible to sign a union authorization card. All Committee Democrats voted against this proposal.

To ensure that the safety and well-being of all workers are protected from the very real threat of union violence, Mr. Wilson of South Carolina offered an amendment that would have enhanced the NLRB's authority with respect to union organizers and labor organizations engaged in or encouraging violent and dangerous behavior, prohibited the NLRB from ordering reinstatement of an organizer or employee who has engaged or is engaging in union violence, and required the NLRB to decertify any union found to engage in or encourage the use of violence. All Committee Democrats voted against this proposal.

To protect the right of all workers to be protected from forced unionism, Mr. Wilson also offered an amendment which would have ensured that no employee can be forced to join a union or pay union dues or agency fees. This legislation, based on the National Right to Work Act that Mr. Wilson of South Carolina has previously sponsored, simply amends the National Labor Relations Act to prohibit the use of "union security agreements" and provide that employees may not be required to use their hard-earned pay to pay union dues, simply as a condition of keeping their job. All Committee Democrats voted against this proposal.

To address one of the widest-spread problems facing the United States—the flagrant violation of its immigration laws, and the massive and growing crisis of illegal immigration, Mr. Marchant offered an amendment that would have simply required that to be considered valid by the Board, a signed authorization card be accompanied by an attestation (supported by documentary evidence) that the employee was, in fact, a legal resident of the United States. Notably, the Marchant Amendment would have required no more of unions than is already required of employers under federal immigration law, and simply would have insured that illegal aliens are not given the right to dictate the terms and conditions of legal coworkers. All Committee Democrats voted against this proposal.

Mr. Kline offered an amendment recognizing the special and sovereign nature of our nation's Indian tribes, which would have provided that the card check provisions contained in H.R. 800 could not be used to organize employees working for businesses owned by Indian tribes and operating on their tribal lands. The Kline Amendment would have simply provided that much in the way federal labor law does not mandate "card check" agreements for sovereign state and local governments, it should not do so for sovereign Indian tribes. All Committee Democrats voted against this proposal.

Finally, recognizing the wholesale and unprecedented change to federal labor law embodied in H.R. 800's provisions mandating binding first-contract interest arbitration, Mrs. Biggert offered an amendment to strike that section of the bill. The Biggert Amendment would have at least ensured that while employees may be stripped of a right to vote on whether to unionize via H.R. 800's "card check" provisions, their right to vote on a collective bargaining agreement governing the terms and conditions of their employment could not be taken away. All Committee Democrats opposed this proposal.

Given the irremediable flaws in this politically-motivated legislation, Committee Republicans were unanimous in opposing this bill, and voting against reporting this measure to the full House of Representatives.

CONCLUSION

Despite its contortionist title, the so-called "Employee Free Choice Act" represents an egregious and frontal assault on worker rights, the likes of which have not come before the Committee in more than a decade. The bill would strip American workers of their right to vote their conscience on the question of unionization in a federally-supervised private ballot election. Instead, the bill is an open invitation to subject workers to intimidation, harassment, and deception until they "sign the card." The bill's provisions increasing damages, penalties, and remedies are unwarranted and one-sided, and unfairly tip the balance of labor law in the direction of one party. Finally, H.R. 800's mandatory, binding arbitration provisions would strip workers of the right to vote on the terms of a collective bargaining agreement, and would serve only to foster more overpromising and misleading claims, with even less fear of repercussion.

H.R. 800 represents the worst sort of legislation, and we respectfully oppose it.

HOWARD P. MCKEON.
TOM PETRI.
PETER HOEKSTRA.
MIKE CASTLE.
MARK SOUDER.
VERNON J. EHLERS.
TODD R. PLATTS.
RIC KELLER.
JOE WILSON.
JOHN KLINE.
CATHY MCMORRIS RODGERS.
K. MARCHANT.
TOM PRICE.
LUIS FORTUÑO.
C. W. BOUSTANY, Jr.
VIRGINIA FOXX.
ROB BISHOP.
DAVID DAVIS.
TIM WALBERG.

○

THE FACTS

What the Freedom to Join Unions Means to America's Workers and the Middle Class

AMERICA CANNOT BE A SUCCESSFUL LOW-WAGE CONSUMER SOCIETY. The Bush administration tried to make up for stagnant wages with consumer debt—a choice that has proven disastrous. Our country needs more money to go to America's workers and less to Wall Street speculators and CEOs. That is why a key element of our nation's economic recovery must be to restore workers' freedom to form unions, speak for themselves and negotiate a fair share of the wealth they create. Rising income, not more debt, is the only way out of the economic crisis.

America became the greatest middle class society in the world when our country respected workers' fundamental human right to represent themselves and bargain for better wages and benefits. Through bargaining, workers transform bad, dead-end jobs into living-wage jobs with opportunities for training and upgrading.[1] The long-term decline in collective bargaining coverage is a significant cause not only of wage stagnation but also of the nation's health care and retirement income security crises—crises that grow worse by the day.[2]

But the law that protects workers' freedom to bargain has been perverted. Companies routinely fire workers who stand up for themselves. Workers who want to form unions are threatened with plant closings, interrogated, offered bribes, spied on and intimidated.[3] The result? Only 8 percent of private-sector workers actually belong to unions, even though independent surveys by a leading national survey firm show that 58 percent of U.S. workers say they want a union in their workplace—the highest percentage in 25 years.[4]

Denying Americans the freedom to form unions at their place of work is not just unfair, it is destructive economic policy. Taking away workers' rights on the job has hurt the American middle class, increased economic inequality and destabilized our economy.[5] With deunionization, we have set off a long-term downward spiral of lower wages

ATTACHMENT 2

and fewer benefits. Pockets of workers with good jobs try to hold on to a middle class standard of living, even as more and more people suffer lower wages, less health care and no retirement security. As companies fight to cut costs, consumer demand falls, breeding recession and instability.

Over the past 35 years, workers' productivity has risen by more than 75 percent, but inflation-adjusted wages of America's workers—as published by the President's Council of Economic Advisors—are lower than in 1973.[6] The reality today for America's workers is:

1. Stagnant wages and rising economic inequality.
2. Pessimism and deepening worker dissatisfaction with their economic prospects.[7]

A multitude of published studies by respected and prominent economists have found that when workers have the right to come together and form unions, their lives improve and the larger economy is healthier: Productivity rises, product and service quality improves, economic inequality is reduced and wages are boosted substantially for all workers—but especially for low-wage workers and workers of color.[8] Unions and collective bargaining have been especially important in giving workers access to health insurance and defined-benefit pensions.[9]

During the 1950s and 1960s, when America's economy grew at the fastest rate since World War II, the percentage of workers who had unions was at its highest point in U.S. history. Conversely, on the eve of the worst economic crisis of the 20th century, the Great Depression, union membership had been declining for more than a decade, just as it is today.[10] The times in our history when workers have been able to come together to speak for themselves in the workplace have been times of rising real wages, economic and financial stability, rising health care coverage, rising pension coverage and rising productivity. But when workers' rights are repressed, the American economy produces gross inequality and financial instability.

Some responsible and profitable major corporations have adopted majority sign-up as standard practice and an important element of their corporations' successful high-road business plans. The result for companies like AT&T and Kaiser Permanente has been workplaces with better labor-management relations, less tension, more respect for employees and a positive impact on employee morale.[11]

Of course, there are employers that want America to be a low-wage economy. The U.S. Chamber of Commerce has issued white papers attacking workers' freedom to organize, relying on writings by a handful of far right-wing economists.[12]

What the Chamber doesn't want policymakers to know is that union membership is the route out of poverty for workers in low-wage occupations. For example, union cashiers earn 30 percent more than nonunion cashiers, union dining room and cafeteria attendants earn 49 percent more than nonunion dining room and cafeteria attendants, and union janitors earn 31 percent more than nonunion janitors.[13]

Today, states with the highest union density enjoy higher wages, higher family incomes, lower poverty rates and smaller percentages of people without health insurance than states with the lowest union density.[14]

When workers can form unions, rising wages set off a positive, upward cycle. States with the highest union density spend more per pupil on public education; pay teachers higher salaries; have more doctors per capita, lower infant mortality and lower death rates; have a lower incidence of workplace fatalities; and have better worker safety net programs such as unemployment insurance and workers' compensation than states with the lowest union density.[15] Unions not only improve the quality of worker protection programs at state and federal levels—they inform and educate workers about these programs and help them gain access to their benefits and protections.[16]

Unions also have a large positive impact on civic participation by America's workers.[17] It comes as no surprise that the states with the highest union density have higher voter participation rates than states with the lowest union density.[18]

Unions and collective bargaining are vital not only in the workplace but also in society at large. Half a century ago, the groundbreaking economist John Kenneth Galbraith identified unions as a vital source of countervailing power in an economy dominated by large corporations. That remains true today.

The Employee Free Choice Act is part of a strategy for American economic revival—for a high-wage, high-skill economy. Increasing incomes and respecting workers' rights on the job must be a central part of that strategy.

What is the plan proposed by the anti-worker voices in the business community? More consumer debt? More subprime mortgages? More jobs without pensions and health care? A vain effort to compete with low-wage countries by cutting our standard of living to their levels for all but the wealthiest Americans?

America deserves better than economic inequality and economic decline. That's why America needs to restore the freedom for all of its workers to bargain for a better life by passing the Employee Free Choice Act.

Endnotes

[1]Jeffrey C. Waddoups, "Unions and Wages in Nevada's Hotel-Casino Industry," *Journal of Labor Research*, Vol. 21, Issue 2 (Spring 2000); Laura Dresser and Annette Bernhardt, "Bad Service Jobs: Can Unions Save Them? Can They Save Unions?" in Richard Block (et. al.), eds., *Justice on the Job: Perspectives on the Erosion of Collective Bargaining in the United States*, Upjohn Institute, 2006; Daniyal Zuberi, *Differences that Matter: Social Policy and the Working Poor in the United States*, Cornell University Press, 2006.

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[3]John Schmitt and Ben Zipperer, "Dropping the Ax: Illegal Firings During Union Election Campaigns," Center for Economic and Policy Research, January 2007; Kate Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobilization on Workers, Wages and Union Organizing*, Cornell University (2000); Compa, L.A., and Human Rights Watch, 2000, *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards*, New York: Human Rights Watch.

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[5]Annette Bernhardt, et. al (eds.), *The Gloves Off Economy: Workplace Standards at the Bottom of America's Labor Market*, Cornell Press, 2008 LERA research volume.

[6]Economic Report of the President: 2008 Report Spreadsheet Tables, http://www.gpoaccess.gov/eop/tables08.html. See Tables B-47 and B-49.

[7]87 percent of Americans say they are dissatisfied with the economic situation in the country today, and 91 percent report negative personal feelings about the economic situation for people like them. Peter D. Hart Research Associates, December 2008. According to 2008 national election exit polling, voters are deeply unhappy with their economic situation. Just 1 percent rate economic conditions as excellent, 6 percent say they are good, 44 percent say economic conditions are not so good and 49 percent say they are poor, http://www.cnn.com/ELECTION/2008/results/polls/#val=USP00p5

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[9]Paul Fronstin, "Union Status and Employment-Based Health Benefits," *EBRI Notes,* Vol. 26, No. 5 (May 2005), http://www.ebri.org/pdf/notespdf/0505notes.pdf; Thomas C. Buchmeuller, John DiNardo and Robert G. Valletta, "Union Effects on Health Insurance Provision and Coverage in the United States," *Industrial and Labor Relations Review,* Vol. 55 (July 2002), pp. 610-627; William J. Wiatrowski, "Factors Affecting Retirement Income," *Monthly Labor Review,* March 1993, p. 25–35, and "Employee Benefits for Union and Nonunion Workers," *Monthly Labor Review,* February 1994, p. 34–38; U.S. Department of Labor, Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in Private Industry in the United States,* March 2005, http://www.bls.gov/ncs/ebs/sp/ebsm0003.pdf, and John Budd, "The Effect of Unions on Employee Benefits," in James T. Bennett and Bruce E. Kaufman (eds), *What Do Unions Do?: A Twenty-year Perspective,* Transaction Publishers, 2007.

[10]The Statistical History of the United States, Basic Books, "Labor Union Membership By Industry, 1897-1934," p. 178.

[11]Adrienne E. Eaton and Jill Kriesky, *"No More Stacked Deck: Evaluating the Case Against Card Check," Perspectives on Work,* Volume 7, No. 1; June 2003.

[12]*Is Unionization the Ticket to the Middle Class? The Real Economic Effects of Labor Unions,* U.S. Chamber of Commerce (2008); *The Truth About American Workers: They are Satisfied, Respected, and Benefiting from Productivity Gains,* U.S. Chamber of Commerce (2008).

[13]U.S. Census; *Union Membership and Earnings Data Book,* Barry T. Hirsch and David A. Macpherson, Bureau of National Affairs, 2005.

[14]Source for wages and family income: AFL-CIO analysis of Kathleen O'Leary Morgan and Scott Morgan, *State Rankings 2005,* Morgan Quitno Press, 2005. Source for poverty rates: U.S. Census Bureau, "Table 21. Number of Poor and Poverty Rate, By State: 1980 to 2003." Source for data on the uninsured: U.S. Census Bureau, Historical Health Insurance Tables, "Table HI-4. Health Insurance Coverage Status and Type of Coverage by State, All People: 1987 to 2003."

[15]Source for per pupil education spending, teacher salaries, doctors per capita, death rates and Workers' Compensation benefits: AFL-CIO analysis of Kathleen O'Leary Morgan and Scott Morgan, *State Rankings 2005,* Morgan Quitno Press, 2005. Source for infant mortality data: Centers for Disease Control and Prevention, National Center for Health Statistics, www.cdc.gov/nchs/data/nvsr/nvsr53/nvsr53_05.pdf. Source for workplace fatalities data: U.S. Department of Labor, Bureau of Labor Statistics, Census of Fatal Occupational Injuries (2003). Source for unemployment insurance data, U.S. Department of Labor, Employment and Training Administration.

[16]John Budd, "The Effect of Unions on Employee Benefits," in James T. Bennett and Bruce E. Kaufman (eds.), *What Do Unions Do?: A Twenty-year Perspective,* Transaction Publishers, 2007; Barry T. Hirsch, David A. Macpherson and J. Michael Dumond, "Workers' Compensation Recipiency in Union and Nonunion Workplaces," *Industrial Labor Relations Review,* Vol. 50, No. 2, January 1997, p. 213–236; David Weil, "Enforcing OSHA: The Role of Labor Unions," *Industrial Relations,* Vol. 30, No. 1, Winter 1991, p. 2036; John W. Budd and Brian P. McCall, "The Effect of Unions on the Receipt of Unemployment Insurance Benefits," *Industrial and Labor Relations Review,* Vol. 50, No. 3, April 1997, p. 478–492; and Amit Kramer, "Unions as Facilitators of Employment Rights: An Analysis of Individuals' Awareness of Parental Leave in the National Longitudinal Survey of Youth," *Industrial Relations,* Vol. 47, No. 4 (October 2008).

[17]Benjamin Radcliff, "Organized Labor and Electoral Participation in American National Elections," *Journal of Labor Research,* Spring 2001.

[18]AFL-CIO analysis of Center for the Study of the American Electorate, www.fairvote.org/reports/CSAE2004electionreport.pdf.

HAWAII TEAMSTERS AND ALLIED WORKERS, LOCAL 996
Affiliated with the International Brotherhood of Teamsters

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Honolulu, Hawaii 96819-3205

Telephone: (808) 847-6633
Fax: (808) 842-4575

Rep. Karl Rhoads, Chair
Rep. Kyle Yamashita, Vice-Chair
Committee on Labor and Public Employment

Glenn Ida
Representative
Friday, Mar. 20, 2009, 9:30 AM
Conference Room 309

Support of SB 1621, SD2, Relating to Collective Bargaining.

The Hawaii Teamsters Local 996 believes that SB 1621, SD2, will even the playing field and removes some of the barriers that currently exists in a corporate dominated economic environment in gaining union representation for working people through Card Check.

SB 1621, SD2, also guarantees a first contract by putting negotiations on a schedule that may lead to mediation and then to binding arbitration if necessary to reach an arbitrated settlement good for up to two years, extends certain privileges to the Union, and allows Labor disputes to be defenses from prosecution for certain violations of Law.

The Hawaii Teamsters Local 996 strongly supports SB 1621, SD2, Relating to Collective Bargaining.

Thank you for allowing me to testify on this important matter.

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION
AFSCME Local 152, AFL-CIO

AFSCME
LOCAL 152, AFL-CIO

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The Twenty-Fifth Legislature, State of Hawaii
House of Representatives
Committee on Labor & Public Employment

Testimony by
Hawaii Government Employees Association
March 20, 2009

S.B. 1621, S.D. 2 – RELATING TO COLLECTIVE BARGAINING

The Hawaii Government Employees Association strongly supports the purpose and intent of S.B. 1621, S.D. 2, which proposes amendments to Chapter 377, HRS (The Hawaii Employment Relations Act), and Chapter 380, HRS (Labor Disputes; Jurisdiction of Courts). The bill allows: (1) union certification by signed authorization from the employee; (2) facilitating initial collective bargaining in the private sector; (3) sets civil penalty for unfair labor practices; (4) extends certain authorities to labor organizations representing employees for collective bargaining; and (5) provides for defenses for protected activity in a labor dispute.

The proposed process permits the employees, with a majority of their signatures, to petition to be represented by a union. Currently, an employer does not have to recognize the majority's signatures and can insist on a secret ballot election. The measure will help level the playing field by giving the choice to employees.

The proposed mechanism to facilitate settlement of an initial collective bargaining agreement will prevent efforts by employers to stall negotiations indefinitely. It also provides for a request for conciliation and, ultimately, arbitration to resolve a dispute and for a collective bargaining agreement that will be binding for two years. Further, the measure proposes to codify certain authorities of labor organizations in their representational activities.

Labor unions have a significant role to play in helping our economy recover and restoring the middle class. We strongly support the purpose and intent of the proposed legislation to streamline union certification and give employees a voice at work.

Thank you for the opportunity to testify in support of S.B. 1621, S.D. 2.

Respectfully submitted,

Nora A. Nomura
Deputy Executive Director

OUR UNION OUR FAMILY

UPW

AFSCME LOCAL 646 AFL-CIO

House of Representatives
The Twenty-Fifth Legislature
Regular Session 2009

Committee on Labor & Public Employment
Rep. Karl Rhoads, Chair
Rep. Kyle Yamashita, Vice Chair

DATE: Friday, March 20, 2009
TIME: 9:30 a.m.
PLACE: Conference Room 309

TESTIMONY OF THE UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO ON SB 1621, SD2, RELATING TO COLLECTIVE BARGAINING

My name is Dayton M. Nakanelua, state director of the United Public Workers, AFSCME, Local 646, AFL-CIO (UPW). The UPW currently represents approximately 8,700 blue collar, non-supervisory employees and 2,800 institutional, health, and correctional workers in the State of Hawaii and the various counties. We also represent approximately 3,000 retired members currently receiving benefits under chapter 87A.

UPW strongly supports SB 1621, SD2. which allows for certification of union representation through card check authorization; provides for first time contract mediation and binding arbitration; provides a union representation privilege; sets civil penalties for unfair labor practices; and allows labor disputes to be defenses against prosecution for certain violations.

There is something fundamentally wrong with our labor economy. Despite worker productivity rising more than 75% over the past 35 years, inflation-adjusted wages of these workers are still lower than in 1973 *(Economic Report of the President: 2008 Spreadsheet Tables)*. There is no

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HAWAII - 362 East Lanikaula Street ◆ Hilo, Hawaii 96720-4336 ◆ Phone: (808) 961-3424
KAUAI - 4211 Rice Street ◆ Lihue, Hawaii 96766-1325 ◆ Phone: (808) 245-2412
MAUI - 841 Kolu Street ◆ Wailuku, Hawaii 96793-1436 ◆ Phone: (808) 244-0815
1-866-454-4166 (Toll Free, Molokai/Lanai only)

mystery to this inequity: wage stagnation is directly correlated to the long-term decline in union membership. When America's middle class was at its peak, the percentage of union workers was also at its highest. Today membership has dropped to eight percent of the private sector workforce as our economy continues its recessionary decline.

The National Labor Relations Act (NLRA) was enacted to protect the rights of workers to form unions and to bargain for better wages and benefits. Over time, the law has been seriously perverted. The NLRB now serves as a tool for corporations to frustrate workers' freedom to choose and deny their right to collective bargaining. The data is well documented: 25% illegally fire workers for union activity during organizing campaigns; 75% hire union-busters to fight organizing drives; 78% force workers to attend one-on-one meetings; and 92% force employees to attend closed-door meetings against the union *(Kate Bronfenbrenner, Uneasy Terrain)*.

This bill levels the playing field by ending the corporate intimidation, retaliation, and delaying tactics which prevent workers from their fundamental and democratic rights. This bill along with the national Employee Free Choice Act are part of a strategy for American economic revival to restore and grow the middle class. For all these reasons, we urge the passage of SB 1621, SD2.

IRONWORKERS STABILIZATION FUND

Honorable Karl Rhoads, Chair
Members of the Committee on Labor & Public Employment
Hawaii State Capitol
415 South Beretania Street
Honolulu, HI 96813

RE: IN SUPPORT OF SB1621 SD2, RELATING TO COLLECTIVE BARGINING
Hearing: Friday, March 20, 2009

Dear Chair Rhoads, and the Committee on Labor & Public Employment:

The Ironworkers Stabilization Fund Local 625 SUPPORTS the passage of SB1621 SD2, which allows the union certification of employees by a signed authorization from the employees.

The State of Hawaii has long been known to be fair and protect the rights of the working men and women of Hawaii. This bill will allow for those who are unable to protect themselves at work a organization that will assist in giving them the pay and benefits they deserve. This bill will allow the process to create deadlines for the initial collective bargaining agreement and will set up procedures and conciliation of disputes.

We believe that this bill will assist in giving a decent pay for those people who cannot protect themselves. Our union, just want what is right for the hard working men and women of Hawaii.

Thank you for the opportunity to submit this testimony for Senate Bill 1621 SD2.

94-497 Ukee Street *Waipahu, Hawaii 96797* *(808) 671-4344*

House of Representatives
Committee on Labor and Public Employment
March 20, 2009, 9:30 a.m.
Conference Room 309

Statement of the Hawaii Carpenters Union on S.B. 1621, SD2

The Hawaii Carpenters Union supports S.B. 1621, SD2, in keeping with Article 13.1 of The Constitution of the State of Hawaii, stating that "Persons in private employment shall have the right to organize for the purpose of collective bargaining." There is a need to provide realistic means for employees to exercise that right.

Differences in workplace and historic conditions require differing means to address them. The construction industry is an example where unique conditions have been recognized, so different means of organizing for collective bargaining have been established in law.

Today's conditions for workers to freely choose collective bargaining differ from the period when elections were provided as the means. Collective bargaining was established as beneficial public policy, to defuse the time bomb of wide gaps between the rich and workers. Elections were the means to validate it. That means has since been frustrated.

New means are needed, and this Bill provides for the showing of a majority by signature, for individuals to authorize an organization as their collective bargaining representative. A signature similar to what we use to authorize an attorney to represent individuals or groups, or to authorize a mortgage debt, or to designate beneficiaries. This Bill will also supports initial collective bargaining, recognizing the practice of employers simply ignoring certified employee majorities, basically daring workers to strike.

This Bill will help prevent strike situations by specifying free-speech rights of employees to inform the public of their situation. It is well recognized that certain privately owned walkways, streets, etc. are intended and used for public access. Employees provided equal treatment may take their case to the arena of public opinion rather than workplace confrontation.

Other changes in historic conditions are that virtually all sizes of workplaces are under Federal jurisdiction, and that unions must make decisions inclined against representing very small units of employees. Employees of substantial agricultural employers should be afforded their rights. Hawaii didn't wait for the rest of the nation to extended collective bargaining rights to our ancestors working in agriculture, and should update that commitment in today's conditions.

While State jurisdiction is very limited as compared with that of the Federal National Labor Relations Board, our legislature should lead in statute where it can, as our State Constitution does as compared with our Federal document.

Thank you for your consideration of the testimony of the Hawaii Carpenters Union.

Testimony in Strong **Support** of
SB1621 SD2
Relating To Collective Bargaining

To the Committee on Labor and Public Employment
Friday, March 20, 2009, 9:30 a.m.
State Capitol, Room 309

By Al Lardizabal, Director
Government Relations
Laborers' International Union of North America Local 368

Honorable Karl Rhoads, Chair; Honorable Kyle T. Yamashita, Vice Chair and Members of the Committee:

The Laborers' Union is in strong **support** of SB1621 SD2 Relating to Collective Bargaining.

1. President Barack Obama said, "We cannot have a strong middle class without strong labor unions. We need to level the playing field for workers and the unions that represent their interest."

2. Vice President Joe Biden said, "...we need to make sure that the benefits of that growth reach the people responsible for it. We can't standby and watch as that narrow sliver of the top of the income scale wins a bigger piece of the pie---while everyone else gets a smaller and smaller slice."

3. Former Labor Secretary Robert Reich said, "...a way to make our economy work for everyone is to restore the freedom to form unions, and give the workers the bargaining power they need to improve their own lives....the crises in debt, health care, housing and jobs can be traced to a shrinking middle-class, with too little economic security and purchasing power. And while many public policies can work around the edges, our country's history shows that the health of the economy is improved by making possible for workers to form unions and bargain for a better life."

4. Opponents of the right to bargain collectively say that now is not the right time to give collective bargaining rights to workers. When is the "right time" to give workers the right to bargain for better working

conditions and wages to allow them to feed their families and not need to work two jobs to make ends meet?

5. Opponents say that it will destroy the business. When employees have a stake in a business and are treated with dignity and respect, not just treated as commodities bought and sold and discarded at will, they will fight hard and make sacrifices to have the enterprise succeed because their future depends upon it and because they in turn, respect the managers for their decent treatment of workers.

6. It was stated at a recent hearing (Finance) that most of the agricultural workers in Hawaii are Filipino. There was no explanation as to the relevance of this fact to deny these workers the right for a living wage in Hawaii through collective bargaining.

7. It was also stated that Hawaii had nearly the best paid agricultural workers compared to the mainland. They did not address the relevance of the cost of living in Hawaii and the need for families to work two jobs to exist. This comparison of wages with other states must be compared to the cost of living in these states to have any meaning.

Thank you for the opportunity to present this testimony.

House of Representatives
The Twenty-Fifth Legislature
Regular Session of 2009

Committee on Labor and Public Employment
Representative Karl Rhoads, Chair
Representative Kyle T. Yamashita, Vice Chair

Friday, March 20, 2009 at 9:30 a.m.
Conference Room 309, State Capitol

Re: S.B. 1621 SD2 Relating to Collective Bargaining

The Screen Actors Guild Hawaii Branch ***strongly supports*** the purpose and intent of S.B. 1621 SD2 and the proposed amendments to Chapter 377, HRS (The Hawaii Employment Relations Act). Presently, an employer does not have to recognize majority sign-up and can insist on a secret ballot election, resulting in numerous delays, threats, coercion and any other tactics to ensure union organizing drives fail. In fact, nationwide, over 86,000 workers have been fired over the past eight years for trying to unionize.

According to Kate Bronfenbrenner from Cornell University, "employers fire workers in a quarter of all campaigns, threaten workers with plant closings or outsourcing in half and employ mandatory one-on-one meetings where workers are threatened with job loss in two-thirds." Undeniably, employees are fearful of losing their jobs and therefore, vote no when the election finally occurs. This type of coercion needs to stop, and the employee free choice act can help prevent these horrible tactics from occurring.

Furthermore, opponents contend the employee free choice act would take away the sanctity of the secret ballot and as a result oppose the bill. However, opponents should try and compare a union election to a political election. In a political election, candidates have equal access to the voters, whereas in a union election, the employers have access to the employees while the union does not. This is not fair and an unfair disadvantage to unions.

In addition, the suggested additions to Chapter 377, HRS will prevent efforts by employers to stall negotiations indefinitely. The parties are required to make every reasonable effort to conclude and sign a collective bargaining agreement. If the parties are not successful after ninety days of negotiations, either party can request conciliation through the Hawaii Labor Relations Board. This will help thwart the numerous delays that employers use.

It is time to give the working class a break. The economy is nearing depression levels, unemployment numbers are up and each month more and more of our working class struggle to stay in their homes. Meanwhile, CEO's, executives, and others continue to receive multi-million dollar bonuses while the working class is laid off and or their pay continues to decrease. It is time to pass the employee free choice act and level the playing field once and for all. It is the working class that will revitalize our economy and get us out of this economic crisis we are currently in. Passage of the employee free choice act is a step in the right direction.

Thank you for the opportunity to testify in support of S.B.1621 SD1.

Glenn Cannon, President
Brenda Ching, Executive Director

SCREEN ACTORS GUILD
949 KAPIOLANI BLVD., SUITE 105, HONOLULU, HI 96814 ★ Tel. 808.596.0388 ★ Fax 800.305.8146
www.sag.org
Branch of Associated Actors and Artistes of America / AFL-CIO • Affiliate of International Federation of Actors

Hawai'i Alliance for Retired Americans

An affiliate of the Alliance for Retired Americans
c/o AFSCME · 888 Mililani Street, Suite 101 · Honolulu, Hawaii 96813

AFT Retirees
HGEA Retirees
HSTA – Retired
ILWU Retirees
Kokua Council
Machinists Union Retirees
UPW Retirees
ADA/Hawaii
Hawaii Family Caregivers Coalition

(Submitted by email to: LABtestimony@capitol.hawaii.gov March 17, 2009)

Statement of Al Hamai, President, Supporting SB 1621, SD 2, Relating to Collective Bargaining

Hearing of the House Committee on Labor and Public Employment

March 20, 2009, 9:30 a.m. Conference Room 309

Chair Karl Rhoads, Vice Chair Kyle T. Yamashita and Members of the Committee,

HARA strongly supports SB 1621, SD2. HARA has nine affiliates, listed on this letterhead, representing 21,000 members.

The purpose of this bill is to promote the right to organize for the purpose of collective bargaining, as recognized in Article XIII of the Hawaii state constitution.

We concur with the purpose of this bill. Approval of this bill will be a big step toward enabling workers, who want to belong to unions, a fairer chance to belong to a union, and secure a collective bargaining contract. A worker by himself alone is helpless on the job. He needs the strength on union to get better wages and working conditions for himself, for his family and really for his community.

The NY Times editorial of December 28, 2008, entitled "The Labor Agenda" in support of the national Employee Free Choice Act in 2009 stated in part:

"Even modest increases in the share of the unionized labor force push wages upward, because nonunion workplaces must keep up with unionized ones that collectively bargain for increases. By giving employees a bigger say in compensation issues, unions also help to establish corporate norms, the absence of which has contributed to unjustifiable disparities between executive pay and rank-and-file pay."

HARA urges this Committee to support and approve SB1621, SD2. Mahalo.

HARA is a strong voice for Hawaii's retirees and seniors; a diverse community-based organization with national roots; a grassroots organizer, educator, and communicator; and a trusted source of information for decision-makers.

People Serving People

est. 1947

Hawaii Restaurant Association

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Honolulu, HI 96814
www.hawaiirestaurants.org

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hra@hawaiirestaurants.org

March 18, 2009

Rep. Karl Rhoads, Chair
Committee on Labor & Public Employment
House of Representatives
Hawaii State Capitol, Rm. 326
Honolulu, Hawaii 96813

Dear Chair Rhoads,

The Hawaii Restaurant Association stands in opposition on SB 1621 SD2 changing the process of the Hawaii Labor Relations Act.

We believe that this bill will have a very negative impact on business and economy here in Hawaii.

The removal of the secret ballot is taking away the employee's fundamental right to vote in private and make the workers more vulnerable to misinformation, intimidation, and coercion by both sides.

The mandatory binding arbitration provision is also problematic in that you have people deciding on issues for a business industry that is unfamiliar to the arbitrator.

This bill also removes the private property rights if unions want to trespass and picket.

This is an issue that is currently debated in our US Congress and it belongs there.

Thank you for giving us the opportunity to share our position.

Sincerely,

Victor Lim
Chair

HAWAI'I HOTEL & LODGING
ASSOCIATION
2270 Kalakaua Ave., Suite 1506
Honolulu, HI 96815
Phone: (808) 923-0407
Fax: (808) 924-3843
E-Mail: hhla@hawaiihotels.org
Website: www.hawaiihotels.org

TESTIMONY OF MURRAY TOWILL
PRESIDENT
HAWAI'I HOTEL & LODGING ASSOCIATION

March 20, 2009

RE: SB 1621 SD2 Relating to Collective Bargaining

Good morning Chairman Rhoads and members of the House Committee on Labor & Public Employment. I am Murray Towill, President of the Hawai`i Hotel & Lodging Association.

The Hawai`i Hotel & Lodging Association is a statewide association of hotels, condominiums, timeshare companies, management firms, suppliers, and other related firms and individuals. Our membership includes over 170 hotels representing over 47,300 rooms. Our hotel members range from the 2,523 rooms of the Hilton Hawaiian Village to the 4 rooms of the Bougainvillea Bed & Breakfast on the Big Island.

The Hawai`i Hotel & Lodging Association opposes SB 1621 SD2 Relating to Collective Bargaining. This bill would allow for the certification of a labor organization without an election.

We do not believe it is appropriate to remove an employee's right to a secret ballot in determining their representation by a labor organization. Each individual should have the right to choose representation without being subject to pressure from either management or a labor organization.

We urge you to hold this bill. Mahalo again for this opportunity to testify.

Representative Karl Rhoads, Chair
Representative Kyle Yamashita, Vice Chair
Committee on Labor and Public Employment

HEARING Friday, March 20, 2009
9:30 am
Conference Room 309
State Capitol, Honolulu, Hawaii 96813

RE: SB1621, SD2 Relating to Collective Bargaining

Chair Rhoads, Vice Chair Yamashita, and Members of the Committee:

Retail Merchants of Hawaii (RMH) is a not-for-profit trade organization representing 200 members and over 2,000 storefronts, and is committed to support the retail industry and business in general in Hawaii.

RMH strongly opposes SB1621, SD2, which allows union certification of certain employees or employee groups by signed authorization from the employee; requires collective bargaining to begin upon union certification; sets certain deadlines for initial collective bargaining agreement procedures and conciliation of disputes; sets civil penalty for unfair labor practices; extends certain authorities to labor organizations representing employees for collective bargaining; and allows labor disputes to be defenses against prosecution for certain violations of law.

Already in place are federal and state laws that recognize employees' rights to organize and therefore provide necessary guidelines to facilitate and support that process. An integral provision of these processes is protection for an employee's right to freely choose to decide whether or not join a union. SB1621, SD2 eliminates an individual's fundamental right to a secret ballot election and opens the door to the possibility of undue pressure and coercion. It further, once the basic required number of signatures is attained, unequivocally denies the remainder of employees any voice in the process.

Furthermore, SB162, SD2 takes wage and benefit negotiations away from employees and employers and places the responsibility under the purview of arbitrators with little or no prior knowledge of the business or the industry to make prudent decisions. Their rulings would then be binding for two years.

While we recognize the rights of workers guaranteed by the NLRA, namely, the right to "engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection," **we are strongly opposed to §380 – Defense for protected activity in a labor dispute.** Allowing such activities within the confines of a shopping mall or shopping center would undoubtedly have negative impact on innocent businesses and consumers. Companies are in close proximity to each other; oftentimes, entrances are but a mere ten to twelve feet apart. Allowing picketing at these entrances could easily impact the right of way of consumers and create an unfair disturbance to a business where there is no dispute. Additionally, the gathering of a group of picketing employees will likely create a confusing and dangerous situation for the unsuspecting public in a crowded mall. All businesses within a mall or shopping center are required to comply with the provisions of their lease agreement with the owner/manager of that mall; particularly there are strict restrictions governing the common areas accessible to the general public. Such activities would put the employer in violation of his lease and subject him to fines or other consequences that could result in his expulsion from that mall or shopping center. In this case, everyone loses.

Our businesses work diligently with their employees to address day-to-day concerns and to build camaraderie and career satisfaction. Passage of this measure would place a union representative between employers and employees thus destroying the framework by which these businesses have operated successfully for many years.

We respectfully urge you to **hold SB162, SD2.** Thank you for your consideration and for the opportunity to comment on this measure.

Carol Pregill

Carol Pregill, President

RETAIL MERCHANTS OF HAWAII
1240 Ala Moana Boulevard, Suite 215
Honolulu, HI 96814
ph: 808-592-4200 / fax: 808-592-4202

Testimony presented before the
House Committee on Labor & Public Employment
State Capitol - Conference Room 309
March 20, 2009
9:30 a.m.

RE: SENATE BILL NO. 1621 SD2 RELATING TO COLLECTIVE BARGAINING

Chair Rhoads, and Members of the Committee:

My name is Kathryn Matayoshi, Executive Director of the Hawaii Business Roundtable. The Roundtable opposes Senate Bill No. 1621 SD2, relating to Collective Bargaining.

The Roundtable supports retaining the privacy protections that a secret ballot election provides. SB No. 1621, would remove that protection, one that is critically important for providing employees the opportunity to choose, in private, whether they want to join a union.

The Roundtable also supports continuing to protect the workers' right to vote on new contracts. SB 1621's binding arbitration provision would eliminate the workers opportunity to vote on that contract.

Thus, in summary, the Roundtable believes that the process for employees to make choices about unionization should not be changed, and that the right to vote on new contracts should also be retained. The Roundtable opposes SB 1621 SD2, and asks that it be held. Thank you for your consideration.

yamashita1- Kathy

From: Dave Rolf [drolf@hawaiidealer.com]
Sent: Thursday, March 19, 2009 8:38 AM
To: LABtestimony
Subject: HADA testimony in STRONG OPPOSITION TO SB 1621 SD2--

March 19, 2009

Testimony in STRONG OPPOSITION to SB1621 SD2

RELATING TO COLLECTIVE BARGAINING
Presented to the House Committee on Labor and Public Employment

at the public hearing to be held 9:30 a.m. Friday, March 20, 2009
in Conference Room 309
Hawaii State Capitol

Testimony submitted by the David H. Rolf for
The Hawaii Automobile Dealers Association
Hawaii's franchised new car dealers

Chair Rhoads and members of the committee:

Because a measure like HB 1621 SD2 would RESULT IN INCREASED UNEMPLOYMENT FOR HAWAII, we respectfully oppose the measure.

Economist Anne Lyne-Farrar of the economic-consulting firm LECG predicts "that a 3% point gain in union membership would lead to a 1% point increase in the nation's unemployment rate," as quoted in the Wall Street Journal in its Monday, March 2, 2009 edition.

Applying these numbers to the Hawaii unemployment figures, Hawaii too would likely see a 1% climb in unemployment with a 3% increase in union membership.

When Hawaii reaches the 7% level – a vortex, of sorts, develops, pulling retail sales down and in with its gripping power. Soon...it's 8.5%. Then...10%. Hawaii could see as many as 60,000 people out of work if the state were to reach double-digit unemployment....with almost 12,000 of those newly jobless likely attributed to actions fostered by this bill.

Hawaii cannot afford such.

Further, there are GRAVE concerns about this bill's proposed dilution of the right to a secret ballot. The secret ballot is a sacred right in matters where force and coercion can be exerted on workers.

We respectfully request you hold SB1621 SD2. Dire consequences to Hawaii's economy would be the result of increased unemployment numbers.

Respectfully submitted,
The Hawaii Automobile Dealers Association

David H. Rolf
1100 Alakea St. Suite 2601, Honolulu, Hawaii 96813 Tel: 808 593-0031 Cel: 808 223-6015

Associated Builders and Contractors, Inc.

Hawaii Chapter

House Committee on Labor and Public Employment
Friday, March 20th, 2009
Room 309

OPPOSITION TO

Senate Bill 1621 S.D. 2--Relating to Collective Bargaining

Chair Rhoads and Members of the Committee:

I am Karl Borgstrom, President of Associated Builders and Contractors Hawaii, a company-based organization of construction contractors, service providers, and suppliers dedicated to the free enterprise approach to construction contracting and the rights of construction employees to freely choose whether or not and by whom to be represented in a labor negotiation.

Associated Builders and Contractors Hawaii strongly OPPOSES Senate Bill 1621 SD2 for the following reasons:

1. The proposal to use an arbitration panel to render a binding settlement in a dispute in a collective bargaining process would act as a disincentive to the full and fair commitment of the parties to achieve agreement through that process, thereby defeating its intent.
2. The granting of the privilege of virtual immunity to any collective bargaining organization from public or legal scrutiny of its actions runs counter to accepted practice in the Sarbanes-Oxley era, in which corporate, non-profit, and government organizations and agencies are being held to higher standards of transparency in their operations as a matter of public policy. **It is ironic that this legislation would grant total secrecy to a union organization while at the same time depriving workers of their right to a secret ballot in the choice of a collective bargaining representative!**
3. As with other "card check legislation," SB 1621 SD2 mandates a shortcut to the labor union certification process to facilitate labor union organizing for virtually all workers in Hawaii not currently covered under the provisions of the National Labor Relations Act; this would include those employed by for-profit and non-profit small businesses that fall in size below the NLRA threshold, and other workers not within the purview of the NLRB. (In our own organization, approximately 30-40% of the members of ABC Hawaii would likely be impacted by SB 1621 SD2).

In effect, **this bill selects out these workers and denies them the right, granted to employees of larger enterprises and other NLRA-covered activities, to vote by secret ballot in choosing whether or not to be represented by a collective bargaining agent. In so doing, the bill precludes the application of one of our most fundamental of democratic principles.** In its place would be a petition or "card check" system that would allow a simple majority of signers in an employee group to "certify" a bargaining representative when there are no other competing individuals or labor organizations seeking to represent employees.

The rationale sounds simple enough--why bother to hold an election when there is no competition? This ignores the fact that the petitioning process may, and will likely, occur without the employer being aware of it; employees may never hear the employer's position or be allowed to consider whether or not they want to be represented by a union at all. This is a choice a worker will only be able to express by refusing to sign the petition. There is no place to vote "No" in a petition or "card check" process, but the possibilities for manipulation and abuse of employee rights are manifestly obvious. Lacking confidentiality, employees may for any number of reasons feel compelled to sign a petition personally circulated by an agent of either management or a labor organization, to protect their jobs or relationships with their peers.

Notwithstanding the reference to "procedures to be used by the board to establish the validity of signed authorizations," the certification of the petitioning process by the board does not stipulate any standards of conduct for petitioners or any measures that in any way are equivalent to the secret ballot by which the board will objectively assess whether or not the "majority of the employees . . . (who) have signed valid authorizations" have done so freely and without coercion.

For more than seventy years the NLRB rules and procedures for determining employee labor affiliation and collective bargaining representation have resulted in a fair and winning solution for labor, management and employees covered under the Act. The legislature's apparent intention to abandon the time-honored and fundamental democratic principle of the secret ballot in promoting labor organizing among employees is unwarranted and a disservice to the rights of employees who would be impacted, throughout the State of Hawaii.

Recent national polls show that as this matter of giving up the secret ballot in a labor election has come under increasing public scrutiny, almost three quarters of those surveyed indicated their opposition to similar federal legislation under the so-called "employee free choice act." Hawaii is one of the most highly unionized states in the Union, and no case has been made for a need by the Hawaii legislature to expedite and immunize labor organizing in this state.

ABC Hawaii urges you to vote NO on SB 1621 SD2!

Hawaii Chapter
AMERICAN PUBLIC WORKS ASSOCIATION

Chapter Office
501 Sumner Street, Suite 620
Honolulu HI 96817

Telephone
(808) 531-1308
Facsimile
(808) 521-7348

March 19, 2009

Fax to: 586-6331

Hearing: Friday, March 20, 2009; 9:30 am, CR 309

Committee on Labor and Public Employment

Honorable Representatives Karl Rhoads, Chair, Kyle Yamashita, Vice Chair and Members of LAB

Subject: **SB 1621 SD2 - Relating to Collective Bargaining**

The American Public Works Association Hawaii Chapter represents over one hundred engineering design professionals in public and private sector. **We Strongly Oppose SB 1672 SD2 - Relating to Collective Bargaining**. This bill places an extreme burden on the Construction Industry during a time when businesses are suffering and gives the unions tremendous advantages over businesses. The following features of the Bill are totally unacceptable:

The Bill eliminates secret ballot elections for union certification if a majority of employees provide written authorization for a union to be their bargaining representative.

The Bill provides unions with legal immunity and authorizes unions to engage in criminal conduct if engaging in a labor dispute. If passed, this bill would provide protection to unions against criminal trespass in a labor dispute. Under this bill, a reasonable request or order from a law enforcement officer can be defied with impunity, thereby allowing labor activity to obstruct walkways and driveways and totally restrict any public access. We do not see any fairness in this provision. While the conduct of unions in obstructing walkways and driveways would be authorized by this law, the general public will be subject to criminal penalties if they try to gain public access that has been blocked.

The Bill provides immunity for any civil claims against a union, its officials or any member while engaging in collective bargaining activities in a labor dispute.

Thank you for an opportunity to express our views regarding this bill.

Sincerely,
American Public Works Association, Hawaii Chapter

Lester H. Fukuda, P.E., FACEC
Legislative Coordinator

BIA-HAWAII

BUILDING INDUSTRY ASSOCIATION

March 20, 2009

Honorable Karl Rhoads, Chair
Committee on Labor & Public Employment
State Capitol, Room 309
Honolulu, HI 96813

RE: SB1621, SD2 "Relating to Collective Bargaining"

Chair Rhoads and Members of the Committee on Labor & Public Employment:

I am Karen Nakamura, Chief Executive Officer of the Building Industry Association of Hawaii (BIA-Hawaii). Chartered in 1955, the Building Industry Association of Hawaii is a professional trade organization affiliated with the National Association of Home Builders, representing the building industry and its associates. BIA-Hawaii takes a leadership role in unifying and promoting the interests of the industry to enhance the quality of life for the people of Hawaii.

BIA-Hawaii is strongly opposed to SB 1621, SD2, "Related to Collective Bargaining" because of the increased burden it would place on businesses at a time when they can least afford it while giving unions unfair and extraordinary powers and rights.

SB 1621, SD2 is also referred to as the "Card Check" bill because it would eliminate the secret ballot elections for union certification if a majority of employees provide written authorization for a union to be their bargaining representative.

SB 1621 also provides unions with legal immunity and authorizes unions to engage in criminal conduct if engaging in a labor dispute. If passed, this bill would provide protection to unions against criminal trespass in a labor dispute. Under this bill, a reasonable request or order from a law enforcement officer can be defied with impunity, thereby allowing labor activity to obstruct walkways and driveways and totally restrict any public access. We do not see any fairness in this provision. While the conduct of unions in obstructing walkways and driveways would be authorized by this law, the general public will be subject to criminal penalties if they try to gain public access that has been blocked.

There would be total immunity for any civil claims against a union, its officials or any member while engaging in collective bargaining activities in a labor dispute. Untruthful smear campaigns; obstruction of access to your premises, libel and slander; and torts will all be protected activity if it occurs while a union or one of its members is "participating in a labor dispute".

SB1621 includes a "binding arbitration" provision that mandates arbitrators to dictate the wages and benefits under a union contract, then deprives workers of the chance to vote on that contract.

For these reasons, BIA-Hawaii asks that this bill be held. It is bad for business and ultimately the consumers in this state.

Thank you for the opportunity to express our views.

Karen L. Nakamura

Chief Executive Officer
BIA-Hawaii

Healthcare Association of Hawaii

HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT
Rep. Karl Rhoads, Chair

Conference Room 309
March 20, 2009 at 9:30 a.m.

Testimony in opposition to "card check" provision of SB 1621 SD 2.

The Healthcare Association of Hawaii advocates for its member organizations that span the entire spectrum of health care, including acute care hospitals, two-thirds of the long term care beds in Hawaii, as well as home care and hospice providers. Thank you for this opportunity to testify in opposition to the "card check" provision of SB 1621 SD 2 that creates an alternate means of certifying a union.

The procedure created by the bill for certifying a union as a collective bargaining representative contradicts the time-honored use of the secret ballot. The secret ballot assures that the choice of each employee is anonymous. It ensures that employees may vote their conscience without intimidation, coercion, or fear of retaliation from either management or the union. The secret ballot is fundamental to the democratic process and should be retained.

For the foregoing reasons, the Healthcare Association opposes the "card check" provision of SB 1621 SD 2.

HAWAII CREDIT UNION LEAGUE

1654 South King Street
Honolulu, Hawaii 96826-2097
Web Site: www.hcul.org

Telephone: (808) 941-0556
Fax: 808) 945-0019
Email: info@hcul.org

AMERICA'S CREDIT UNIONS

Testimony before the House Committee on Labor & Public Employment
Friday, March 20, 2009 at 9:30 a.m.

Testimony opposing SB 1621 SD2, Relating to Collective Bargaining

To: The Honorable Karl Rhoads, Chair
The Honorable Kyle Yamashita, Vice-Chair
Members of the Committee on Labor & Public Employment

My name is Stefanie Sakamoto and I am testifying on behalf of the Hawaii Credit Union League, which represents 91 credit unions serving approximately 810,000 credit union members throughout the state.

Our concern is that the process this measure proposes would place the employer in an unfair position, and would also take away an employee's right to choose, or not choose union representation. Employees should have a choice, and should be have the opportunity to be presented with information from both the employer and union. SB1621 SD2 would circumvent this process.

Thank you for the opportunity to testify.

Chair, Representative Karl Rhoads
Vice-chair, Representative Kyle Yamashita
Committee: Labor & Public Employment
From: Society for Human Resource Management (SHRM) Hawaii
(808) 523-3695 or e-mail: shrmhawaii@hawaiibiz.rr.com
Testimony date: Friday, March 20, 2009

Strongly Oppose SB 1621 SD2 Relating to Collective Bargaining

SHRM Hawaii is the local chapter of a National professional organization of Human Resource professionals. Our 1,200+ Hawaii membership includes those from small and large companies, local, mainland or internationally owned - tasked with meeting the needs of employees and employers in a balanced manner, and ensuring compliance with laws affecting the workplace. We (HR Professionals) are the people that implement the legislation you pass, on a day-to-day front line level.

SHRM Hawaii strongly opposes SB1621 SD2. The two-step process for union certification is vital for employees. Secret ballot voting protects employees against retaliation from those who disagree with their position on unionization. "Coercion" and "Intimidation" are charges made against both union organizers and business owners – secret ballot is the only way to ensure coercive and intimidating tactics are neutralized, and employees' choices are protected.

Elimination of the two-step process would:

- Take away the additional time needed for employees to ask questions of multiple sources, consider the options, and make an informed choice.
- Encourage coercion and/or intimidation by those who are for and/or against union representation.

Because elimination of the secret ballot portion of the two-step certification process holds nothing redeeming for employees, SHRM Hawaii respectfully urges the committee to kill SB1621 SD2 to protect an employee's right to choose union or non-union with the protection of their identity.

Thank you for the opportunity to testify. SHRM Hawaii offers the assistance of its Legislative Committee members in discussing this matter further.

NFIB
The Voice of Small Business®

Before the House Committee
On Labor and Public Employment

DATE: March 20, 2009

TIME: 9:30 a.m.

PLACE: Conference Room 309

Re: SB 1621 SD2
Relating to Collective Bargaining
Testimony of Melissa Pavlicek for NFIB Hawaii

Thank you for the opportunity to testify. On behalf of the business owners who make up the membership of the National Federation of Independent Business in Hawaii, we ask that you reject SB 1621 SD2. NFIB opposes this measure in its current form.

The National Federation of Independent Business is the largest advocacy organization representing small and independent businesses in Washington, D.C., and all 50 state capitals. In Hawaii, NFIB represents more than 1,000 members. NFIB's purpose is to impact public policy at the state and federal level and be a key business resource for small and independent business in America. NFIB also provides timely information designed to help small businesses succeed.

More and more, employers are being forced to recognize labor unions without first holding a private-ballot employee election -- the election process that is guaranteed in law and administered by the National Labor Relations Board. To prevent intimidation or harassment, the law establishes that neither a union nor an employer may coerce, harass or restrain employees in exercising their right to choose whether or not to support the union. Each employee's choice is made in the privacy of a voting booth, with neither the employer nor the union knowing how any individual voted. We believe that a secret ballot process is essential to ensure a process that is fair to both employers and employees.

We respectfully ask that you do not advance this measure.

841 Bishop Street, Suite 2100, Honolulu, Hawaii 96813 (808)447-1840

ACEC

AMERICAN COUNCIL OF ENGINEERING COMPANIES
of Hawaii

March 19, 2009

EMAILED TESTIMONY TO: LABTestimony@Capitol.hawaii.gov

Hearing Date: Friday, March 20, 9:30 a.m., Conference Room 309
(House Committee on Labor and Public Employment)

Honorable Representatives Karl Rhoads, Chair, Kyle Yamashita, Vice Chair, and Members of the House Committee on Labor & Public Employment

Subject: **SB 1621 SD2, Relating to Collective Bargaining**

Dear Chair Rhoads, Vice Chair Yamashita, and Committee Members,

The American Council of Engineering Companies of Hawaii (ACECH), representing 70 consulting engineering firms, is opposed to this bill, Relating to Collective Bargaining. We believe this bill would give unions unfair and unjustified powers and rights, while providing a burden to businesses in these troubling economic times. We feel the measures contained in the bill are unreasonable and unnecessary and, therefore, respectfully request that the bill be held.

We appreciate your time and the opportunity to testify on this bill. Please do not hesitate to contact us if you have any questions regarding our testimony.

Respectfully submitted,

Janice C. Marsters

Janice Marsters
National Director

GracePacific CORPORATION
GP Roadway Solutions • GPRM Prestress • GLP Asphalt • Maui Paving

Ms. Rusty Niau
Vice President, Human Resources & Safety
Grace Pacific Corporation
Asphalt Paving/Highway Construction/Aggregate Mining
PO Box 78 Honolulu, HI 96810

Testimony to the House Committee on Labor & Public Employment March 20, 2009 9:30 a.m. Room 309, State Capitol Re: SB 1621, SD2 relating to Collective Bargaining Chair Rhoads, Vice Chair Yamashita and members of the committee: I respectfully request that you hold SB 1621, SD2. The entities that will be affected by this measure will increase the likelihood of them not surviving the additional costs, lost productivity, and bureaucratization of the workplace that come with procedures mandated by this measure. Our state has been focused on sustainability. This measure will undermine our efforts. Simply, unionization will increase the cost of locally produced food and weaken Hawaii's valuable but shrinking agricultural industry. Furthermore, this bill will hurt certain small businesses and entities. Additionally, fundamentally, this measure dilutes every employee's right to a secret ballot in determining whether to have union representation. They should have the right to make their decision in private, not in the open. Finally, the binding arbitration will hurt both employees and employers as for the former, they would be denied the ability to vote on the pay and benefits. For the employer, it could be stuck with a contract that is compeletely incompatible with the cost structure and business model. Thus, this could have a huge impact on the livelihood of the business and the security of jobs. We should be focusing on finding ways to revitalize Hawaii's economy, not hinder it. For the above reasons, I strongly ask that you hold this bill. Thank you for the opportunity to submit written comments.

Hawaii Farm Bureau
FEDERATION
2343 Rose Street, Honolulu, HI 96819
PH: (808)848-2074; Fax: (808) 848-1921

Testimony

House Committee on Labor and Public Employment

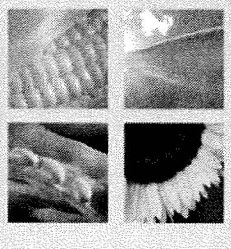
Re: SB1621 SD2 RELATING TO COLLECTIVE BARGAINING.

Chair Rhoades and Members of the Committee:

Hawaii Farm Bureau Federation on behalf of its farm families and organizations is in **opposition** to SB1621 SD2, streamlining the union certification process.

We recognize the role the Unions have played in Hawaii and that they have supported agriculture. At the same time, the world is changing. Agriculture is changing – the industry is in transition with diversity being the common element across the State. It is very different from the monocrop systems that the Union has been accustomed to. Even the seed companies that may approach the size of what used to be our smaller sugarcane companies must be highly flexible at this time. Technologies are changing rapidly and the people working in the area must be able to have maximum adaptability to do different tasks at different times in different ways ..not be caught in routine as has been characteristic of traditional unions. What agriculture and everyone needs is workforce development. It is assistance in training a workforce that can meet business needs. This must be followed by the ability to continually train workers who have skills to meet the ever changing work environment and regulatory needs. We have approached the Union about this need and are willing to be the test cases in the process.....however, the condition is that the traditional union is not part of the agreement. We believe the leadership of the Unions can play a major role in changing the way labor relations occur in Hawaii. The economy dictates that change is inevitable. Everyone must be part of the change. We also recognize that what we are suggesting is difficult. But all of us in the business world are making difficult decisions. None of us is expecting to continue as we did yesterday.

Agriculture is at a very serious crossroad. Our future is in question. We respectfully request the Committee to understand our industry's needs and oppose this measure while encouraging an evolution in Labor in Hawaii. We appreciate this opportunity to provide our opinion on this important matter.



91-1012 Kahi'uka Street
'Ewa Beach, HI 96706
Tel: (808) 224-3648
director@hciaonline.com
www.hciaonline.com

Hawaii Crop Improvement Association

Growing the Future of Worldwide Agriculture in Hawaii

Testimony By: Alicia Maluafiti
SB 1621sd2, Relating to Collective Bargaining
House LAB Committee
Friday, March 20, 2009
Room 309, 9:30 am

Position: Strong Opposition

Chair Rhoads and Members of the House LAB Committee:

My name is Alicia Maluafiti, Executive Director of the Hawaii Crop Improvement Association. The Hawaii Crop Improvement Association (HCIA) is a nonprofit trade association representing the agricultural seed industry in Hawaii. Now the state's largest agricultural commodity, the seed industry contributes to the economic health and diversity of the islands by providing high quality jobs in rural communities, keeping important agricultural lands in agricultural use, and serving as responsible stewards of Hawaii's natural resources.

HCIA strongly supports our workers' rights to secret ballot, to the inalienable privilege and right to vote in private for union certification. The current process provides this worker right, and we wholeheartedly endorse it. A few years ago, a union certification process was attempted on one of our member companies. In the end, after the secret ballot process, nearly 81% of the employees did not want to be union certified. HCIA member companies provide competitive benefit packages, good wages and job environments where safety of the worker is the first priority.

Union members themselves don't seem to want card check, according to two recent polls. A 2004 Zogby poll conducted for the Mackinac Center for Public Policy found that 71 percent of union members believe that the current private-ballot process is fair, versus only 13 percent who disagree. Nor do union members want to lose their right to a private vote. Fully 78 percent of union members favor keeping the current system over replacing it with one that provides less privacy. (See Joseph Lehman, "Union Members' Attitudes Towards Their Unions' Performance," Mackinac Center for Public Policy, *www.mackinac.org/archives/2004/s2004-05.pdf.)*

Government should also protect the right of workers and employers to bargain freely. Binding arbitration, as stated in this bill, means that federal agents or an undefined arbitration panel would impose employment contracts on newly organized companies. Workers would not have the option of voting down the contract, and companies would have no recourse if an arbitrator imposed uncompetitive terms that would drive it into bankruptcy. Hawaii state policy should not impose these kinds of wage controls, particularly in this economy.

SB 1621sd2, like the federal Employee Free Choice Act does not do what its sponsors contend that it would do. In reality, it strips workers of their rights and their privacy while exposing them to abuse and intimidation and taking away their ability to bargain with their employers.

We urge you to hold this bill in committee. Thank you for the opportunity to testify.

March 20, 2009

HEARING BEFORE THE
HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT

TESTIMONY ON
SENATE BILL 1621, SD 2

Chair Rhoads and committee members:

My name is Fred Perlak and I am the Vice-President of Research and Business Operations for Monsanto in Hawaii. I ask that you consider my testimony in strong opposition to SB 1621.

My company is part of the corn seed industry here in Hawaii. This industry has grown significantly in Hawaii in recent years, over 40% from 2007 to 2009. We are now the leading agricultural component in the state with over $146 million in direct spending in Hawaii. It is the faint flicker of light in a darkening and increasingly difficult economy both here in Hawaii and on the mainland.

A big part of our success has been our highly motivated workforce. Everyday, I see how hard everyone works. All of us have demonstrated commitment to our company with dedication, efficiency and a willingness to consistently produce high quality seed. We are proud of our workforce and what we have accomplished. In return, our company provides us with an excellent wage and benefits package, a very safe workplace environment where safety is not compromised and our company's appreciation and respect for employees.

All of the legislation proposed this session to simplify the unionization process has one common theme, the elimination of the secret ballot during the consideration of unionization. I strongly believe our workers have the right to secret ballot, to choose in confidence whether to accept unionization or not. It is their right, a right they have had for decades, a right that has been and should be protected. In a state that prides itself on the protection of the rights of all, I find it wrong and inconsistent that legislation could be adopted that so casually removes the rights of these workers.

Many familiar with the unions do not understand our opposition. Everyone at Monsanto works hard for their pay and our workers should safely and privately, decide whether or not they want to give 2% of their salary for union representation.

When considering this legislation, please consider the rights of our co-workers to choose the issue of unionization safely, privately and secretly. Please do not take that right away. Thank you.

Ocean Tourism Coalition

The Voice for Hawaii's Ocean Tourism Industry
820 Mililani Street, #810
Honolulu, HI 96813
(808) 205-1745 Phone (808) 533-2739 Fax
office@oceantourism.org

March 20, 2009

TESTIMONY TO: House Committee on Labor and Public Employment
9:30 AM Room 309 Chair Rhodes

Presented By: James E. Coon, President of the Ocean Tourism Coalition

Subject: **SB 1621 SD2 Section 4(e) & (f)**

STRONG OPPOSITION TO SB1621 SD2

Chair Rhodes and Respected Members of the Committee:

I am Jim Coon, President of the state-wide Ocean Tourism Coalition (OTC) speaking in **Very Strong Opposition** of this bill.

I speak today to ask you to remove Section 4, 377-5 (e) & (f) from this bill.

The Ocean Tourism Industry is comprised of hundreds of small family businesses. Most of these have very few employees outside of their families, yet a bill like this would hurt our industry. The right to a private secret ballot is fundamental to our American Freedoms. This bill takes that away from us.

Almost everyone realizes the present economic crisis is very serious. The Golden Goose story comes to mind. However we also realize that this bill--in its current form---would seriously erode the rights of all workers as well as hurt the community at large that the government is designed to protect. We are the goose that needs to be nurtured not butchered.

We humbly request that you remove Section 4 (e) & (f) or hold this bill.
Thank You,

James Coon, President OTC

yamashita2 - Kristen

From: LBR Testimony
Sent: Wednesday, March 18, 2009 3:41 PM
To: LABtestimony
Subject: FW: Opposition to SB 1621, HD 2 Section 4, 377-4 (e) & (f) by LBR in Rm 309 on Friday 20 March

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From: rawcohi@cs.com [mailto:rawcohi@cs.com]
Sent: Wednesday, March 18, 2009 3:24 PM
To: LBR Testimony
Subject: Opposition to SB 1621, HD 2 Section 4, 377-4 (e) & (f) by LBR in Rm 309 on Friday 20 March

TESTIMONY IN STRONG OPPOSITION TO SB 1621, SD 2, SECTION 4 (e) & (f)

HOUSE COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT

Friday, 20 march 2009 in Room 309 at 0930

Chair Rhoads and Respected Members of the Committee;

My name is Reg White. I speak today to ask you to remove Section 4, 377-5 (e) & (f) from this bill. I have been a merchant mariner all of my working life. I have sailed for 28 different companies over the past 59 years. I have belonged to two different maritime unions during that period and I worked for two companies that truly needed a union because of the way they treated their crew, but did not have one. I did my best to help organize those two companies, but never, at any time, did it ever occur to me to deny those people the right to vote in private, without intimidation or fear of retribution. That's an American right, and over the past 250 years many Americans have died to protect that right to vote in private, without intimidation or fear of retribution. That's what democracy is: Freedom of choice! Please do not allow this right to be diluted by a bill like this!

Please remove Section 4, 377-5 (e) & (f)!!

Respectfully,

Reg White
VP, project development
Star of Honolulu Cruises and Events
1540 S. King St
Honolulu, Hawaii 96826-1919
(808) 222-9794
RawcoHI@cs.com

MAUNA LANI RESORT

Mauna Lani Resort (Operation), Inc.

TO: House Labor and Public Employment Committee
FAX: 800-535-3859

FROM: Patricia M.Y. Kawasaki
Mauna Lani Resort (Operation), Inc.
68-1400 Mauna Lani Drive, Suite 102
Kohala Coast, Hawaii 96743

Company Description: Business on the Kohala Coast, Island of Hawaii includes Francis H. I'i Brown Golf Courses and Mauna Lani Bay Hotel

Testimony to the House Committee on Labor & Public Employment
March 20, 2009
9:30 a.m.
Room 309, State Capitol

Re: SB 1621, SD2 relating to Collective Bargaining

Chair Rhoads, Vice Chair Yamashita and members of the committee:

We respectfully request that you hold SB 1621, SD2.

The entities that will be affected by this measure will increase the likelihood of them not surviving the additional costs, lost productivity, and bureaucratization of the workplace that come with procedures mandated by this measure.

Our state has been focused on sustainability. This measure will undermine our efforts. Simply, unionization will increase the cost of locally produced food and weaken Hawaii's valuable but shrinking agricultural industry. Furthermore, this bill will hurt certain small businesses and entities.

Additionally and fundamentally, this measure dilutes every employee's right to a secret ballot in determining whether to have union representation. Employees should have the right to make their decision in private, not in the open.

Finally, the binding arbitration will hurt both employees and employers. The employees would be denied the ability to vote on the pay and benefits. The employer could be stuck with a contract that is completely incompatible with the cost structure and business model. Thus, this could have a huge impact on the livelihood of the business and the security of jobs.

We should be focusing on finding ways to revitalize and improve Hawaii's economy, not hinder it.

For the above reasons, we strongly ask that you hold this bill. Thank you for the opportunity to submit our written comments on behalf of our Company.

c: Hisashi Konno, President
Mauna Lani Resort (Operation), Inc.

Kona Hawaiian Resort
75-5961 Ali'i Drive
Kailua-Kona, HI 96740

Testimony to the House Committee on Labor & Public Employment
March 20, 2009
9:30 a.m.
Room 309, State Capitol

Re: SB 1621, SD2 relating to Collective Bargaining

Chair Rhoads, Vice Chair Yamashita and members of the committee:

I respectfully request that you hold SB 1621, SD2.

The entities that will be affected by this measure will increase the likelihood of them not surviving the additional costs, lost productivity, and bureaucratization of the workplace that come with procedures mandated by this measure.

Our state has been focused on sustainability. This measure will undermine our efforts. Simply, unionization will increase the cost of locally produced food and weaken Hawaii's valuable but shrinking agricultural industry. Furthermore, this bill will hurt certain small businesses and entities.

Additionally, fundamentally, this measure dilutes every employee's right to a secret ballot in determining whether to have union representation. They should have the right to make their decision in private, not in the open.

Finally, the binding arbitration will hurt both employees and employers as for the former; they would be denied the ability to vote on the pay and benefits. For the employer, it could be stuck with a contract that is completely incompatible with the cost structure and business model. Thus, this could have a huge impact on the livelihood of the business and the security of jobs.

We should be focusing on finding ways to revitalize Hawaii's economy, not hinder it.

For the above reasons, I strongly ask that you hold this bill. Thank you for the opportunity to submit written comments.

Bob Berges
Resort Manager

March 18, 2009

Representative Karl Rhoads, Chairman
Representative Kyle T. Yamashita, Vice Chair
Members of the Committee
House Committee on Labor and Public Employment

Re: Hearing on SB1621, SD2 relating to Collective Bargaining

Room 309, State Capitol; March 20, 2009 @ 9:30am

Dear Chairman Rhoads, Vice Chairman Yamashita and Members of the committee:

My name is Gretchen Lawson, I am the President/CEO of the Arc of Kona and Vice President for South Kona for the Kona-Kohala Chamber of Commerce.

I am opposed to SB1621 SD2 and respectfully request you hold it in committee and vote no for passage. This bill negates a basic premise of American democracy by withholding the right of all people to voice their affirmations or objections by secret ballot and thus protect themselves from possible retribution from those who are in power but oppose their individual points of view.

Hawaii is struggling to recover some balance in the economy and the strong union representation has meant that businesses are not free to maintain viability in the face of extreme cost increase. Salary wages and benefits represent the single highest cost of most non-manufacturing businesses, the bulk of the economy in Hawaii. Please recognize the hardships that giving credence to this measure will create for small business in Hawaii.

Thank you for giving positive consideration to this opporition and voting no on this bill.

Sincerely'

Gretchen Lawson
President/CEO
The Arc of Kona

Testimony:

SD 1621 SD2 Union Card Check Bill

House LAB on Friday, 3-20-09 9:30 AM House conference room 309

Testifier:	Mark Fergusson, CEO Down to Earth All VEGETARIAN Organic & Natural
To:	Rep. Karl Rhoads, Chair, and Rep. Kyle T. Yamashita, Vice Chair HOUSE LABOR AND PUBLIC EMPLOYMENT COMMITTEE
Date:	March 19, 2009
Re:	Opposition to SD 1621 SD2 Union Card Check Bill

I am writing on behalf of Down to Earth ALL VEGETARIAN *Organic and Natural* to urge you to vote against the Union Card Check Bill SD 1621 SD2. If enacted into law, this bill would enable a union to become the bargaining representative of workers when it merely obtains authorization cards from a majority of unit employees, without a secret ballot election.

Such a process makes it possible for unions to gain support by forcing workers to sign authorization cards through the use of peer pressure or other coercive methods. Given labor union's history of using pressure tactics, such a move by the state of Hawaii would be undemocratic. The secret ballot election procedure facilitates a vote that reflects the true desires of employees. Without it, government risks disenfranchising the rights and interests of citizens of our state.

Currently, state law allows employers to request a secret ballot election even when a union has presented the employer with authorization cards from a majority of employees. This is the correct and truly democratic procedure and it should be upheld.

The secret ballot is the foundation of our democratic system. Basing the decision to use collective bargaining using a card check procedure may allow coercion or fear of retribution to enter into the process. Employees deserve the chance to make this important decision in private with a secret ballot.

Each business is unique and binding arbitration could put the determination of the details of a union contract in the hands of persons not fully able understand the complexities of each business. Therefore, laws regarding property rights should not be permitted to be compromised for any reason by anyone.

While there may be a need to simplify the process by which employees determine their right to collective bargaining, SD1621 SD2 is contrary to basic democratic and constitutional principles and should not be passed.

On behalf of all the team members of Down to Earth ALL VEGETARIAN *Organic and Natural*, who will benefit through transparent voting procedures, and as an employer of approx. 200 people in the state, I urge you to vote against SD 1621 SD2 .

Mahalo,

Mark Fergusson

yamashita2 - Kristen

From: Tom Stewart [tstewart@alsco.com]
Sent: Thursday, March 19, 2009 11:20 AM
To: LABtestimony
Subject: Bill SD 1621 SD 2

ALOHA,

VOTE NO ON BILL SD 1621 SD 2.

WOULD WE OPEN THE SAME PROCESS FOR OUR ELECTION OF THE PRESIDENT OF THE U.S., GOVERNOR OF HAWAII, MAYOR, OR STATE SENATORS?

I THINK NOT!

MAHALO,

THOMAS G. STEWART
ASSISTANT GENERAL MANAGER
ALSCO
2771 WAI WAI LOOP
HONOLULU, HAWAII 96819

American Income Life Insurance Company

Daryl Barnett
Director, Public Relations

Senate Bill 1621
Twenty-Fifth Legislatures, 2009
State of Hawaii

Mr. Chairman, Members of the committee, thank you for providing me and American Income Life Insurance Company with the opportunity to comment on State Bill No. 952, "Employee Free Choice Act. My name is Daryl Barnett; I am employed as a director of public relations for American Income life.

American Income life Insurance Company (AIL) and National Income Life Insurance Company (NILCO) is licensed in three countries, the United States of America, New Zealand and Canada. We currently have over 3000 unionized employees internationally, which includes our representatives. Our headquarters for the company is located in the United States of America.

In the State of Hawaii; American Income Life (AIL) has an office with approximately 50 representatives and employees of AIL all who are unionized employees, and work on all Islands. As a company, we are pleased to be able to provide jobs to local residents. As a company we contribute to the State of Hawaii and the community through the payment of taxes. We are a community minded organization, and contribute too many activities in the community. AIL supports the AFL-CIO and unions presentation regarding the proposed amendments to S377, as these amendments in our view would ensure reasonable and responsible laws that would assist in protecting workers interest.

American Income Life is a unionized company, and has been for decades. We thrive as a responsible employer. We continue to expand, and the growth of the organization continues, with continued growth we hire and create more employment opportunities throughout the United States. As an organization we have maximized productivity, negotiated increased wages for our staff and have expanded benefits, and we continue to remain profitable for our stakeholders as a result of our unionized staff. AIL and National Income Life Insurance Company (NILICO) has combined assets of more than $1.8 billion with more than $29.3 billion of life insurance in force for working families. This has been accomplished while working with the bargaining agents, (unions) who represent our employees and sales force.

The President and CEO of American Income Life Insurance Company and National Income Life Insurance Company, Mr. Roger Smith was recently quoted as saying. "We believe the Employee Free Choice Act is a smart, fair and good public policy because it protects workers' freedom to form unions. " He went on to Say "What is good for workers is good for business."

1701 K. N.W. Washington, D.C. USA 20006 – Toll Free 1-866-413-7648 Fax: 1-514-371-0652 Email: Dbarnett@ailife.com

American Income life Insurance Company recognized the importance of unions by holding a majority sign-up, and our results speak volumes about the positive relationship that we have with our employees and representatives.

It is our view; unions are an essential part of a strong democracy and play a crucial roll in America's public and community life. Not only do they give workers a voice on the job and help negotiate fair benefits and wages for their members, but they also use their resources to raise the floor for everyone who works for living. Unions by standing for higher standards for workers, businesses, families, the environment and public safety, have helped to build the middle class and make sure the economy works for everyone.

We believe the proposed amendments presented by the AFL-CIO and Hawaii unions to the legislative body will protect workers. In our view it is an injustice where workers do not have the right to free collective bargaining. It is unfair that 32% of workers lack a collective bargaining agreement one year after voting for union representation. This in our view is due to weak national labor laws.

At AIL we were surprised to learn through a recent Peter Hart post-election survey, that 60% of all voters support this type of legislation. It is our view and is supported historically, that fair collective bargaining agreements have resulted in building a dynamic productive workforce with shared prosperity. We believe in these tough economic times, employers and employees should be sitting at the table together, crafting solutions which support the long-term growth and sustainability for both business and workers.

Today more than ever we need to protect workers as well as the long-term economic interest of American business. It is only logical for businesses to support policies that create a robust middle class, spur economic growth, and create shared prosperity. This type of legislative amendment is good for workers, and ultimately, that is good for our economy.

Thank you

Daryl Barnett
Director Public Relations
American Income Life.
cep

1701 K. N.W. Washington, D.C. USA 20006 – Toll Free 1-866-413-7648 Fax: 1-514-371-0652 Email: Dbarnett@ailife.com

THE GENTRY COMPANIES

March 19, 2009

Honorable Karl Rhoads, Chair
Committee on Labor & Public Employment
State Capitol, Room 309
Honolulu, HI 96813

RE: SB1621, SD2 "Relating to Collective Bargaining"

Chair Rhoads and Members of the Committee on Labor & Public Employment:

I am Mike Brant, Vice President of Gentry Homes and 2009 Building Industry Association of Hawaii (BIA-Hawaii) President. Chartered in 1955, the Building Industry Association of Hawaii is a professional trade organization affiliated with the National Association of Home Builders, representing the building industry and its associates. BIA-Hawaii takes a leadership role in unifying and promoting the interests of the industry to enhance the quality of life for the people of Hawaii.

BIA-Hawaii is strongly opposed to SB 1621, SD2, "Related to Collective Bargaining" because of the increased burden it would place on businesses at a time when they can least afford it while giving unions unfair and extraordinary powers and rights.

SB 1621, SD2 is also referred to as the "Card Check" bill because it would eliminate the secret ballot elections for union certification if a majority of employees provide written authorization for a union to be their bargaining representative.

SB 1621 also provides unions with legal immunity and authorizes unions to engage in criminal conduct if engaging in a labor dispute. If passed, this bill would provide protection to unions against criminal trespass in a labor dispute. Under this bill, a reasonable request or order from a law enforcement officer can be defied with impunity, thereby allowing labor activity to obstruct walkways and driveways and totally restrict any public access. We do not see any fairness in this provision. While the conduct of unions in obstructing walkways and driveways would be authorized by this law, the general public will be subject to criminal penalties if they try to gain public access that has been blocked. There would be total immunity for any civil claims against a union, its officials or any member while engaging in collective bargaining activities in a labor dispute. Untruthful smear campaigns; obstruction of access to your premises, libel and slander; and torts will all be protected activity if it occurs while a union or one of its members is "participating in a labor dispute".

For these reasons, BIA-Hawaii asks that this bill be held. It is bad for business and ultimately the consumers in this state.

Thank you for the opportunity to express our views.

Michael J. Brant
Vice President – Engineering
Gentry Homes, Ltd.
2009 BIA-Hawaii President

560 N. Nimitz Hwy., Honolulu, Hawaii 96817 P.O. Box 295, Honolulu, Hawaii 96809 (808) 599-5558

91-1440 Farrington Hwy, Kapolei, Hawaii 96707 Phone: (808) 677-9516 Fax: (808) 677-9412

March 19, 2009

Honorable Representative Karl Rhoads, Committee Chair
Honorable Representative Kyle T. Yamashita, Vice Chair
COMMITTEE ON LABOR & PUBLIC EMPLOYMENT

RE: Testimony in opposition to SD 1621 SD2

Dear Rep. Rhoads, Rep. Yamashita, and Committee Members

Aloun Farms has been a part of Hawaii Agriculture and Farming for over 25 years. Currently, Aloun Farms employs about 160 employees. The passing of SD1621 would not be beneficial to our employees as it infringes on their basic right to a secret ballot election. It is our belief, that this bill would also add one more negative challenge to the survival and success of Aloun Farms. We began as a small nucleus of a couple dozen employees and have today developed a strong bond and a good working relationship with our employees. SD1621 in its very nature will breach that strong bond that we have and created an eventual hostile owner/employee relationship that will destroy our company.

Our agricultural industry remains in a constant struggle as we contend with increasing the costs of land, water, fuel and supplies. However, we difficulty of a global recession, the success that Agriculture is experiencing can be a bright spot for Hawaii. Unlike the military and tourism sector of our economy which both are affected by external and global economy, farmer producing food for our people on an isolated statehood is not affected by global recession and external factors, but rather our own ability to produce and consume. This one bright spot in our industry should be supported favorable policies and incentive especially in this economic trouble times, and not be tested and negatively affected by bill such as SD1621.

We strongly oppose SD1621 and respectfully ask for your support. Mahalo.

Sincerely,

Alec Sou
President and General Manager
Aloun Farms, Inc.

ABC STORES
766 Pohukaina Street
Honolulu, Hawaii 96813-5391
www.abcstores.com

Telephone: (808) 591-2550
Fax: (808) 591-2039
E-mail: mail@abcstores.com

March 19, 2009

TO: Committee on Labor and Public Employment
Representative Karl Roads, Chair
Representative Kyle Yamashita, Vice Chair

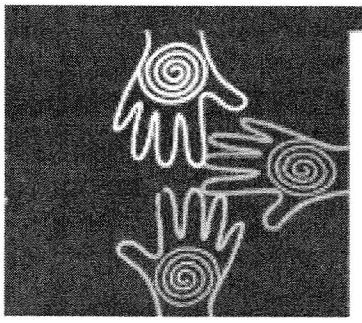
RE: Testimony on SB 1621, SD2 Relating to Collective Bargaining

My name is Paul Kosasa, President and CEO of ABC Stores. We are a local business employing 800 people in the State of Hawaii. We **oppose** SB 1621, SD2 , known as the "Card Check" bill.

Many businesses, large and small, are well managed. Many employers, if not most, take good care of employees. Companies that employees vote for the union, deserve the union. But the card check technique is subject to peer pressure, coercion, or false promises to obtain signatures.

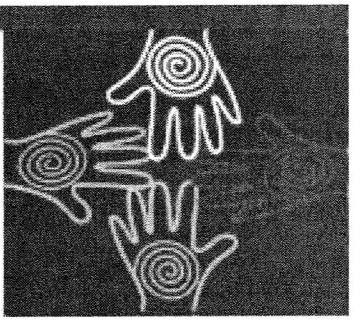
Would Unions allow current unionized companies decertify using the card check petition? Ask the question because this is the balance that the current system of secret ballot elections allow.

Thank you.



PRIDE AT WORK Hawai'i

LESBIAN, GAY, BISEXUAL, & TRANSGENDER LABOR



PO Box 22416 Honolulu, HI 96822
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www.hawaflcio.org/PAWHI

March 20, 2009

Hawaii State House of Representatives
Committee on Labor and Public Employment
Chair, Rep. Rhoads
Vice Chair, Rep. Yamashita

Testimony in favor or S.B. 1621, SD2 – RELATING TO COLLECTIVE BARGAINING

Pride At Work Hawai'i, whose mission is to mobilize lesbian, gay, bisexual, and transgender (LGBT) workers and their supporters for full equality and to build mutual support between the labor movement and the LGBT community, strongly supports S.B. 1621, SD2. As amended, the bill would promote all workers' rights to organize for the purposes of collective bargaining by providing a more level playing field and strengthening protections against employer intimidation. Passage of this bill will help fulfill the promise of the right to organize made in Article XIII of our State Constitution.

Presently, an employer does not have to recognize majority sign-up and can insist on a secret ballot election, resulting in numerous delays, threats, coercion and any other tactics to ensure union organizing drives fail. In fact, nationwide, over 86,000 workers have been fired over the past eight years for trying to unionize. According to Kate Bronfenbrenner from Cornell University, "employers fire workers in a quarter of all campaigns, threaten workers with plant closings or outsourcing in half and employ mandatory one-on-one meetings where workers are threatened with job loss in two-thirds." Experience proves that there is nothing free and fair about the current system, but this bill will help change that.

Passage of this bill is especially important for lesbian, gay, bisexual, and transgender workers. Nationally, studies have shown that gay workers are typically paid less than their heterosexual peers. A union contract helps to put straight and gay workers on a more even level, as well as provide additional protections against discrimination. LGBT workers are also particularly vulnerable to employer intimidation during organizing efforts. By providing for penalties against abusive employers, this bill will make LGBT workers feel safer and more willing to join unionization campaigns.

In these difficult and uncertain economic times, it is more important than ever to give workers a fair shake if they want to organize themselves into unions. It is working people - LGBT and straight - that will help revitalize our economy and get us out of this economic crisis we are currently in. Passage of the employee free choice act is a step in the right direction.

Thank you for the opportunity to testify in support of S.B. 1621 SD2. On behalf of all LGBT workers in Hawai'i, we hope you will support this bill.

Respectfully submitted,
Steve Dinion
President
Pride At Work Hawai'i

HOUSE OF REPRESENTATIVES
THE TWENTY-FIFTH LEGISLATURE
REGULAR SESSION OF 2009
COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT
Representative Karl Rhoads, Chair
Representative Kyle Yamashita, Vice-Chair
Friday, March 20, 2009; 9:30 a.m.
Conference Room 309

STATEMENT OF DR. GORDON LAFER ON S.B. 1621
RELATING TO COLLECTIVE BARGAINING

Chairman Rhoads, Vice Chairman Yamashita, and Members of the Committee, thank you for the opportunity to submit testimony for your Committee's hearing. My name is Gordon Lafer. I hold a PhD in Political Science from Yale University and am currently a professor at the University of Oregon's Labor Education and Research Center. I am also the founding co-chair of the American Political Science Association's Labor Project.

Over the past four years, I have conducted extensive research measuring the extent to which National Labor Relations Board elections match up to American standards – developed from the Founding Fathers to the present -- for defining "free and fair" elections. Unfortunately, I must report that NLRB elections look more like the discredited practices of rogue regimes abroad than like anything we would call American.

I would like to briefly describe the problems that currently plague the NLRB election system as well as the difficulties in negotiating first contracts. I am aware that SB1621 addresses Hawaii state labor law and not federal law. However, as the procedures governing union certification elections at the state level are largely similar to those of the National Labor Relations Act, the problems identified with the NLRB system are equally present in the current Hawaii state system.

I have attached a report that summarizes my research on NLRB elections. In what follows I will touch on only a few highlights of that report.

The role of secret ballots

In fact, there is no truly secret ballot in Labor Board elections, because supervisors are permitted to interrogate their underlings in terms that force most employees to reveal their political choices long before they step into the voting booth. The pressure tactics used to force employees to reveal their political preferences would be illegal in any election to the Senate - and we would not tolerate them in any foreign elections that claimed to be democratic. I would be happy to explain this problem further if Senators have followup questions on this issue.

Before going into the substance of my findings, I want to say a word about secret ballots, since so much of the debate around labor law reform has focused on the role of secret ballots.

Defenders of the current system argue that NLRB elections represent the "gold standard" for democracy in the workplace for a single reason: that Board elections end in a secret ballot.

To some, it may seem that as long as an election ends in a secret ballot, it must be fair. In the workplace, one might imagine that even in the worst case, if a worker is intimidated by his or her employer, one could lie to one's supervisor and pretend to be opposing the union; as long as, at the end of the day, you cast your ballot in the privacy of a voting booth, you are free to exercise your conscience.

It is critical to note that the American democratic tradition - from the Founders to the present - fundamentally rejects this view. In elections to public office, while the secret ballot is a necessary ingredient, there are a whole set of standards that must be met in the leadup to election day - such as equal access to the media and voters, free speech, etc. - which are equally crucial elements of defining a "free and fair" process. Indeed, our government has often condemned elections abroad when there was no question that they ended in a secret ballot, because they failed to meet these other, equally important standards.

After all, even Saddam Hussein had secret ballots. Indeed, history is full of dictatorial regimes that have remained in power despite the use of secret ballot elections. How do they do it? Through things such as threatening the livelihoods of opponents; denying them access to the media; and forcing all voters to attend propaganda rallies for the ruling party. Our government has rightly condemned these votes as "sham elections."

Unfortunately, the very standards that we insist on as minimal guarantors of democracy in other countries is violated by the NLRB system. With the exception of the secret ballot - and, as I will discuss later, there is no truly secret ballot in NLRB elections -every other aspect of NLRB elections fails to meet American standards defining "free and fair" elections.

Today I would like to focus on just three dimensions of democratic elections: access to voters; free speech; and protection of voters from economic coercion.

Access to voter lists

The first step in any American election campaign is getting a list of eligible voters, and it is law that both parties must have equal access to the voter rolls.

In NLRB elections, however, management has a complete list of employee contact information, and can use this for campaigning against unionization at any time - while employees have no equal right to such lists. Employers use legal maneuvers to delay union elections for months. Only after all delays have been settled does the union have a right to the list of eligible voters. A federal commission found that on average, unions received the voter list less than 20 days before the election.[1] Even then, the NLRB requires employers to provide workers' names and addresses - but no apartment numbers, zip codes, or telephone numbers.

If we imagine this system being applied to Senatorial elections - where one candidate had the voter rolls two years before election day, while his or her opponent was restricted to a partial list and only got it a month before the vote - none of us would call this a "free and fair" election.

Economic coercion of voters

When the founders of our country created the world's first democracy and gave the vote to the common people, they were particularly concerned that employers might use their economic power over workers to influence their political choices. In general, Alexander Hamilton warned, "power over a man's purse is power over his will."

For this reason, there is a wide range of federal and state laws that make sure employees can make political choices free from economic coercion.

In federal elections, it is illegal for a private corporation to tell its employees how they should vote, or to suggest that if one party wins business will suffer and workers will be laid off.[2] Supervisors or managers can't say *anything* to those they oversee that amounts to endorsing one side or the other. It is noteworthy that federal law doesn't require that employers spell out a *quid pro quo* threat stating, for instance, that anyone caught wearing a button supporting the "wrong" candidate will never get a promotion. It is understood that employees naturally are

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[1] Dunlop Commission, Final Report, p. 47.

[2] Under FECA, corporations are free to campaign to their "restricted class" of managerial and supervisory employees, but are prohibited from engaging in any communication to rank-and-file employees that includes express advocacy for a specific candidate or party. 2 USC 441(b)(2)(A); 11 CRF 114.3, 114.4. According to the FEC, "express advocacy" can be either an explicit message to vote for or against a given candidate, or a message that doesn't use such explicit language but that "can only be interpreted by a 'reasonable person' as advocating the election or defeat of one or more clearly identified candidates." Federal Election Commission, *Campaign Guide for Corporations and Labor Organizations*, Washington, DC, June 2001, p. 31.

extremely sensitive to the need to make a good impression on their boss, and don't need a threat to be spelled out for it to influence their behavior. Thus, federal law protects the ability of workers to make a political choice based on personal conscience rather than economic coercion.

But in NLRB elections, this kind of intimidation is completely legal. Standard employer behavior involves having mass meetings where upper management attacks the idea of unionization, and then having supervisors tell each of their subordinates personally that they should vote against the union. In this way, NLRB elections maximize exactly the kind of behavior that is banned in federal elections.

Free speech and equal access to media

Free speech is the cornerstone of American democracy.

In election to public office, it is a bedrock principle that there is no such thing as a neighborhood, park or shopping mall that is accessible to one candidate but off-limits to the other. Radio and television stations are required to sell ad time on the same terms to competing candidates. Even private corporations are prohibited from inviting one candidate to address employees without giving equal opportunity to the opposition. From the founders to the present, it has been understood that democracy requires free speech, equal access to the media, and robust debate.

Yet this most basic standard of freedom is ignored by the NLRB.

Management is allowed to plaster the workplace with anti-union leaflets, posters, and banners – while maintaining a ban on pro-union employees doing likewise.

In addition, anti-union managers are free to campaign against unionization all day long, anyplace in the workplace, while pro-union workers are banned from talking about unionization except on break times. As a result, research shows that in a typical campaign, most employees never even have a single conversation with a union representative.

The most extreme restriction on free speech is employers' forcing workers to attend mass anti-union meetings. Not only is the union given no equal time, but pro-union employees can be forced to attend with the condition that they don't open their mouths. If they ask a question, they can be fired on the spot.

If, during the 2004 presidential election, the Bush campaign could have forced every voter in America to watch the *Swiftboat Veterans' for Truth* movie, with no opportunity for response from the other side – or if the Democrats could have forced everyone to watch *Fahrenheit 9/11* – they might well have seized the opportunity. But none of us would call this democracy.

No Truly Secret Ballot in NLRB Elections

While defenders of the NLRB system point to its secret ballot as the guarantor of democratic rights, in fact the system does not guarantee true privacy of the ballot.

In the American democratic tradition, the principle of the secret ballot is more than simply the fact that one enters a private booth to cast one's ballot. It is, more broadly, the right to keep one's political opinions to oneself - before, during and after the moment of voting. If a friend, neighbor or canvasser asks whom you are supporting in an election, you don't have to say. Indeed, you don't have to talk to them at all. The right to a secret ballot includes the right to refuse to participate in conversations designed to flush out one's politics: you cannot be forced to engage in a conversation that reveals your political preferences. It is this right, as much as what happens on Election Day itself, that makes up the principle of the secret ballot. Each of us is guaranteed the right to make political decisions as a matter of individual conscience, and to control how and whether we choose to share that with anyone else.

While NLRB elections do culminate in a private voting booth, they effectively undermine the secret ballot by allowing management to engage in practices that force workers to reveal their political preferences long before they step into the voting booth.

The standard procedure of employers - as documented in the guidebooks of management-side attorneys and consultants -- is to have every supervisor require each of their subordinates to participate in intensive one-on-one conversations designed to flush out that worker's feelings about unionization. These conversations happen multiple times during the course of the election campaign - sometimes multiple times per week. Because it is illegal to directly ask workers how they're voting, supervisors are coached in how to get this information without using those explicit words. Supervisors are, instead, instructed to have "eyeball to eyeball" conversations, in which they make provocative anti-union statements, and then carefully observe their subordinates' body language, listen to their response, and report back to the consultants who typically run such campaigns, grading each worker on a 1-5 scale measuring their political leanings.

Employees cannot refuse to participate in these conversations. But under this type of interrogation, only the most skilled of actors or dissemblers can fool their supervisors and keep their political leanings truly secret. Everyone else reveals their preferences - indeed, one management attorney boasted that, through the use of such methods, he could almost always predict the final vote total with remarkable accuracy.

The principle of the secret ballot is that you have the right to keep your political opinions to yourself forever, not just for the 60 seconds that you stand in the voting booth. By permitting employers to limit the secrecy of the ballot to the moment of voting, the NLRB system has hollowed out the fundamental meaning of this principle.

These practices would of course all be illegal if carried out in the context of a campaign for federal office. If we saw this happening in another country, we'd say that the secret ballot had been eviscerated in all but name. But this is the system currently in place in workplaces across our country.

Higher Standards Abroad than At Home

The truth is that we uphold higher standards for voters abroad than for American workers.

In 2002, the State Department condemned elections in Ukraine for failing to "ensure a level playing field," because

- employees of state-owned enterprises were pressured to support the ruling party;
- faculty and students were instructed by their university to vote for specific candidates;
- and the governing party enjoyed one-sided media coverage, while the opposition was largely shut out of state-run television.

Every one of these practices is completely legal under the NLRB.

The sad fact is that right now, our government demands higher standards of democracy for voters in Ukraine than it does for Americans in workplaces across the country.

Negotiating a First Contract

As stated in the Wagner Act, it is federal policy to encourage collective bargaining. One of the major obstacles to realizing this goal, however, is the difficulty workers face, even after winning recognition of their union, in negotiating a first contract. Studies estimate the up to one-third of newly organized unions fail to ever achieve a first contract.

This remarkable failure rate represents a widespread effort of employers to eliminate collective bargaining before it can take root as established practice in the firm. These employers view first contract negotiations as a second chance - following an election in which workers choose to organize - to keep their employees from having a collective voice in the workplace.

The NLRB system, while not per se encouraging such obstructionist behavior, greatly facilitates it. Employer-side attorneys and consultants regularly counsel their clients to adopt a strategy of maximum delay, in order to erode employees' sense of hope and confidence in the collective bargaining process; there is nothing in the NLRB system to contain such tactics. Furthermore, when employers violate the law by refusing to bargain in good faith, by far the most common remedy required by the Board is simply for employers to promise to act correctly in the future; no penalty of any kind is imposed. Finally, when negotiations reach an impasse and both sides declare themselves stuck, the NLRB system imposes a one-sided solution: management's last proposal is unilaterally implemented and, by force of law,

becomes the contract under which employees are governed. The ease with which most employees can be replaced, and the legal right of employers to permanently replace strikers, means that most workers cannot afford to strike to prevent this one-sided resolution. Knowing this, management-side attorneys often adopt a negotiating strategy explicitly aimed at reaching the point of impasse, forcing employees into a choice between an undesirable contract and the prospect of a long, costly and difficult strike.

Those who defend the current system against the proposal for first-contract arbitration sometimes insist that they are motivated by defending the right of employees to vote for themselves on what defines acceptable contract terms. But forcing employees to choose between a losing strike and having a one-sided contract unilaterally imposed on them is not a defense of workers' rights. I would guess that most employees would be perfectly happy to forego the "right" to have a contract unilaterally imposed on them.

Similarly, opponents of first-contract arbitration sometimes raise the prospect of arbitrators deciding contracts on terms that render an employer financially insolvent or uncompetitive. But the data do not support this fear. There is an extensive track record of labor contracts settled by arbitration – in the private sector, in the public sector, and in other countries. I do not know of a single case where a public or private entity was forced to close operations as a result of contract terms established by arbitration.

For employees – and for the federal goal of encouraging a stable regime of collective bargaining – establishing an impartial and non-confrontational means for settling first contracts would be a major step forward.

Illegal activity in NLRB system, compared with FEC

The things I've described so far are legal. However, NLRB elections are also characterized by an extraordinary level of illegal activity.

Labor law is the only area of American employment law in which it is statutorily impossible to impose fines, prison, or any other punitive damage.

As a result, it is not just "rogue" employers who break the law. Any rational employer might decide it's worth it to fire a few workers in order to scare hundreds more into abandoning their support for unionization.

In my research, I have measured the impact of illegal retaliation against union supporters by making the most conservative possible calculations. Nevertheless, the results are extremely troubling. One out of every 17 eligible voters in NLRB elections is fired, suspended, demoted or otherwise economically punished for supporting unionization.

If federal elections were run by NLRB standards, we would have seen 7.5 million Americans economically penalized for backing the "wrong" candidate in the last presidential election cycle.

Imagine what this would mean. Every family in America would know someone who had been fired or suspended in retaliation for their political beliefs. Most citizens would quickly become too scared to participate in any public show of support for non-incumbent candidates. If we continued to hold elections amidst such widespread repression, they would be sham elections. The outcome would not represent the popular will, but would simply reflect the fear that governed the country.

What I'm describing may sound like a bad science fiction movie. But it is the reality that workers face when they try to organize.

If we compare illegal activity per voter under the NLRB with that under the FEC, the data suggests that NLRB elections are 3,500 times dirtier than federal elections.

This number may sound incredible; but it's true. But suppose my numbers are off by as much as an entire order of magnitude. Then the NLRB system would be only 350 times dirtier than federal elections.

Any way you count it, the system is profoundly broken, profoundly undemocratic, and, I would say, profoundly un-American.

Conclusion

If we're serious about having a truly democratic process for American workers, we must begin by fixing these problems.

The undemocratic nature of the current election system cannot be fixed by better funding or smarter administration. It can only be fixed by changing the law.

Thank you again for the opportunity to contribute to your deliberations.

While I am not able to participate in person in Honolulu, I would be happy to respond in writing to any followup questions that your Committee may have, or to provide any additional information that might be useful in your consideration of this critical issue.

Attachment:

G. Lafer, *Neither Free Nor Fair: The Subversion of Democracy Under NLRB Elections*, American Rights at Work, Washington, DC, July 2007.

Neither Free Nor Fair

The Subversion of Democracy Under National Labor Relations Board Elections

Gordon Lafer, Ph.D., University of Oregon

AN AMERICAN RIGHTS AT WORK REPORT

Neither Free Nor Fair

The Subversion of Democracy Under National Labor Relations Board Elections

Gordon Lafer, Ph.D., University of Oregon

An American Rights at Work Report

July 2007

About the Author

Gordon Lafer is an Associate Professor at the University of Oregon, where he has lectured on economic policy, globalization, labor, and American politics since 1997. He received his Ph.D. in political science with distinction from Yale University in 1995. Additionally, he has served as an economic policy advisor to the New York City Mayor's Office and as a strategic consultant for a wide range of labor organizations.

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American Rights at Work is a nonprofit, nonpartisan organization committed to ensuring that workers can exercise their democratic rights to join or form a union and engage in collective bargaining.

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Executive Summary

From its inception in 1935, the National Labor Relations Act (NLRA) held out the promise that Americans may enjoy democratic rights in the workplace similar to those we count on as citizens. When the bill was passed, the U.S. Senate explained that its purpose was to guarantee rights to "a worker in the field of industry" similar to those provided to "a citizen in the field of government."

Unfortunately, however, in the 70 years since the law was established, Americans' democratic right to represent themselves through a union has increasingly become a right that exists on paper only, as aggressive employers and ineffective laws have effectively denied most employees the ability to exercise this right in practice. Over the years, the National Labor Relations Board (NLRB) has interpreted the law in ways that allow employers to deny free speech in the workplace, pervert the political process, and intimidate workers who are voting on the question of unionization. Many forms of employer intimidation that are banned in elections to public office are permitted in NLRB elections. Furthermore, since the penalties for violating labor law are so minimal, it has become commonplace for employers to break the law as part of their efforts to prevent employees from forming unions; thousands of Americans every year are either fired, suspended, or otherwise financially punished for backing the "wrong side" in union elections.

In new research, University of Oregon professor Gordon Lafer, Ph.D., lays bare the realities of how workers' rights to democratic process and freedom of association have been effectively eliminated under the NLRB system, exposing the myriad ways in which workers are denied the most basic tenets of democracy. This research illustrates just how far NLRB elections fall short of the standards that we rely on in elections to Congress and other public offices. Finally, this report addresses head-on the claim that the NLRB election process guarantees workers a truly secret ballot — the central claim of anti-union advocates who seek to keep the current NLRB system in place. Lafer's work shows instead that NLRB elections fail to safeguard workers' right to keep their opinions private; and that, on the contrary, the NLRB system results in workers being forced to reveal their political preferences long before they step into the voting booth — thus turning the "secret ballot" into a mockery of democratic process.

Employers' Foremost Goal: No Elections at All

In presentations to Congress, business lobbies have sometimes argued that the NLRB system is critical to maintaining workers' democratic right to a secret ballot election. But in their own internal publications, employer organizations routinely promote a strategy of "union avoidance," which aims above all to prevent workers from ever having a vote of any kind related to forming a union. The near-universal mantra of management consultants is "You can't lose an election that never takes place." Or, as attorneys from the celebrated labor law firm Jackson Lewis advise, "winning an NLRB election undoubtedly is an achievement; a greater achievement is not having one at all!"

"Union avoidance" consultants — employed by a majority of large- and medium-sized employers facing the prospect of a union election — counsel employers to conduct an aggressive, intimidating offensive as soon as any workers begin discussing unionization. Since an NLRB election is held only after 30 percent of employees sign cards calling for a vote, employers' foremost strategy is to prevent emlpoyees from signing cards that would trigger an election. The thousands of efforts to form unions that have been defeated through such intimidation tactics don't show up in any government statistics, because employees are scared into silence before any election can be scheduled. But in weighing the arguments of "union

avoidance" proponents, it is critical to understand that these are aimed not at safeguarding anyone's democratic rights, but in guaranteeing that workers never have the right to democratic self-representation.

NLRB Elections: A Model for Authoritarian Regimes Abroad

This report describes what has become standard employer practice in response to workers' desire to represent themselves through a union. The pages that follow detail the myriad strategies — both legal and illegal — that typically comprise employers' efforts to deny their workers' the right to collective bargaining. Many of these entail practices that our government routinely denounces when practiced by foreign regimes. But they have become commonplace in the American workplace. Among the most disturbing of these practices are:

Denial of free speech

At the heart of American democracy is the principle that both voters and candidates must be guaranteed the right to free speech, including equal access to information from all sides of a political debate. But this most fundamental principle is ignored by the NLRB. While management is permitted to plaster the workplace with anti-union posters, leaflets, and banners, pro-union employees are prohibited from doing likewise. Union organizers are banned from ever entering the workplace — or even publicly-used but company-owned spaces such as parking lots — at any time, for any reason. Employees of the company are banned from talking about forming a union while they are on work time, and are banned from distributing pro-union information except when they are both on break time and in a break room. Management consultants typically advise employers on how to maximize the impact of these one-sided advantages, resulting in an election environment that more closely resembles the sham "elections" of one-party states than anything we would call American democracy.

Economic coercion and intimidation

When employers speak out, employees always listen carefully for even the subtlest hints as to what kind of behavior will be rewarded or punished. This is all the more true in an economy where so many Americans feel insecure about their economic future. For this reason, federal election law maintains a blanket prohibition on private companies telling their employees which candidate they should support. Even making more nuanced statements — such as suggestions that if one party or the other triumphs, business may suffer and workers may have to be laid off — is illegal under federal law.

However, under standard "union avoidance" strategy, supervisors are forced, on pain of termination, to engage each of the people under them in intimidating one-on-one anti-union conversations. Workers commonly report illegal threats being made in these meetings, since there are no witnesses present.

But even without illegal threats, supervisor one-on-one meetings undermine democracy. In these conversations, the person who has the most immediate control over your hiring and firing, promotion or demotion, scheduling, duties, hours, and all other aspects of your work life, explains why they believe so strongly that a union would be destructive to the workplace.

Because such conversations are *inherently* coercive, they are completely banned in elections to Congress or the President. But what is prohibited in federal elections is standard practice under the NLRB and at the heart of employer's anti-union campaigns.

Ostracism and defamation of union supporters

The NLRB allows employers to make almost any type of threatening or derogatory statement to employees, as long as it doesn't contain an explicit *quid pro quo* threat. Workers who have earned

their way to good standing with the company are often ostracized and belittled by management after publicly asserting their support for the union. In one example, a worker was followed to restaurants on days off by security guards with walkie-talkies. A member of management was assigned to work with her eight hours a day, five days a week, and was told he was there solely to work on her to change her ideas about unions. She was timed going to the bathroom. Other employers have referred to pro-union employees as "the enemy within," publicly questioned their personal morality, or isolated them with heavy-handed and heavily-visible security forces. If we imagine a workplace where all Democrats or all Republicans were singled out for such treatment, we would correctly view such tactics as un-American.

There is no such thing as a secret ballot under NLRB elections

Much has been made about the importance of the secret ballot in NLRB elections. But, as this report documents, the NLRB safeguards the secret ballot in name only. The principle of the secret ballot in the American democratic tradition encompasses more than the fact of casting one's ballot in a private booth on election day. More broadly, it is the principle that voters have the right to keep their political opinions to themselves, and that they cannot be forced to reveal which party they're supporting before, during or after election day.

But this principle has been eviscerated by the NLRB. Federal law allows anti-union managers to force individual employees into repeated, intimidating one-on-one conversations with their personal supervisors that are designed to make employees reveal their political leanings long before election day. "Union avoidance" consultants typically script supervisors' conversations, train them how to read employees verbal and non-verbal reactions, and have them ask indirect questions without explicitly asking employees how they will vote. Supervisors often adopt a sophisticated grading system to mark the political tendencies of each of their subordinates; for those whose leanings are unclear, consultants require that supervisors go back for repeated conversations until employees' political sentiments have been flushed to the surface. Unlike political elections, employee voters have no right to walk away from such conversations or to insist that they don't want to discuss union-related issues with their supervisor. They can be forced to engage in such conversations daily, or multiple times a day, in an atmosphere of dramatically increasing pressure.

Unsurprisingly, all but the most skilled actors end up revealing their union preferences in these conversations with supervisors. One management consultant recalls that he would commonly initiate a pool among managers, in which each supervisor would predict the number of anti-union votes, with a $100 prize for the closest guess. "It was amazing," he reports. "In pool after pool the supervisors were astonishingly accurate."

To the extent that such tactics are effective, the technically secret ballot has ceased to provide any meaningful protection to voters subject to the intense scrutiny of those who control their work lives.

Lack of meaningful enforcement results in pervasive lawlessness

Because labor law lacks any punitive sanctions — no fines, no loss of license, no possibility of prison time — employers are free to break the law with near-total impunity. Over the period of 2000-05, there were an average of just over 19,000 charges filed per year alleging employer violations of federal labor law; of these, 40% — or 8,500 cases per year — presented sufficiently strong evidence that the Labor Board either issued a complaint or oversaw an informal settlement between the parties (NLRB complaints are the equivalent of criminal indictments, and both complaints and settlements represent cases in which the Board judges a charge to have merit). While both unions and employers violate the law, the vast majority of charges stem from employer behavior. In 2004, for example, 88.5 percent of all complaints issued by the Board, and over 90 percent of all cases tried in hearings of the full Board, addressed illegal behavior by employers.

The most egregious form of illegal behavior is the firing, suspension, or demotion of employees. On average over the past 10 years, nearly 23,000 workers per year received backpay from employers after accusing them of violating labor law — and this only includes the cases adjudicated to the point that employers were forced to provide backpay to their victims.

While the regularity with which pro-union employees suffer financial punishment is shocking, it is often only the tip of the iceberg of illegal employer behavior. Much of this employer behavior remains hidden from legal authorities. But a glimpse into such practices was provided in 2004, when a South Carolina manufacturer sued Jackson Lewis — one of the country's preeminent labor law firms — for advising illegal tactics in "a relentless and unlawful campaign to oust the union." These included spying on workers, firing union activists, organizing a bogus "employee" anti-union committee, writing supposedly employee-authored fliers calling union activists "trailer trash" and "dog woman," and supplying cash-filled envelopes to anti-union employees. What was unusual about this case is not the tactics employed, but simply that the internal tension between the company and its attorneys led to a public record of management's tactics.

Conclusion

The NLRB election system has come to be defined by intimidating, coercive, and undemocratic employer behavior — both legal and illegal. Current federal law fails to protect the rights that the U.S. Congress thought it had bestowed to workers more than 70 years ago. If we're serious about having a truly democratic process for American workers, we must guarantee that workers have access to a fair electoral system, and that must begin by amending existing federal law. Passage of the Employee Free Choice is critical to addressing these failures.

Introduction

When most Americans hear talk of "union elections," they assume that these must run more or less the same way as elections for Congress or the President. As a nation, we have a deep-seated understanding of how fair choices are made, and we rightly expect that these standards of fairness apply to the workplace as much as to any other type of election.

Unfortunately, the process through which American workers choose whether or not to represent themselves through a union looks nothing like normal elections for public office. The election system established by the National Labor Relations Act fails to meet the most fundamental standards of American democracy.

This report is the second in an ongoing series of investigations. An earlier report (*Free and Fair? How Labor Law Fails U.S. Democratic Election Standards, American Rights at Work*, June 2005) compared the election process overseen by the National Labor Relations Board with the standards that are normally taken to define "free and fair" elections in the American democratic tradition. That report found federal labor law standards fell far short of American norms for democratic elections — and in fact were more similar to the sham votes conducted by rogue regimes abroad.

The first report focused on the law — comparing the electoral system created under federal labor law with that established by federal and state electoral statute. However, the report did not address how these sets of laws are applied in reality.

This report extends the analysis into the real world of NLRB elections, examining how the law is applied in the context of union organizing campaigns. In what follows, I again compare NLRB election procedures with American democratic norms, in order to measure the extent to which NLRB elections can truly be termed "democratic." This time, however, American democratic norms are used not simply to evaluate federal law, but to evaluate the actual practices that characterize a typical NLRB election as it is experienced by American workers. While both unions and employers seek to influence workplace voters, this report focuses primarily on the campaign strategies of employers. As detailed previously, federal labor law grants employers a series of lopsided advantages in workplace election campaigns that no party enjoys in elections to public office. In order to understand how these departures from the principles of American democracy impact the quality of workplace elections, this study focuses on how employers make use of those advantages in the course of real-life campaigns.

Unfortunately, it turns out that NLRB elections are even less democratic in practice than on paper. This is so for several reasons.

First, employer practices aim at exploiting the most undemocratic loopholes in labor law, and thus maximize the unfairness of NLRB elections. Federal labor law provides management a variety of avenues for campaigning against union organizing. Some of these avenues would produce an even playing field with the pro-union campaign; others take advantage of unequal powers in order to create a lopsided campaign. Unfortunately, standard practice for employers — and the unanimous counsel of anti-union consultants and attorneys — is to concentrate the employer campaign on exactly those aspects of the law that provide management the most unequal of powers. Thus, standard management practice maximizes the undemocratic nature of labor elections.

Second, while labor law provides flimsy protection for the democratic rights of workers, the law is even weaker in practice than it is on paper. For instance, labor law requires that, once an election date is set, the employer must provide union supporters with only a list of workers' names and addresses. This law fails to meet democratic standards even if perfectly upheld — it allows management to use the list of eligible voters for many months before pro-union employees have it. Even then, the list provides the union with only names and addresses, without apartment numbers, zip codes, telephone numbers, or email addresses. However, the law in practice is often worse still. What happens if an employer does not provide even the minimal information required by law? In theory, the NLRB could establish a "zero tolerance" policy, mandating that elections be rerun if a complete voter list is not provided. In practice, however, the NLRB only requires "substantial compliance" of employers. Thus, an employer who omits five percent of the employees' names from the voter list it provided to the union may nevertheless be deemed to have been "substantially compliant" with the law.[1] If a county registrar of voters withheld five percent of voters' names from one candidate while providing a complete list to the other, no authority would regard this as legitimate. But in NLRB elections, this is not considered grounds to overturn the results of an election. In this and other ways, the NLRB has adopted a standard of enforcement that is even lower than the already anemic standards enshrined in law.

Last, elections are marred by a huge number of out-and-out illegal actions. Because the penalties for violating the NLRA are so weak, employers have little incentive to avoid illegal tactics if they will succeed in intimidating workers into abandoning the union effort. Indeed, some executives were known to refer to the NLRB's backpay remedy for firing union supporters as their "hunting license."[2] In 2004, there were nearly 30,000 charges filed alleging illegal behavior; of the complaints issued by the NLRB based on these charges, nearly 90 percent were against employers, with just under 10 percent concerning illegal actions by unions.[3] If we compare the number of illegal actions per eligible voter in workplace and federal elections, using Federal Election Commission (FEC) violations and NLRB charges as a measure of the "dirtiness" of contests, the data suggest that workplace elections are 3,500 times "dirtier" than elections to federal office.[4]

Much of employers' illegal behavior involves threats of layoffs, promises of benefits for anti-union employees, or spying on or interrogation of employees. However, even the most serious type of illegal activity — actually firing, suspending, or cutting the hours of employees in retaliation for supporting the creation of a union — is extremely common. In 2004, an estimated 15,400 employees were illegally fired, suspended, or otherwise financially penalized for supporting a union in an election context.[5] In that same year, the total number of potential voters in NLRB elections was approximately 260,000; by this count, one employee was illegally fired or suspended for every 17 eligible voters.[6] By comparison, the FEC reports 565 cases of illegal activity for all elections to federal office during the 2001-02 campaign cycle, the most recent for which complete data is available.[7] If federal campaign law were broken as commonly as labor law, the number of FEC violations would increase from 565 to over 7.5 million. Every family in America would know someone who had been fired or suspended in retaliation for their political beliefs. Every neighborhood, and almost every workplace, would include several people who had suffered this fate. Under such a system, the majority of citizens would quickly become too fearful to participate in any public show of support for opposition candidates. All but the bravest would be deterred from ever speaking out against those in power. If we continued to hold elections amidst such widespread repression, they would be sham elections. The outcome would not represent an expression of popular will, but rather simply a reaffirmation of the fear that ruled the country. None of us would call this democracy.

In the debate surrounding proposals for federal labor law reform, business lobbyists and employer associations have often insisted on maintaining the current NLRB election process, declaring it the "gold standard" of workplace democracy.[8] So too, some of the most virulently anti-union employers promote the NLRB election system as the preferred method for settling the question of unionization. For instance, Yale-New Haven Hospital spent nine years resisting employees' organizing efforts and working hard to prevent employees from signing union authorization cards in order to avoid ever having to hold a union election. Finally, under pressure from the local community and city government, the hospital in 2006 signed an agreement with the workers' union, committing to hold a secret ballot election free of coercion,

intimidation, or misinformation. As the date of the vote approached, however, the hospital ignored this agreement, and was ultimately found by an arbitrator to have engaged in multiple acts that violated federal law as well as its agreement with the union. Facing mounting political pressure and the possibility that the arbitrator might require it to recognize the union on the basis of signed statements from a majority of employees, the hospital instead called for an NLRB vote. "The only thing that the Hospital has consistently wanted for our employees," claimed CEO Marna Borgstrom, "was the right to vote in an election."[9] Given the conduct during NLRB elections — as detailed in the report that follows — it is unsurprising that even the most unscrupulous employers engage in such heartfelt support for the NLRB system. But such statements are disingenuous; anti-union employers wax so eloquently in defense of the NLRB system not because it protects employees' democratic rights but the opposite: because it subjects them to a system of political repression that mirrors that of totalitarian states, and that makes it nearly impossible for workers to effectively exercise their supposed right to organize a union.

Methodology: Establishing What a "Typical" NLRB Election Looks Like

In theory, the ideal means for establishing what a "typical" National Labor Relations Board election looks like would be through systematic data collected on every stage of the campaign cycle. Unfortunately, however, no such data exists. The NLRB itself collects only the most general information regarding elections: the names of the employer and union, the number of employees involved, and the date and outcome of the vote. While the NLRB also collects data on illegal firings and other unfair labor practices, it does not specify which of these occurred in the course of an election campaign. Thus, there is no way of telling from NLRB data how many of the illegal acts occurred during election campaigns, as opposed to in the context of an already established collective bargaining relationship.

Even if the NLRB had more perfect data, this would still only capture the legal and bureaucratic milestones of an election — the procedural steps of petitions, votes, and charges of illegal behavior. No government agency tracks the range of activities that truly make up a campaign — the mandatory anti-union meetings, the use of supervisors to influence their subordinates, the use of workplace media such as leaflets and bulletin boards, the implicit threats made in individual or group meetings, the legal maneuverings to control the campaign's timing and momentum, and the general social dynamics that animate an election campaign. These elements — all of which are critical to assessing the democratic nature of NLRB elections — are neither monitored by nor reported by any authority.

In this context, the most rigorous methodology for social scientists is to assemble the best known data from a multiplicity of sources, and track the extent to which it converges on a consensus description of the facts. This is the method used for this study. The analysis that follows draws on a host of overlapping sources. First, I have examined both published and unpublished data from the NLRB, including a comprehensive survey of both elections and unfair labor practices committed over the past five years. Second, I have drawn on a number of government reports, most importantly including those of the federal Dunlop Commission on the Future of Worker-Management Relations, the most recent federal commission to have examined these issues in depth. Third, I have brought together data from each of the major studies of NLRB election campaigns that were performed by social scientists on statistically significant samples. The most comprehensive analyses of employer anti-union campaigns have been conducted by Kate Bronfenbrenner, the most recent of which was commissioned by the U.S. Trade Deficit Review Commission. Two additional studies, while smaller in scope, use similarly rigorous methods to update Bronfenbrenner's findings.[10] Fourth, I have taken data from surveys of both union and non-union employees, in order to measure their experience of and response to common campaign strategies. Most important among these studies is the national survey described in Freeman and Rogers' What Workers Want, and the work of Phil Comstock's Wilson Center, which over a period of 14 years interviewed 150,000 employees at companies where union organizing efforts were underway.

Finally, I have paid special attention to the advice of the nation's premier anti-union attorneys and consultants — as spelled out in books, newsletters and seminars — regarding the standard campaign

tactics they have proposed to the thousands of employers whose election strategies they guide. The union-avoidance industry, which remained relatively modest throughout the 1950s and 1960s, is estimated to have grown by 1,000 percent in the 1970s.[11] By 1990, one insider estimated that anti-union campaign strategy had become a $1 billion industry, providing work for 10,000 consultants and attorneys. The most recent data suggests that over three-quarters of employers hire such consultants when faced with a organizing effort.[12] The growth of this industry is both a marker of employers' commitment to preventing unions and a measure of the extent to which employers' campaigns have become standardized, as consultants have developed cookie-cutter strategies that are applied across industries. Indeed, there is a remarkable degree of consistency in the advice given by disparate consultants and across three decades. Almost all advisors issue virtually identical recommendations regarding both the general tactics and the specific themes of employer campaigns, to the extent that one often finds the same phrases repeated in model employer speeches developed by different consultants at different points in time.

Because they are both so standardized and so widely used, the strategic plans of anti-union advisors provide the single most important basis for understanding the tactics that define a typical employer campaign. Some of the preeminent anti-union texts date from the 1970s or 1980s. However, the strategies they recommend are nearly identical with those of more recent publications, and they continue to serve as guides for management practice; for this reason they remain very useful guides to understanding employer strategies in NLRB elections. For this report, I have drawn on a range of union-avoidance consultants, but have focused most heavily on a few of the most prominent architects of this strategy. For over 30 years, one of the leading sources of union avoidance advice has been the New York law firm of Jackson Lewis.[13] In addition to advising clients, the firm hosts seminars designed to train employers in union-avoidance techniques. The firm's two principals co-authored one of the first management-side campaign manuals, *Winning NLRB Elections: Management's Strategy and Preventive Programs*; I have drawn heavily on two updated versions of this volume.[14] On preemptive strategies for avoiding elections, one of the most comprehensive volumes is John Kilgour's *Preventive Labor Relations*, published by the American Management Association. One of the foremost union-avoidance consultants for the past three decades has been attorney Alfred DeMaria, who has advised hundreds of employers while publishing *How Management Wins Union Organizing Campaigns* and *The Supervisor's Handbook on Maintaining Non-Union Status*[15] and editing a monthly newsletter for employers, the *Management Report for Nonunion Organizations*. A more recent source is Gene Levine's 2005 *Complete Union Avoidance Manual*. While less prominent than DeMaria or the Jackson Lewis firm, Levine runs a successful seminar series and has advised a long list of prominent clients, including General Electric, Ford, GM, Hewlett Packard, Lucent Technologies, and Yale University.[16] Among employer organizations, the National Association of Manufacturers has published the most extensive series of union-avoidance guidelines, including *Remaining Union-Free: A Supervisor's Guide; Keep the Card Count Down*; and a series of pamphlets developed by the Association's educational arm, the Council for a Union-Free Environment.[17] There has only been one book written by an anti-union consultant recounting the tricks of the trade: Martin Levitt's 1993 *Confessions of a Union Buster*. While Levitt primarily reports on his personal campaign experience, there is good reason to believe his account is representative of the field. Levitt worked with a series of prominent firms that descended from the original architects of anti-union campaign strategy.[18] In 2001 the U.S. Labor Department noted that Levitt's account of employer tactics was "consistent with prior statements by other consultants."[19] All of these accounts figure prominently in the analysis that follows.

While no single one of these sources is definitive on its own, when brought together they paint an extremely consistent picture of the standard themes, strategies, and tactics that define contemporary NLRB elections in the United States. Indeed, the degree to which such disparate sources agree in their description of campaign dynamics is remarkable. It is this composite picture — based on the convergence of data and description, of workers' and managers' testimony — which I have used to judge the democratic and undemocratic aspects of election campaigns in American workplaces.

What follows is a description of typical election practices before, during, and following a workplace election as supervised by the NLRB.

Before the Organizing Campaign

Employers' Foremost Goal: No Elections at All

In debates over proposed reforms to federal labor law, business organizations frequently oppose alternatives to the NLRB election process (such as majority sign-up, alternatively known as "card check" recognition) on the grounds that anything but a Board-supervised, secret ballot election undermines the core imperative of labor relations: the fundamental right of workers to a free and uncoerced vote on the question of whether or not to unionize.[20]

In reality, however, the overriding goal of management strategists is not to assure workers the right to an election — secret ballot or otherwise. It is, instead, to prevent workers from ever having an opportunity to make this choice at all. The near-universal mantra of management consultants is "You can't lose an election that never takes place."[21] Or, as attorneys from the noted Jackson Lewis firm advises, "winning an NLRB election undoubtedly is an achievement; a greater achievement is not having one at all!"[22] Anti-union consultants devote considerable attention to the art of deterring employees from signing union authorization cards, in order to avoid ever having an election scheduled.[23] "That, dear reader, is the goal of this manual," explains one 2005 management tome — "to help you avoid an election."[24] Indeed, the most celebrated anti-union consultants brag not only about how many elections they have defeated, but how many they have prevented from ever taking place.[25]

Thus, an accurate understanding of NLRB elections must begin by looking at dynamics that take place long before an official campaign might be thought to begin, that is, long before any petition for election is filed. In addition, the fact that management so often works so hard to deny employees an opportunity to vote on unionization should inform our understanding of management-side campaign tactics during the course of the official election campaign itself.

Manipulating the Electorate

In a regular political election, the boundaries of electoral districts and lists of eligible voters are established long before the campaign begins, in a process that is independent of either candidate. By contrast, the scope of workers who are eligible to vote in any NLRB election is subject to debate during the campaign process itself. By law, the union must file a petition for an election among a specific "bargaining unit" — a group of employees who share a common interest by working for the same employer in the same set of occupations. However, the employer may contest the definition of the bargaining unit, arguing that certain employees should be excluded because they do a different type of work; or, conversely, that employees not originally included in the union's proposed bargaining unit (and presumed to be anti-union) should be added.

In elections for public office, candidates do not attempt to manipulate the vote by changing the borders of election districts — because it's simply impossible. The one exception to this rule comes when state legislatures redraw voting districts. In cases where redistricting appears driven by a clear partisan agenda — such as the highly contentious redistricting plan adopted by Texas in 2002 — these efforts bring widespread accusations of gaming the system. In NLRB elections, however, every single vote is open to such manipulation, and it is standard practice for employers to exploit this opportunity. "The effective use of the bargaining unit," advises one consultant, is "the most potent yet little appreciated instrument of preventive labor relations."[26]

Moreover, management has disproportionate control over the power to gerrymander elections. The NLRB's determination of whether a certain group of employees shares sufficient "community of interest" to be lumped together as one electorate turns on the extent to which employees have similar job duties, occupational titles, wage and benefit policies, and common supervision and physical work space, among other factors. As one consultant points out, "all the factors influencing community of interest are under the direct control of the employer."[27]

With this in mind, management has adopted a host of strategies for gaming the bargaining unit in order to frustrate workers' organizing efforts. Often, managers seek to inflate the size of the bargaining unit to a level that is too large, or too geographically dispersed to be organized. Self-confessed union-buster Marty Levitt, for example, recounted an incident in which workers at one Ohio coal pit sought to create a union. Levitt insisted that their bargaining unit be expanded to include an additional mine located in Kentucky, plus several trucking firms, quarries and a fuel company that were owned by the same parent company.[28] Thus, workers were forced to suddenly start organizing a large number of employees who lived many miles away and had no connection with the original mine; this change by itself killed the organizing drive. In more extreme but not uncommon cases, management stacks the bargaining unit by hiring known anti-union employees at the last minute.[29] Finally, management has wide discretion over how much supervisory authority to grant various employees; by investing slightly increased authority in a class of individuals, management can easily remove them from the bargaining unit.[30] One consultant, boasted of getting all the nurses in a hospital declared "supervisors" and thus ineligible to vote in an NLRB election. "That's how we won it," he explained. "Otherwise, if you went by the election there was no question [the union] had 90 percent of the people signed up."[31] In all these ways, management enjoys broad prerogative to shape the electorate to its liking.[32]

Creating Ground Rules to Kill an Election Before It Gets Started

Because management functions both as an interested party and as the government of a workplace, employers have wide-ranging powers to establish campaign ground rules that serve their partisan interest. Consultants' recommendations include proposals that employers maintain a separate, fenced parking lot for employees, in order to prevent union organizers from leafleting cars or talking to workers; banning delivery drivers from entering the work area or using normal employee bathrooms, and banning employees from taking lunch or coffee breaks on the loading docks, in order to separate unionized drivers from unorganized employees; creating multiple lunch rooms, water fountains, bathrooms, time clocks and exits in order to prevent too many employees from talking to each other; and instituting staggered lunch hours, break times, and starting and quitting hours in order to stop employees from organizing mass meetings.[33]

Anti-Union Campaigning Starts with One's First Day of Work

While union organizers are only able to systematically contact potential voters when they get the list of employee names and addresses from the employer — usually just a few weeks before the election — it is common practice for employers to initiate anti-union campaign communications from the first day new workers are hired. Indeed, consultants regularly advise employers to write anti-union principles into the employee handbook and include them in orientation sessions on the first day new hires are on the job. Attorney Al DeMaria's *Management Report for Nonunion Organizations*, for example, suggests that incoming workers be reminded that their new employer intends "to do everything possible to maintain our company's union-free status."[34]

By including an anti-union message in new employees' orientation, managers are seeking to press their agenda in a moment in which employees are particularly impressionable. As one consultant notes, "there is probably no time when the employee is as receptive to communication from management as during the initial day or two on the job."[35] Declarations made on the first day of work tend to impart a

definitive impression of what type of workplace one is entering — in this case, a workplace where unions are unwelcome. This in turn gives new employees a feeling that, by taking the job, they have agreed to work in a place that is committed to remaining non-union. The hiring process is a moment in which employees feel particularly indebted and eager to please. While employers cannot require a pledge to eschew union creation as a condition of hiring, by building such forceful statements of commitment into the orientation, employers may inculcate feelings of guilt or obligation on the part of new hires. These new employees might naturally feel that, having been clearly told what they were getting into, it would be an act of ingratitude or bad faith to later organize against the managers who hired them. As Hughes explains:

> Research in the area of communication and persuasion has ... shown that new employees during their orientation program ... form lasting impressions. When an individual understands that it is a union-free company and that the majority of the employees want it to stay that way, we have ... established a concept in that individual's mind that will generally be lasting.[36]

In addition, of course, orientation is a moment when employers may impress their views on new hires before they have access to any alternative viewpoints. As prominent consultant John Sheridan stressed, orientation is an opportunity for "indoctrinating" new employees "into your philosophy, your program ... before any union or malcontents can get their hands on that employee."[37]

An employee's first weeks on the job may similarly be used as a period for anti-union indoctrination. An American Management Association tome suggests assigning new employees a mentor who is both a respected member of the work unit and solidly anti-union; the mentor's responsibility is to guide the new hire's thinking about joining a union while teaching him or her the ropes of the job.[38] The same volume recommends placing new hires in a "general labor pool" for their first few weeks on the job, in order to keep them isolated from union activists during this formative period of initial employment, and in order to make a final determination of their union sympathies. Employees who turn out to be supportive of creating a union can then be assigned to departments less susceptible to job actions; those that are strongly anti-union may be assigned to units with union supporters in order to "dilute the union's strength."[39] Finally, the author suggests that, if union organizing activity is detected, "one approach ... is to transfer the personnel involved to other duties and locations in order to break up the union's organization."[40] While the discriminatory assignment or transfer of union supporters is illegal, it is virtually impossible to police. If a private corporation assigned mentors and organized department staffing plans on the basis of isolating supporters of one political party and subjecting the others to partisan political indoctrination, this would be widely denounced as an anti-democratic abuse of power. But in the workplace, employers are functionally free to pursue such heavy-handed tactics at will.

Employer Strategies for Making Elections Impossible

Rather than promoting the workers' right to decide on forming a union through an election, virtually every management advisor focuses on the importance of stopping organizing efforts before a union can collect enough signatures to trigger an election. Supervisors should not spend time looking for union buttons or bumper stickers, one advisor warns; by the time these are visible, it will be too late. "Much more valuable is the early sign, the overheard comment, the slip of the tongue, or the pattern of unusual activity and attitude that suggests that something is taking place."[41] Other attorneys urge supervisors to be suspicious if "employees meet and talk in out-of-the-way places and separate upon their supervisor's approach."[42] Even new social bonds are suspect; under the heading of "Signs of Union Activity You Should Watch For and Report," Levine warns that "employees receiving new or unusual attention from other employees" may be a dangerous omen.[43]

Once any sign of organizing is detected, employers initiate a determined campaign to prevent workers from petitioning for an election.[44] "Upon detection of union activity," one recent manual advises management, "your immediate and primary thrust should be to mount a counter-campaign that focuses on convincing employees not to sign union cards — to keep the union from getting the 30

percent show of interest" required for an NLRB election.[45] Above all, employers rely on supervisors to convince their immediate subordinates to avoid signing cards that could lead to an election.[46] Levine's 2005 manual outlines additional elements of a "Don't Sign a Card" campaign, including letters sent to employees' homes; mandatory small- and medium-group meetings with supervisors; anti-union posters and bulletin board notices; mandatory anti-union multi-media presentations; and mandatory anti-union video screenings for employees and their supervisors.[47] One organizer describes a particularly aggressive employer response to the first signs of organizing:

> Supervisors ... were already calling workers at home on Saturday morning, instructing employees not to speak with union organizers who had begun home visits on Friday afternoon. On Monday morning at 7:00 am the plant manager began captive-audience meetings, fifteen of which were held, where supervisors warned employees that the corporation might shut the plant down if it were unionized.[48]

This is the aggressive front line of every anti-union manual. In workplaces across the country, management uses its lopsided power not only to influence workers' choice regarding organizing, but first and foremost to prevent them from having any such choice whatsoever.

Conduct of the Election Campaign

Most workplace election campaigns start with upwards of two-thirds of employees having signed cards supporting unionization.[49] When examining the election process, the central question is how during the course of the campaign, such strong pro-union majorities are so often reduced to bare majorities or to outright defeat.

Unequal Access to Voter Lists

Given the union's inability to communicate with voters in the workplace, the campaign of union supporters rests critically on obtaining an accurate list of employee contacts in order to communicate with them outside of work hours. Unfortunately, the combination of weak law and aggressive employers makes it difficult for unions to get such information in a complete or timely manner. Employers go to great lengths to prevent employees from accessing Christmas card lists, staff telephone directories, or similar lists.[50] By law, employers are not required to provide the union a contact list until seven days after the NLRB has ordered an election. This enables employers to run an intensive campaign for weeks or months before the union is able to make its first contact with most workers. The standard campaign timetable of Jackson Lewis attorneys, for instance, includes two letters mailed to employees' homes, anti-union messages posted on bulletin boards and handed out in the workplace, and a mandatory anti-union meeting for all employees — all before the company has provided the union with a list of eligible voters.[51] Moreover, since employers are not required to turn over a list until the NLRB has ordered an election, any procedural objections to the terms of the election delay the Board's ruling and with it the requirement for list-sharing. Since virtually any objection — no matter how groundless — will cause the NLRB to delay proceedings and hold a hearing on the issue, it is simple for any employer that wants more time to campaign while the union is silenced to file any one of a number of objections. Even if an employer is sure to lose its objection, it is equally sure to win additional weeks in which to campaign without effective opposition. In the mid-1990s, the federal Commission on the Future of Worker-Management Relations found that, while NLRB election campaigns averaged 50 days, the union was typically provided a list of employees only 10-20 days before the vote.[52]

When a company does provide the union its list, it is only obliged to provide the names and addresses of employees — no phone numbers, email addresses, or zip codes.[53] Moreover, even when the company omits some number of names from the list, or provides incorrect addresses, this is not necessarily grounds for an election to be overturned.[54] Finally, before a list is released to the union, employers typically send a letter to all employees warning them of an impending "invasion of privacy" by union organizers knocking on their doors.[55] Taken together, the typical list is provided in a manner similar to that reported by Levitt:

> I provided the minimum information legally required while withholding enough details to frustrate union officers in their hunt for employees. I never included first names, for example, only the first initial. I listed the employee's house number and street, as required, but always was sure to leave out apartment numbers and street designations such as Street, Avenue, Drive, or Place. I never included zip codes. Such a skeletal list guaranteed that some employees would not be found and that the union would take an inordinately long time finding others. To top off the sabotage, I sent a letter to every employee on the list before releasing their names to the union. In the letter ... I informed employees that we had given out personal information on

> them to the union as required by law and assured them that we would never have given out such information otherwise. The letter went on to warn the workers to expect harassing phone calls and visits from union officials at their homes. Management apologized, of course, for the trouble the union drive was causing the good workers .... The union-organizing process was contaminated from the beginning.[56]

If we imagine similar standards being applied to a Congressional campaign, it would be virtually impossible for a challenger to ever win election. Such discriminatory use of voter rolls is illegal in every state in the country; the fact that an election that began this way might end with a secret ballot would in no way make us think it was a fair contest — or that it fit within the American tradition of democracy.

Lack of Regulation Over Campaign Finance

Part of the essential framework for ensuring fairness in elections to public office is campaign finance law that, while not requiring all candidates to operate with the exact same amount of money, aims at creating a roughly balanced playing field between competing parties. In NLRB elections, however, there are no restrictions whatsoever on campaign financing; thus wealthy employers are free to translate their financial superiority into another lopsided campaign advantage. Unions are entirely funded out of the dues money of members, so while they may choose to concentrate resources on a particularly important campaign, they are generally unable to match the budgets and staff time that management devotes to opposing unions. One consultant advises employers that many organizing efforts can be killed simply by outspending the workers.[57]

Due to lax federal reporting requirements, there is no conclusive data on the amount of money employers spend to defeat union creation.[58] Over the years, however, there have been a series of measures, stemming from partial evidence or particular campaign experience. Taken together, these estimates provide a rough estimate of employer campaign expenditures. Employer spending on outside consultants is estimated to be $600–1,600 per employee (see Appendix, Table 1). Spending on consultants and attorneys together is estimated to be $2,500–3,700 per employee.[59] These figures do not include the cost of anti-union letters, leaflets, posters, videos, buttons, t-shirts or other paraphernalia; the time of senior management devoted to planning the campaign; the time of supervisors spent communicating with, monitoring or reporting back on their subordinates; nor the time of employees in mandatory anti-union meetings, whether with individual supervisors or in larger groups. These estimates likewise exclude most of the expenses of attorneys and consultants apart from their hourly fees. If this full range of expenses were taken into account, the per-employee expenditure of anti-union employers would likely be significantly higher than the estimates provided here. Indeed, there are many accounts of employers spending huge amounts of money on anti-union campaigns.[60] In 2004, for instance, one South Carolina manufacturer reported having spent $2.7 million in legal fees alone as part of its effort to forestall organizing among its 500 employees.[61] When employers pour this level of resources into a campaign, it is impossible for the result to be a fair or competitive election.

Monopolizing the Media

In the American democratic system, the use of mass media is governed by two principles. First, all sides must have equal access to all forms of media. Secondly, government resources are not political resources; that is, the party that is in office cannot use the powers of government to dominate the airwaves. Indeed, the phenomenon of ruling parties monopolizing the media while denying their competitors equal access is one of the most common reasons for which our government condemns elections abroad. Yet this is exactly the type of regime that confronts voters in NLRB elections across America.

American democracy — from the Founders to the present — is premised on the principle that voters must have maximum access to information from both sides of a campaign. By contrast, the fundamental

strategy of anti-union employers, which has come to frame nearly all NLRB elections, is to severely restrict union communication in order to stage a highly controlled "debate" in which, for the most part, only one voice is heard. The fundamental aim of workplace rules during an election, as one consultant notes, is "to reduce the union's access to the employees, the employees' access to the union, and the flow of union information within the workplace."[62]

The universal advice of anti-union consultants and lawyers begins with two rules that set the stage for the election. First, union organizers are prohibited from ever entering the workplace — or even publicly-used but company-owned spaces such as parking lots — at any time, for any reason.[63] Second, pro-union employees are banned from talking about the union while they are on work time, and are banned from distributing pro-union information except when they are both on break time and in a break room.[64] This means that there can be no pro-union discussions whatsoever, except when both parties to the discussion are on break at the same time. Unsurprisingly, such a rule renders union conversations virtually extinct. As management attorney DeMaria notes:

> [U]nions are at a severe disadvantage in the communications battle. Home visitations are expensive and time-consuming, meetings are sparsely attended because they take place on the employee's own time, and union organizers can rarely ensure that all voters will even receive the union flyers that organizers hand out. On the other hand, management has the employee under its control for eight hours a day.[65]

Because union communication is so tightly restricted in the workplace, the primary means of talking about organizing is visiting workers in their homes. Yet incomplete address lists, scheduling problems and logistical barriers combine to make this an ineffective substitute for workplace conversation. Indeed, recent data shows that in a typical union campaign, less than half the employees have even a single home conversation with a union representative during the course of the entire election season.[66]

By contrast, employers rely on their domination of workplace media to launch intensive communications campaigns, relying on management's dual role as the "government" of the firm and an interested party in the election campaign. Among the most common management tactics are the use of posters hung up around the workplace; bulletin board notices; anti-union flyers stuffed into employees' pay envelopes; forced viewing of anti-union videos; and the mass provision of "Vote No" t-shirts, buttons, hats, sweatshirts, and bumper stickers.[67]

The Jackson Lewis attorneys' union avoidance volume, for instance, offers a communication plan for an "Illustrative Election Campaign"[68] (see Appendix, Figure A). During the four weeks leading up to the election, they recommend nine letters mailed to employees' homes; four notices on bulletin boards; six leaflets handed out to employees at the workplace; three anti-union speeches with mandatory attendance for all employees; one demonstration of how to vote; and five days of small group meetings in which supervisors tell their subordinates why a union would be bad.[69] With the exception of the letters mailed to employees' homes — which unions may or may not be able to duplicate, depending on the quality of contact information available — every one of these communication strategies represents a medium that is monopolized by management and unavailable to the union or pro-union employees.

In recent years, management strategists have ever more sophisticated tactics for denying any avenue of communication to pro-union employees. One forum where these efforts can be seen is the use of workplace bulletin boards. By law, companies must have a consistent policy regarding the posting of non-work-related notices; they cannot single out union postings to be banned while allowing all other types of notice. However, consultants have designed clever means for undermining this law. Employers often adopt a policy prohibiting anyone but management from posting notices on bulletin boards; bulletin boards thus become a site for regular anti-union posters, with no possibility of pro-union response. However, since bulletin boards are often used for charity fundraisers or employee for-sale items, an employer who does not carefully police their use may end up setting a precedent that requires allowing pro-union notices to be posted. To foreclose this possibility, consultants have recently crafted more

detailed policies that, while uniformly applied, have the effect of screening out pro-union postings while allowing almost everything else.[70] Levine's 2005 manual, for instance, recommends the following policy:

> Non-Company related material must be approved and dated by the Human Resources Manager .... Material must not block or crowd company materials. *General guidelines for approval include:* Church or community announcements, etc., advertisements to buy or sell personal items.[71]

Thus, virtually every dimension of the workplace — the walls, bulletin boards, group meetings, leaflet distribution, and conversation in work areas — becomes a forum for constant anti-union campaigning, but in which pro-union information is prohibited.

It is noteworthy that some of the favored techniques of management campaigns are specifically banned in elections for public office. For instance, many states have laws prohibiting employers from inserting political flyers into employees' payroll envelopes; this is considered an illegitimate use of the economic power of employers in order to intimidate voters into supporting one candidate or another. But this same technique is wholly legal, and widely practiced, in union campaigns.[72] Indeed, many employers go so far as to break employees' pay into two separate checks, one representing the amount they would presumably pay in union dues, in order to dramatize the notion that the costs of unionization outweigh its benefits.[73] In this case, the boundary between management as the "government" of a company and management as an interested party in the election has been completely erased. If a Republican president used the power of his office to have the IRS send out tax bills showing how much individuals owed and how much more they would owe under a Democratic proposal, this would be immediately condemned as an illegal use of public resources for partisan benefit. Yet the use of company resources and authority for partisan anti-union campaigning is at the core of employer strategies.

Among the most important sorts of media available to management but not to pro-union employees is the forced viewing of campaign videos. As DeMaria explains:

> The pro-company message must be communicated quickly and consistently. Employees must be educated, but not alienated or bored. Video presentations are uniquely suited to achieve these results ... [and] will result in the employee remembering much more of the company's message .... The color photography, captions, music, and graphics in video exhibitions almost always create a more durable impression than speeches by company officials.[74]

Thus, these meetings not only reflect management's unparalleled ability to compel attendance, but also make use of a uniquely powerful medium that is not available to the union.[75] Again, if the Bush 2004 campaign could have forced every voter in America to watch the *Swift Boat Veterans' For Truth* video, with no opportunity for response by the other side — or if the Democrats could have forced everyone to watch *Fahrenheit 9/11* — they might well have seized the opportunity. But none of us would call this democracy.

Management's control over the physical worksite gives it an additional advantage in dominating the campaign atmosphere. In any election, the sense of momentum and the desire of voters to be on the winning side play a powerful role in campaign dynamics. In an environment so completely dominated by one side, anti-union employers can easily create an intimidating impression of near-universal support. Thus, Levitt's standard procedure for the 10 days leading up to the election included:

> the 'Vote No' saturation carnival. I had 'Vote No' hats, buttons, and T-shirts printed up. Supervisors and foremen were ordered to wear their 'Vote No' vestments every day and to give away T-shirts and trinkets to any workers who asked for them. Almost everyone ended up wearing something; whether it was out of conviction or fear didn't matter. What mattered was that the 'Vote No' message was everywhere. It hung on the walls, it danced atop people's heads, it rode upon their chests ... It seemed impossible that anyone would feel free to talk against management in that chummy environment. It seemed impossible that union proponents would have any momentum or any support or any hope left.[76]

Similarly, during one election campaign at a garment manufacturer, organizers report that:

> Walls of the factories were covered with newspaper articles, blown up to five feet by three feet, about plant closings. A twelve-foot-by-three-foot banner proclaimed 'Wear the union label — UNEMPLOYED.' Sets of two identical pairs of pants were hung around the factories, and supervisors explained that the only difference was that one pair was made [locally] for five dollars per hour and the other was made in Mexico for three dollars per day.[77]

In all these ways, management's ability to create a near-total media monopoly within the workplace turns NLRB elections into something more like the staged pageants of one-party rulers rather than anything we would recognize as American democracy.

Forced Anti-Union Meetings

The least free media in NLRB elections is the mandatory anti-union meeting. In such gatherings, all employees are forced to come together to hear anti-union campaign propaganda. Employers defend such events as a necessary ingredient in protecting their free speech rights. But these meetings represent anything but free speech, for two reasons. First, in the American democratic system, the right to freedom of speech includes within it the freedom to not listen to political speech.[78] This principle is so obvious to most Americans that we don't even think of it as a "principle" that needs articulating. The First Amendment aims at creating what is sometimes termed a "marketplace of ideas" — a free exchange of opinions in which citizens seek to convince each other of the best policies to support. Central to this notion is the fact that other voters may choose to listen, fall asleep, ignore speech, or walk away at any time. It is based on a model of decision-making in which the power of coercion is replaced by the power of conviction and communication — others will listen to one's view to the extent that it is compelling, and the consensus of public opinion that emerges will be based on a weighing of ideas, not an exercise of power. A "dialogue" in which voters are forced to listen to one side's campaign communication bears no relationship to the free speech endorsed by the Founders.

Second, free speech is meaningless if it does not include equal time for opposing views. In mandatory anti-union meetings, however, not only is there no equal time for response, but pro-union employees may be banned from the meetings, or may be required to attend on condition that they not speak up or ask any questions; those that violate such an order can legally be fired on the spot. The very ideal that lies at the heart of Jeffersonian democracy — free-ranging public debate — is rigorously avoided by employers. *Management Report for Nonunion Organizations*, counsels that "debating the union is never a good idea for the employer."[79] Thus, the very principle that lies at the heart of the Founders' conception of democratic process has become anathema to employers.

It is inconceivable that such a practice could be allowed in elections for public office. If the Democrats, for instance, compelled all voters in a given district to attend Democratic campaign rallies, with no right of reply for Republicans, where Republican voters who spoke their minds would find themselves unemployed, we would regard this as one of the most flagrant imaginable violations of democratic process. Indeed, this is one of the classic behaviors for which we regularly condemn elections abroad: when ruling parties force voters to attend partisan campaign rallies, we recognize it immediately as an abuse of power and a perversion of the free debate that is integral to democratic elections. Even if such a vote ended in a secret ballot, no American would be confused about this being a sham process rather than a truly a "free and fair" election.

Given that such tactics are legal under federal labor law, it is not surprising that employers turn to them with such gusto.[80] The most recent data show that, in NLRB election campaigns, 90 percent of employers force their employees to attend anti-union campaign rallies; employers hold an average of 10 such mandatory meetings during the course of a typical campaign (see Appendix, Table 2).

Disparagement and Isolation of Union Activists

The most critical role in organizing efforts is not played by outside organizers, but by the leading pro-union activists among the company's employees. These are the people who are most central to building the workers' organization. Furthermore, they are often presumed to be the likely elected leaders of any union that emerges from an election; their personal conduct and moral stature is one of the measures that employees weigh when deciding to support or oppose the union. In addition, of course, their treatment at the hands of management is one of the key measures watched by other workers in order to assess the safety or danger of their own participation in union activities.

Unsurprisingly, management often goes to considerable lengths to disparage and isolate these workplace leaders. In many cases, management may rearrange work assignments and add more intensive supervision in order to physically isolate activists and prevent them from communicating with coworkers.[81] Such policies can take an exacting toll on activists, as is evident in one worker's testimony to a federal commission:

> I was a ten year employee of Jordan Marsh, in Peabody, up until this day after Thanksgiving, on which I was fired ... I truly believe, solely because I was a union organizer within the store. I was a dedicated employee, for ten years, for that company ... I cannot impress upon you what an organizer, what an employee who is just fighting for their rights in a campaign, goes through this day and age. I wouldn't have believe[d] it, myself. I have been followed, on my day off, to restaurants, by security guards with walkie-talkies. I had an employee, a management person, assigned to work with me eight hours a day, five days a week, who was told he was there solely to work on me, to change my ideas about unions. I was timed going to the bathroom. I could go nowhere in my workplace without being followed .... Unless you have lived through it, you couldn't know what it feels like.[82]

A textile plant employee similarly reports that during a campaign in her workplace:

> I was not allowed off my little section that I worked in. When I'd go to the bathroom, the Supervisor would follow me. Anywheres I went, I was being followed. I'd go take my break; they'd cut me down to two 10-minute breaks and a 15-minute break. I was checked. I'd go through the mill. I'd always been a happy-go person, I could speak and I — you know, be friendly with people. But I got, as time — I'd have to hold my head down when I walked, because I didn't know what I was going to see.... And then, the stress got so bad that I did have a heart attack. But when I came back, they didn't let up on me. They continued even worse than what they were doing in the beginning. And my supervisor made the remark that he didn't know how I had been taking what I was taking without walking out the door or dropping over dead. That was what they was waiting for, is for me to drop over dead ... And it was all because that we stood up for what we believed in, for what we thought was right, and for what we thought other people wanted. The people wanted the union there ...[83]

Beyond the organizational isolation of union leaders, management often seeks to create a climate in which activists are publicly marked as undesirable. One employer, for instance, referred to employees who solicited coworkers to sign union cards as "the enemy within."[84] Another employer, speaking to a mandatory mass meeting, asked employees to think twice about their pro-union coworkers. "Do they believe in what you believe in? Do they have the same morals and work ethic that you do? Do you really like these individuals?"[85] At HarperCollins Publishing, the CEO held a mandatory meeting in which he announced that he considered the organizing campaign "war," and declared pro-union employees to be "disloyal."[86] Beyond smearing the reputations of these employees, such rhetoric also instills fear in other employees about being seen talking with the "enemy." This point was underlined by an employer who told employees in a mandatory meeting that "I sincerely believe that the union here could spell trouble in great big capital letters. I think the best way to avoid trouble is to stay away from the troublemakers — mainly, the union organizers."[87]

Standard Campaign Themes

Within this lopsided campaign environment, employers' messages focus on a few key themes. Indeed, there is a remarkable degree of consistency in the themes of employer campaigns across all industries and over the past 30 years. Over and over again, employers focus on a few key messages: organizing is futile, and will not cause the company to improve conditions; unions lead to strikes, and in strikes workers can be permanently replaced; unions take workers' dues and provide no benefit in return; and if workers engage in collective bargaining, they may end up with lower wages and worse benefits than they began with.[88] On examination, many of these themes are highly deceptive. Yet in an atmosphere in which pro-union employees have little effective right of reply, these messages may be devastatingly effective. In campaigns for public office, candidates are allowed wide leeway to make exaggerated campaign statements — but only because these statements take place in a context of free speech and equal access to media, which permits each side to challenge or correct the claims of its opponent. Indeed, this give and take is essential to the American notion of how voters are intended to make choices in electoral campaigns. It was Thomas Jefferson who declared that "reason and free inquiry are the only effectual agents against error."[89] In NLRB elections, employers are free to make the most aggressive, exaggerated, or even factually untrue statements — repeated daily, in multiple media, and conveyed by one's personal supervisor — in a setting where the other side of the debate has been virtually silenced. In this context, it may be unsurprising that so many campaigns start with two-thirds of employees signing statements of support for unionization, and end with a majority voting against it.

'We'll never change': Union formation is futile

Above all else, management's message to workers is that forming unions is futile: the company's wages are already the best it can afford; it will refuse to increase them no matter what workers demand; contract negotiations may result in wage cuts rather than raises; the workers' only recourse will be to strike; and the result of a strike will be extreme hardship followed by permanent unemployment. The specter of futility is one of the foremost causes of non-participation in electoral politics; the primary reason that millions of Americans don't vote in elections for Congress or President is the belief that their vote won't change anything in their daily lives. But in workplace elections, the futility issue is even more powerful. When workers vote to create a union, they are not simply deciding that they personally support the idea of unions. They are deciding whether or not they believe that they and their coworkers can do something, as a group, to effectively force management to provide better working conditions than they would of their own free will. If a union cannot produce some improvement beyond what management would do on its own, there is no point in voting for it.

This creates a campaign dynamic which is unique to NLRB elections: a variety of actions that are not explicitly campaign-related are, in fact, designed to influence workers' perception of the promise or futility of organizing. When management does something as seemingly mundane as transferring employees from one department to another, breaking up a formerly cohesive group of union supporters, this act carries an added meaning as a demonstration of management omnipotence and employees' impotence.

The critical need for employees to believe in their own power is all the more true when anti-union employers convey the message that, if the employees do vote to create a union, management will resist negotiating a beneficial contract with every means at its disposal. By law, while companies are prohibited from telling their workers that organization is futile, they are permitted to make virtually any type of statement that conveys the same meaning without using those exact words.[90] One company — in an effort that *Management Report for Nonunion Organizations* recommends as "an excellent campaign tactic" — went so far as to force workers to attend a mass meeting at which the company staged a skit showing that negotiations would come to no good. As the play proceeded:

The union negotiator asked for improvements in benefits. The company negotiator turned down each request. He also rejected a union wage proposal, and countered with a management proposal to

pay minimum wage. The union representative then pounded on the table and called the management proposal ridiculous, but he was unable to obtain agreement to anything more than a 50-cent annual increase, instead of the 50-cent hourly increase the union negotiator wanted. The mock negotiations had the union representative saying that it was the best he could do.[91]

Many employers go further still: not only predicting the uselessness of negotiations, but declaring their personal opposition to honoring the result of a vote to unionize. One company's owner, for instance, concluded his final campaign speech by telling workers that "if we defeat this union, then we can get on with it. If the union wins, well, then as far as I'm concerned, the battle has probably just begun."[92] Another promised that if a union were voted in, he would "fight this to the very end, and that could take years."[93] In such a situation, workers who vote to organize are signing up for a long-term conflict which they will face every day when they come to work.

Management's strategy is to stress the theme of futility as clearly and as often as possible throughout the campaign. Among the primary messages that consultant Gene Levine's *Guide to Union Avoidance* instructs supervisors to deliver to the workers they oversee, for instance, is the declaration that "Employees have nothing to gain from union creation and have a lot to lose."[94] Supervisors are told to:

> Inform the employees that you and the Company have the same right to discharge an employee as before and membership in a union does not protect an employee from discharge .... Inform the employees that no union can obtain more from the Company than any individual employee can obtain from the Company without a union. Inform the employees that the Company is not required to automatically sign a contract or agree to any benefits that are not to its best interest. Inform the employees that the Company is not required to continue its present benefits if a union gets in ... After the union gets in, it can be less than they now receive or it can be more.[95]

Levine's message combines deceptive half-truths with outright falsehoods.[96] But delivered in a context where questions are prohibited, it may have a powerful impact on prospective voters.

The theme of futility runs through management communications from the very earliest stages of organizing to the last day of voting. DeMaria recommends a model "Speech to Employees at the First Sign of Union Activity" which includes the admonition that:

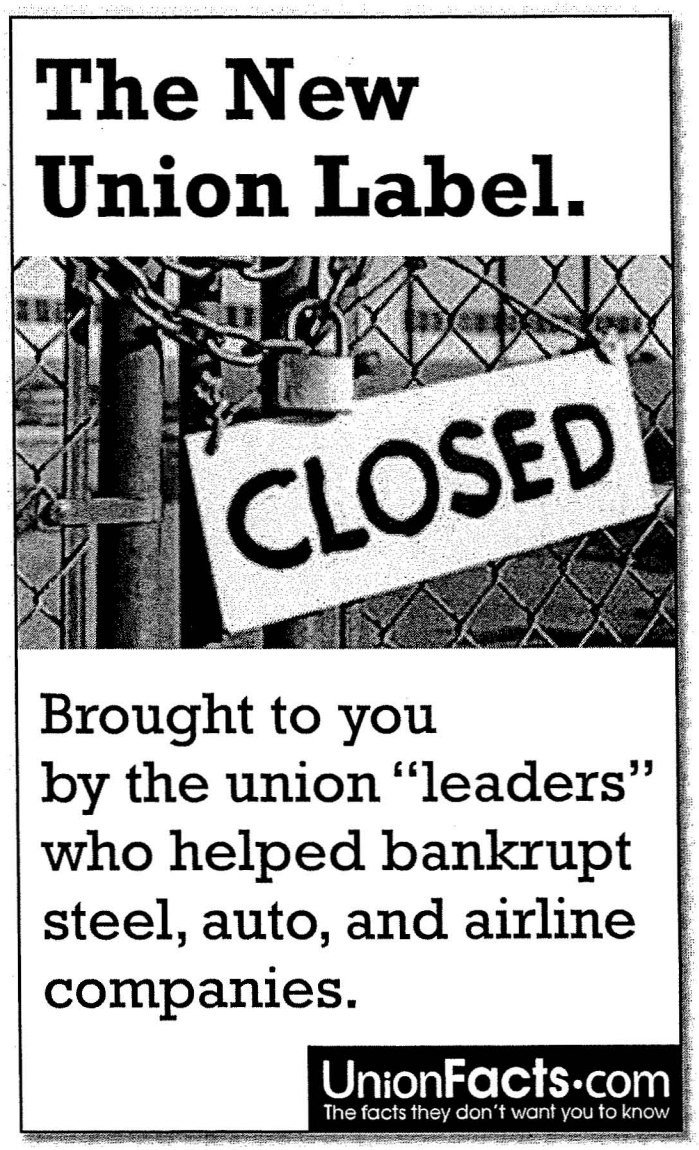
> it's important for you ... to understand how there is no guarantee that you will be one penny better off with a union .... Unions have never been able to stop companies from opening a plant overseas .... A union cannot guarantee that a year from now you will be working here.[97]

At the end of the campaign, DeMaria's newsletter recommends a remarkably similar theme for a model speech to be delivered by the CEO the evening before the election:

> I would like to see the union totally defeated .... [If it wins, t]he union ... would have the right to come in and say 'we want the employees to have an increase.' ... But I would have the right to say 'what I now pay and what I now give is the best that I can afford' ... What happens if there is no agreement? It's a free country. The union has a right to tell you to go out on strike. I also have a right to run my business. I've told you that before. Make no mistake. You know me. We did not start this company to see it controlled by a union. If there is a strike, we will service our customers with new drivers. No union is going to run my business ... I have the right to hire permanent replacements and if the strike is over, I do not have to fire the replacements to make way for strikers to return.[98]

This proposed speech is remarkable for the brazenness with which its central message misleads. If a company truly cannot afford improvements, it must open its financial books to the union to demonstrate its inability to meet the union's demands. There is no known case of a union voting to strike over demands which an employer has already shown to be unrealizable. Even without an employer going

so far as to open its books, there will not be a strike without employees voting to do so. In reality, union employees enjoy an average compensation level that is nearly 30 percent higher than their non-union counterparts in the same occupations and industries.[99] While this fact does not guarantee that any particular employer can afford higher wages, it suggests that there are many employers that are not now paying the "best that they can afford," and that — under the pressure of worker action — can indeed improve compensation levels while remaining competitive. In this sense, the message that organization only leads to an inevitably futile strike is both false and misplaced. If there is a place for such statements, it would be at the end point of contract negotiations, when workers are deciding whether or not to strike over outstanding demands. To issue such predictions before a union has even been established is clearly a scare tactic. And yet, for workers whose vote to form a union is partly based on their expectation of success or failure, such a naked declaration of resistance can be powerfully effective.



Full-page advertisements run in *USA Today*, *The New York Times*, *The Wall Street Journal*, and *The Washington Post*. Available in Center for Union Facts, *When Voting Isn't Private: The Union Campaign Against Secret Ballots*, 2006.

Threat of strikes and layoffs

The common conclusion to management's assertion that creating a union is futile is a prediction that, after negotiations lead nowhere, the union will inevitably, stupidly, and callously force its new members out on a destructive strike.[100] For employees who have no previous experience with unions, the specter of a strike is understandably troubling. This is particularly so because the strike message is inevitably paired with a heavy-handed suggestions that strikers will lose their jobs.[101] DeMaria, for instance, instructs supervisors to "inform the employees that the company has the legal right to ... permanently replace any employee who goes on strike .... It's the law that employees forfeit their right to return to work when they strike."[102]

What no management campaign explains, however, is that forming a union, in and of itself, cannot possibly cause a strike. Strikes occur when contract negotiations break down. Before getting to that point, workers will have formulated a set of contract proposals, listened to management's declarations regarding what it can afford, and decided on a final demand. Only if the workers insist on demands that management refuses to meet could there possibly be a strike. Management communications intentionally omit these facts, suggesting instead that a union itself leads to strikes. "Where There Are Unions ... There Are Strikes," proclaims one model flyer.[103] At times, employer statements represent out-and-out falsehoods, such as the executive who told employees that "if the company said no to union demands,

the only recourse, the only weapon that the union has is to call a strike."[104] The same consultants who craft these arguments elsewhere protest the wide variety of non-strike strategies unions use to convince employers to sign contracts — publicity campaigns, political support, litigation, boycotts, and other forms of pressure that workers may exert without resorting to a strike. To suggest that striking is the only way workers can get management to improve conditions is to intentionally mislead employees regarding both the strategic strengths of unions and the likelihood of a strike. The combination of such heavy-handed misinformation with media restrictions that deny the union an effective right of reply create an environment in which true democratic debate and decision-making is impossible.

Beneath all these campaign messages, the employer's campaign is ultimately supported by employees' fear of losing their jobs. It is illegal for employers to directly threaten workers with being fired in retaliation for supporting unions. However, as Marty Levitt recalls, getting around this technicality is easy. After explaining the limits of the law to supervisors:

> I would tell them how to bend and even break those limits .... '[You] cannot threaten employees,' I warned, 'but we're going to show you how you can deliver threats without doing anything unlawful.'[105]

In a typical election, employees are gathered in front of their CEO and told that, if they vote to form a union, one likely possibility is that the company will be driven out of business and they will all lose their jobs. By law, employers cannot "threaten" to fire people for supporting a union, but they are perfectly free to "predict" that organizing will result in layoffs.[106] One management consultant explained that:

> You can't come out and threaten we are going out of business. But a threat is permissible providing you give a factual basis for it ... We usually say assuming the union refuses certain needs we have to remain competitive and assuming that our competition will have no restrictions on it, we believe we will not be able to maintain the orders we now have and will go out of business.[107]

What normal person can hear these words and not worry for their own security? What employee could be told, as recommended by one attorney, that a union "could hamper the employees' personal relations with the company," or that "an employee's job might be affected by having a union and [remember] that the employee's family [is] dependent on his paycheck," and not understand these as warnings about one's personal fate?[108]

In fact, all such statements must be regarded as pure threats rather than predictions, for one simple reason: voting to form a union does not in itself impose any new conditions whatsoever on a business. Any change in wages, benefits or working conditions can come only as a result of contract negotiations — and then only if the employer agrees to the employees' proposals. In this sense, it is important to note the fundamental contradictions that mark management anti-union messages. On one hand, employers stress the futility of organizing, insisting that unions have no power to make the company agree to anything it doesn't like.[109] On the other hand, the same employers often suggest that the mere existence of a union in the workplace would so dramatically change the firm's financial policies — presumably through forcing exorbitant increases in wages and benefits — as to drive the company out of business.

Indeed, recent evidence confirms that such "predictions" are, almost always, intended as threats. Kate Bronfenbrenner's study of NLRB elections showed that 51 percent of employers tell workers that a union is likely to lead to layoffs. However, in those firms where workers voted to unionize despite their employer's dire predictions, only one percent of companies actually closed down even part of its operations.[110] Thus, regardless of what language is used, such statements almost always function as threats rather than predictions.

Unions exploit workers' dues money

The final standard employer message is that unions care nothing for employees, but are only interested in forcing them to pay dues so that fat-cat officials can pursue lives of corrupt decadence. A typical version of this argument is voiced by the National Association of Manufacturers in its *Remaining Union-Free: A Supervisor's Guide*:

> Why do unions want to organize a company? ... The answers are simple. A union is a business. Instead of selling a product, it sells a service. When a company is unionized, all employees who become members of the union are immediately subject to initiation fees, dues and assessments ... Unions are in business to make money.[111]

Employers relentlessly stress that union organizers are sneaky and duplicitous; they will profess to be altruistically devoted to the needs of employees, but all of this is a ruse to get their hands on dues deductions. *Management Report for Nonunion Organizations* recommends that if employees ask supervisors whether workers are required to let union organizers into their homes, supervisors should explain that "a union representative has no more right to enter your house than any other paid salesman."[112] Elsewhere, the same newsletter suggests a "sample campaign flyer" that features piles of money over the legend "THIS IS WHAT YOU LOOK LIKE TO AFSCME."[113]

The dues message stands in direct contradiction to management's warnings regarding strikes and layoffs. If a union were primarily interested in extracting dues money from workers, it would never risk a strike, nor pursue economic demands likely to result in layoffs, because no one pays dues when they're on strike or out of work. Both these courses of action would thus be anathema to a union intent on maximizing dues revenue.

If managers voiced such duplicitous arguments in a Jeffersonian context — with open debate and opportunity for rebuttal — they would be easily unmasked, and would likely sway few voters. However, the one-party state that the NLRB has sanctioned within the workplace produces a vote based not on the will of an educated electorate, but on deliberate misinformation.

At times, employers go to the extremes of deception in emphasizing the dues theme, as in a speech to employees recommended by DeMaria stating that, based on the most recent annual financial report of the union in question:

> Not one penny of money collected in dues from hardworking people like you went to pay benefits or wages for any of its members. All of the money was spent for salaries to its own officers, organizers, and employees; lawyers and accountants; rent; automobiles; gas; expenses of organizing; paying people to stand outside plants handing out propaganda; office equipment ... In a financial report I read, the government asked how much money Local 1500 spent 'on behalf of individual members.' The answer? Zero![114]

In fact, while unions may provide individual members with emergency assistance in cases such as family medical crises, they are prohibited by law from simply distributing cash to individuals.[115] Indeed, handing out dues money to favored individuals would be a hallmark of corruption. Instead, dues are spent "on behalf of" the members in exactly the ways this report lists — paying organizers to negotiate contracts and lawyers to represent workers in arbitrations, hiring researchers to calculate the finances of bargaining proposals and secretaries to produce member newsletters, etc. The speech he proposes is not an innocent mistake. It is an intentional, insidious effort to mislead employees regarding the moral stature of the union they consider joining.

The hypocrisy of management communications

What sense is one to make of the messages that dominate employer campaign communications? Employers defend their aggressive participation in workers' decision-making process on the grounds

that, without them, employees would be deprived of vital information regarding the downside of organizing a union. Several facts call this logic into question. Most importantly, surveys of American workers who do have unions find high rates of satisfaction with their choice. The federal Dunlop Commission reported that fully 90 percent of union members would vote to retain their union; 70 percent rated their experience with their particular union as either "good" or "very good."[116] These workers have more experience with the realities of union experience than any union-resistant manager. That their experience is so at odds with the dire predictions of anti-union campaigners suggests that the claim that unions don't care about workers and just want their dues are dramatic exaggerations. They cannot be defended as simply delivering needed information to voters. They appear to function, rather, as disinformation and scaremongering.

Timing Is Everything: Delay, Depression, and the Fear of Unending Conflict as Management Campaign Strategies

One of the integral aspects of any political campaign is control over the campaign's timing. Every candidate for public office seeks what George H.W. Bush called "The Big Mo," and carefully plots campaign events in order to have his or her support peak in the days leading up to the vote.[117] One of the ground rules in elections for public office — so commonsensical that we don't even think of it as a "ground rule" — is that Election Day is fixed by law and cannot be manipulated by either candidate.

In NLRB elections, pro- and anti-union campaigners likewise seek to time their efforts in order to build to a peak of support just before the election. NLRB election dates, however, are subject to repeated delays. Both sides have the right to file objections that result in electoral delays. In practice, however, it is generally in the union's interest to have speedy elections, and in management's interest to delay. As Levitt explains:

> delay steals momentum from a union-organizing drive, which is greatly dependent on the emotional energy of its leaders and the sense of urgency among workers.[118]

Employer anti-union strategies largely depend on wearing workers down through a prolonged campaign of fear, intimidation, and tension that serve both to scare workers away from union support and to convince them that management is omnipotent and organization therefore futile.[119] Generally, when the election is first called by workers petitioning the NLRB, two-thirds or more of eligible employees have signed statements of support for the union. In an article entitled "Time Is On Your Side," the Jackson Lewis firm's newsletter advises employers that pre-election legal proceedings should be considered "an opportunity for the heat of the union's message to chill prior to the election."[120]

For employers, every day of delay is a day in which anti-union managers are free to campaign eight hours a day with every worker, while union supporters are restricted to brief lunchtime conversations. Since employers are not required to turn over a list of employee names and addresses until all procedural disputes have been settled and all appeals exhausted, even groundless legal challenges that are clearly doomed to failure buy management an extended period in which most employees are shut off from conversations with union representatives.[121] Unsurprisingly, the evidence suggests that the odds of a pro-union vote decline the longer an election is delayed.

The NLRB process provides employers with multiple opportunities for delay. Common management strategy is simply to refuse to agree on anything related to the election process. "The company may dispute the jurisdiction of the NLRB, that the union is a labor organization, or that the proposed bargaining unit is appropriate," explains one consultant.[122] Under federal law, the NLRB is required to hold a hearing whenever any challenge is raised to any aspect of the election — no matter how trivial or ill-founded. To argue that a given union is not a "labor organization," for instance — when the same union has already been recognized in scores of other elections — may appear to be patently disingenuous.

Nevertheless, the NLRB is powerless to ignore it.[123] Kilgour notes that even losing motions may provide valuable opportunities for delay — citing the example of a firm that, after stating objections to a proposed voting unit, sent a needed manager out of the country for five months as a successful "stalling tactic."[124] In some cases, some employers have been known to intentionally break the law simply in order to create NLRB litigation that will delay the election.[125]

Moreover, determined employers often pursue even trivial charges through multiple layers of appeal. The NLRB encourages employers and unions to agree on a "consent" election — meaning that whatever procedural disagreements may arise will be subject to quick resolution by the regional NLRB director. In the early 1960s, nearly half of all NLRB elections were conducted on this basis. But as management has become more aggressive, consent elections have nearly disappeared from the American workplace. By the late 1970s, only 7.3 percent of NLRB elections were consent elections; by 2004 the percentage had fallen to 1.2 percent.[126] From a management point of view, agreeing to consent elections is akin to unilateral disarmament. "Even though a 'consent' election may be 'quicker' it has the same results as a shot in the head," one consultant explained to Congress. "[Employers should] always go to a hearing ... it always works in your favor."[127]

Management's power to delay elections carries a further significance in that the very act of contemplating union formation is an act of workers' pinning their hopes on the ability to come together in order to change management's behavior. A quick election makes change seem possible, whereas a long-delayed vote serves as an object lesson in the weakness of collective action. Thus, the very fact of delay may change the way people vote. Marty Levitt worked with one of the pioneering management attorneys of the 1970s, whose "specialty was delay tactics, for he understood that management would always win a war of attrition."[128] Levitt explains that:

> [this attorney's] centerpiece technique, now a common strategy among management lawyers, was to challenge everything. He tried to take every challenge to a full hearing, then prolonged each hearing as much as he could. Finally he appealed every unfavorable decision .... Almost invariably [he] refused to work out agreements with the union on such issues ... out-of-court agreements on matters of fact are meant to save court time and speed the legal process. But such legal congeniality would short-circuit [his] strategy. He knew that if he could make the union fight drag on long enough, workers would lose faith, lose interest, lose hope.[129]

Management delay tactics are particularly damaging when coupled with an atmosphere of fear and conflict in the workplace. For many workers, the tension of a prolonged NLRB election becomes unbearable. When management is aggressively committed to preventing organizing — filling the workplace with confrontational banners, flooding it with constant newsletters, forcing workers into a barrage of tense anti-union meetings, and subjecting individuals to repeated one-on-one harangues from their immediate supervisors — the workplace becomes a scene of daily conflict. The longer such an atmosphere continues, the more workers become convinced that organizing, means living in an atmosphere of constant battle. This is particularly the case when employers announce that they will continue to resist union formation in every way possible, even if workers vote to organize. Under such conditions, many workers end up voting 'no' not because they wouldn't like a union, but simply because they want the tension to be over, and they no longer believe that any union would have the ability to curb management.

This dynamic was illustrated in a survey of communications workers who had recently gone through NLRB election campaigns.[130] At one workplace, the company's human resources director called employee activists "union slime," a worker sporting a union button was cursed by his supervisor, and another who refused to put on an anti-union button was forced to clean up the basement. After a period of such tactics, the company's manager complained to employees that the plant was suffering because of the "high tension" caused by the union campaign. On the eve of the election, the general manager's message to employees was "You can vote for this union and make me negotiate against the union, or you can vote against this union and help me shape [the company] into a team."[131]

For many employees, the specter of an indefinite continuation of such tension is untenable. The majority of employees in this survey were not strongly pro- or anti-union. When asked "the best reason not to join any employee organization," only five percent worried about union dues. By far the most common reason given was that a union would "create conflict at work."[132] These employees had not become anti-union; on the contrary, a majority still believed they'd be better off with a union. However, they didn't believe a union could succeed against such vociferous management opposition, and they worried for their own jobs; 42.3 percent of respondents stated that the primary reason their coworkers didn't support unionization was the fear of management retaliation.[133]

Thus, the power of management to reschedule election day — a power never granted to any candidate for public office in the American political system — has become a power to prolong a period of fear, intimidation, and profoundly undemocratic one-sided campaigning.

The Critical and Intimidating Role of Supervisors

One of the principles of the American political system is that words carry different meaning depending on who delivers them. Homeowners can declare that they don't want Republicans in their house, but an employer can't make the same declaration about the workplace. A neighbor can solicit any friend she likes, at any time, for a Political Action Committee, but an employer is largely prohibited from doing likewise with employees. Indeed, an employee may predict to coworkers that if a certain candidate wins, they'll all lose their jobs, but in many states, a company is banned from making the same statement to its employees. Our tradition recognizes that relations of power and dependence may turn otherwise innocent statements into tools of coercion.

Under federal regulations, employers are prohibited from urging rank-and-file employees to vote for a particular candidate or party.[134] In an election for Congress or the Presidency, employers are banned from using any of the media discussed above — bulletin boards, leaflets, or mass meetings — to advocate that employees support a particular party. It is a violation of federal law for employers to have supervisors carry a partisan message to those they oversee. Federal law reflects an understanding that dates back to the Founders — that employees are naturally fearful of offending those they depend on, and therefore that free and fair elections require a blanket ban on employers advocating partisan positions to those whose economic lives they control.

In NLRB elections, standard employer strategy is based on maximizing the very thing that federal statute seeks to prevent: the use of economic power over voters to influence what should be decisions of conscience. While employer organizations frequently stress the importance of providing employee voters with anti-union information, the messenger seems to matter more than the message. There is no known union campaign, for instance, in which anti-union information was provided to workers solely by anti-union employees, independent of the employer. If the purpose is simply to guarantee access to all sides of a debate, leaflets and house visits from such employee opponents would be sufficient. What such a strategy would lack, obviously, is the element of fear — the subtle hint of potential retaliation — that is inherent in employer speech. If a message depends so heavily on its messenger or doesn't work unless delivered by someone with coercive power over the listener it becomes suspect. Such statements are not, in fact, political arguments — they do not constitute impersonal appeals to reason or logic — but rather are acts of coercion masquerading as political speech.

Free speech for managers?

At the heart of employer anti-union campaigns are one-on-one conversations between supervisors and their subordinates. Yet in these conversations, neither the speaker nor the listener are free to voice their conscience. Employers defend the legitimacy of supervisor campaigning on the basis of companies' free speech rights.[135] Supervisors, however, do not actually enjoy free speech at all; their speech is entirely dictated from above. By law, supervisors can be fired if they refuse to play their assigned role

in an anti-union campaign.[136] Indeed, it is perfectly legal for a company to track the union proclivities of employees and fire those supervisors who fail to convince their underlings to back the company's position.[137] Thus, the principle of "employer free speech" masks a reality of systematically coerced speech. At times, this contradiction is painfully apparent in the convoluted logic of consultants, as when Levine counsels that:

> As a supervisor, you are free to make any statement so long as the statement is not coercive ... Your employees want to know what you think about unions. Your company wants you to tell them your opinion about the union that you are opposed to it. You have the right to give your opinion to your employees that you do not think a union would be good.[138]

Here, "freedom" is defined exactly by its opposite; supervisors are "free" to mouth exactly the scripts they are given, and nothing more. To the extent that supervisors are participants in workplace debates over the merits over organizing, this again marks a fundamental perversion of the ideals of American democracy. From the Founders to the present, the bedrock idea of American democracy is a self-governing people that make political choices through a process of free and open deliberation. To have one group of participants in those deliberations (indeed, the single most influential group, with by far the most far-ranging speech rights) acting under a systematic ban on free expression makes this campaign something utterly foreign to the Founders' concept of democracy.

Employer Intimidation and the Mockery of the Secret Ballot

Throughout the union avoidance literature, there is broad agreement that supervisors represent the single most effective channel for turning workers against organizing.[139] For voters, their supervisor is the person with the most direct control over a host of critical decisions — hiring and firing, raises and promotion, more or fewer hours, better or worse job duties, and greater or lesser flexibility in dealing with unforeseen events such as sick children.[140] When managers warn that forming a union could affect employees' "personal relations" with the company, it is this realm of discretionary authority that runs through workers' minds.[141]

Employer strategy for NLRB elections centers on a ceaseless, in-your-face campaign of supervisors pressing anti-union rhetoric on their direct subordinates. During the course of the campaign, supervisors serve as "precinct captains" for the employer. They are generally assigned no more than 10-20 employees, and charged with talking to each of these subordinates at least several times per week, and often daily.[142]

While the primary role of supervisors is to influence the votes of their subordinates, supervisor one-on-one meetings are also designed to force a reaction from employees, enabling management to get an accurate and continuously updated read on both the overall vote count and the identity of union supporters. Several consultants have written anti-union manuals geared specifically to the role of supervisors.[143] Typically, supervisors report to an outside consultant who drafts leaflets and provides scripts. In a typical week, supervisors will be given two or three leaflets to hand out to each individual under their direction. These encounters are designed to be extremely intense; several consultants stress the importance of "eyeball-to-eyeball conversations between supervisors and employees."[144] Managers are trained in how to talk about each leaflet and how to carefully observe and interpret the words, nuances, and body language of employees' response.[145] "Supervisors should not ask employees what they think about the management literature ... as this would constitute unlawful interrogation," explains DeMaria's *Management Report for Nonunion Organizations*. Instead, they should "make positive statements such as 'I thought that flyer on the high cost of union dues really brought home just how costly it can be in dollars and cents to be in a union,'" and then watch for employee reactions.[146]

With each leaflet, supervisors report back to senior management on each employee's reaction, carefully grading and ranking the response of each.[147] While ranking systems differ from consultant to consultant, even the broadest of monitoring systems ranks workers in one of three categories — solidly

pro-union, solidly opposed, or undecided. In more sophisticated campaigns, the ranking system may capture finer-grained distinctions in employee attitudes. Levitt, for instance, recalls that:

> We kept charts on every employee, identifying each with one of five marks: a plus sign in a circle if he was staunchly anti-union; a plain plus sign if he leaned toward management; a minus sign in a circle for a strong union supporter; a simple minus sign if he was pro-union; a question mark for unknowns.[148]

In this sense, the standard conduct of management campaigns undermines the very notion of a secret ballot. On election day, the physical ballot still takes place behind a curtain, but the real protection that curtain provides is increasingly marginal. The purpose of a secret ballot is to safeguard individual workers against retaliation based on their political views. However, if management has already learned where each individual employee stands before the vote takes place, the secrecy of the ballot has become eviscerated.

How is it possible for management to know workers' feelings with such exactitude? It is, after all, illegal for employers to interrogate employees as to their stance on union formation. The answer to this seeming mystery lies in a battery of tactics designed to evade the law and pierce the veil of the secret ballot. Management's intelligence-gathering often begins with sophisticated attitude surveys designed to identify a psychological "proclivity" toward union activism.[149] In other cases, management spies on employee conversations or recruits sympathetic employees to report on who says what in union meetings.[150] When management provides 'Vote-No' buttons, hats, t-shirts or bumper stickers, this too provides a means of gauging workers' views simply by watching who uses then and who avoids them.[151]

Above all, management's ability to subvert the secret ballot is based on the relentlessly intrusive one-on-one confrontations between supervisors and their subordinates. As described, these repeated confrontations draw on the power of the supervisor-employee relationship in order to force voters to reveal their political intentions. Voters on the receiving end of such questioning do not have the legal right to say "I don't want to talk about it now." There may be individuals who — day after day, week after week — are able to hide their true feelings from their supervisors. For these individuals, the secret ballot retains its function.[152] For the overwhelming majority of people who are not so skilled at deception, management has succeeded in rendering the "secret ballot" meaningless, since their vote was known long before they stepped into the polling booth. Indeed, management's vote-counting is often eerily accurate. Levitt recalls that he would commonly initiate a pool among managers and foremen, in which each supervisor would predict the number of anti-union votes, with a $100 prize for the closest guess. "It was amazing," he reports. "In pool after pool the supervisors were astonishingly accurate."[153] But to the extent that such tactics are effective, the technically secret ballot has ceased to provide any meaningful protection to voters subject to the intense scrutiny of those who control their work lives.

Election Day

One might think that, even if the whole campaign leading up to an NLRB election is slanted toward management, at least election day itself must run the same as a normal election. After all, the act of voting itself seems straightforward — one enters a private booth, marks a ballot, and an impartial authority oversees the process and counts the votes. How much room for manipulation could there be? Unfortunately, the answer turns out to be much more than one might expect.

First, the very timing of the vote itself may be the result of political manipulation. When the NLRB first convenes a hearing to set the election ground rules, one of the issues that the two sides negotiate is the date of the election. Generally, management has the superior leverage in these discussions; since the union is anxious for a quick election, union representatives often give in on other aspects of the process. Management consultants urge their clients to schedule the vote for payday whenever possible, so that workers will be grateful toward their employer and so the employer can have the last word of the campaign by distributing 'Vote No' flyers with employee paychecks. Likewise, management typically seeks to hold the vote early in the morning, so that employers can host an anti-union dinner the night before, and union supporters will have no opportunity to rebut that message.[154] And always, Fridays are better than Mondays if you want happy rather than disgruntled voters. Thus, the schedule of the election itself may be a product of management strategy — a partisan advantage that is, of course, never permitted in elections for public office.

The events of election day itself likewise unfold largely according to management strategy. Physical control over the workplace affords management control over the campaign environment while voting is ongoing. The actual room in which workers cast their ballots is off-limits to campaigning. However, voters walk to the polls past rooms, hallways, posters, and bulletin boards dominated by anti-union campaign propaganda. On election day, like all other days, anti-union supervisors may walk around the company, having mandatory one-on-one conversations with every voter; neither union representatives nor pro-union employees have the right to do likewise. Indeed, the Jackson Lewis attorneys urge employers to take care even regarding the union observers who by law must be allowed to monitor the balloting; they recommend that employers plan out a route for them, from the front door to the voting room, that will minimize exposure to employees, and make sure that they are escorted by a management representative in order to prevent them from engaging in the same type of conversations supervisors will be having all day.[155] Furthermore, controlling the polling site allows management to stage events that influence the environment in which voters cast ballots. In one case, for instance, an employer who had previously never used of security guards, but who had campaigned on the notion that organizing would lead to violence, hired an armed guard (complete with guard dog) to patrol its property during election day — thus dramatizing the level of conflict and retribution that might result from a 'yes' vote.[156]

In addition, anti-union consultants and attorneys generally hold that a large turnout favors the anti-union side, and use control over the balloting site to guarantee partisan turnout. It is believed that union supporters are, by nature, more motivated to vote. If, as Cohen and Hurd's survey suggests, there is a large body of fence-sitters who above all want to avoid conflict, it is likely that many of these employees would naturally avoid voting at all if given the chance. If they do vote, however, many are likely to vote 'no' simply because they have been convinced that management is implacable, that the union can't win real improvements, and that a 'yes' vote is a vote for continued conflict. Under these assumptions, management works hard to turn out the vote.[157] The fact that management can target slackers with repeated reminders to vote — under conditions where refusing to vote will be understood as an act of

displeasing one's supervisor — is recognized by management advisors as a crucial advantage.[158] Indeed, Jackson Lewis attorneys go so far as to advise employers that "a check of absentees should be made on the morning of the election, and transportation offered them."[159]

The Jackson Lewis advice points to the unique power of controlling the polling site. The ability to get an immediate list of employees who have not come in to work, and arrange to ferry them in to vote, is a power that only management has; pro-union employees have no equal right of access to election day attendance sheets. By law, it is illegal for supervisors to keep lists of who has and has not voted; however, managers generally can track this information with no need for a written list. The Sodexho union avoidance manual, for instance, includes an edict that on election day, "every supervisor should make sure that every employee is encouraged to vote."[160] The ability to monitor and follow up on voters with such exactitude is, again, a power that management has but union supporters do not. And, again, it is a power that no party would be permitted in a regular election. No polling place would ever be situated in Democratic or Republican headquarters; no party would ever be allowed unilateral access to the list of who had shown up to the voting place, nor unilateral ability to send partisan representatives to personally escort those who hadn't yet voted; nor, finally, could the turnout push come from a party that had both a highly partisan position and control over voters' financial future.

The advantages employers gain from controlling the polling site are reflected in their opposition to policy changes that would institute off-site voting. Under the National Mediation Board — the federal agency overseeing elections for the railway and airline industries — all elections are conducted by "mail ballot;" currently this means employees vote through their choice of touch-tone telephone or internet website. The process is both efficient and secure; with over 1,500 elections run under this system, there has not been a single allegation of voter fraud or coercion.[161] Indeed, the system follows the vote-by-mail system that has been adopted for elections to public office in the state of Oregon, where elections have been found to be at least as clean as those conducted under previous voting systems.[162] Furthermore, elections by mail ballot are significantly cheaper to run than on-site elections; in an age of repeated cuts in the NLRB budget, one might think this would increase the agency's incentive to adopt off-site voting. But employers are strongly opposed to changing the system, and to-date the NLRB has refused to reconsider its insistence on workplace balloting.[163]

Employers are straightforward in their reasons for opposing voting alternatives. "Sophisticated employers know well that mail ballots are 'bad news' for employers," notes one national law firm, explaining that "in mail ballot elections, employers have a much more difficult time controlling timing of campaign strategy."[164] DeMaria's *Management Report*, in an article titled "Reasons Employers Should Resist Mail Ballots," explains not only that it is harder to turn out anti-union voters when the election is off-site, but also that mail balloting diminishes management control over the emotional atmosphere on election day. Mail ballots generally include a more extended voting period — sometimes up to 30 days — and employers are prohibited from forcing workers to attend mass anti-union meetings during this entire period, rather than simply the final 24 hours leading up to an on-site ballot. The newsletter explains that:

> The whole idea of the 25-hour presentation is to bring the campaign to an emotional pitch, so that employees walk out of the final employer presentation revved up to vote for the company based upon the 'last word.' Mail balloting destroys this dynamic, because employees can vote several weeks later after the impact of the employer's final presentation has worn off.[165]

If either Democrats or Republicans insisted that voting take place in their headquarters, and that all voters be forced to attend a partisan rally 25 hours before casting their ballots, with no equal opportunity for response for their opponents, none of us would be fooled into thinking this a democratic election. If they went even further — insisting that such unilateral prerogative was a critical ingredient of free speech and democratic process — it would be hard not to view this as the most cynical and shameless dissembling. Yet this logic rules workplaces across the country.

Inadequacy and Weak Enforcement of the Law

Beyond the extraordinary advantages provided employers under labor law, NLRB elections stand in marked contrast to those for public office in the incidence of outright illegal activity. From its beginnings, the world of anti-union campaigns has been rife with illegal activity of almost every kind.[166] As early as the mid-1950s, Congressional investigators uncovered an extensive pattern of illegal behavior among the nation's foremost management advisors on labor issues, including bribery and coercion of employees, spying on and harassing union supporters, offering rewards to anti-union employees, and threatening those who were pro-union.[167] Levitt followed the same path two decades later; as part of his routine strategy, he "set to work establishing a network of rank-and-file employees who would serve as spies, informants, and saboteurs."[168]

Levitt describes how illegal activity was built into the normal practice of employer campaigns:

> My team and I routinely pried into workers' police records, personnel files, credit histories, medical records, and family lives in search of a weakness that we could use to discredit union activists .... To fell the sturdiest union supporters ... I frequently launched rumors that the targeted worker was gay or was cheating on his wife .... If even the nasty stories failed to muzzle an effective union proponent, [we] might get the worker fired.[169]

Indeed, virtually every step of the campaign process, as described by Levitt and other management strategists, has been marred by illegal practices — including packing the bargaining unit with last-minute anti-union hires; lying to employees about the confidentiality of personal interviews; falsifying payroll memos in order to provide illegal wage increases; vandalizing company cars and blaming it on the union; tapping the union organizer's phone; and paying employees to vote against union formation.[170] Such tactics shouldn't be imagined as confined to the long-ago past or the province of "rogue" consultants. In 2004, a South Carolina manufacturer sued Jackson Lewis for advising illegal tactics in "a relentless and unlawful campaign to oust the union" that included spying on workers, firing union activists, organizing a bogus "employee" anti-union committee, writing supposedly employee-authored flyers calling union activists "trailer trash" and "dog woman," and supplying cash-filled envelopes to anti-union employees.[171] What was unusual about this case is not the tactics employed, but simply that the internal tension between the company and its attorneys led to a public record of management's tactics. "Jackson Lewis is a key player in the union avoidance industry," noted former NLRB General Counsel Fred Feinstein, and "this kind of aggressive anti-union campaign is not unusual."[172]

Over the period of 2000-05, there were an average of over 19,000 charges filed per year alleging employer violations of federal labor law; of these, 40 percent — or 8,500 cases per year — presented sufficiently strong evidence that the NLRB either issued a complaint or oversaw an informal settlement between the parties (see Appendix, Table 3). NLRB complaints are the equivalent of criminal indictments, and both complaints and settlements represent cases in which the NLRB judges a charge to have merit.[173] While both unions and employers violate the law, the vast majority of charges stem from employer behavior. In 2004, for example, 88.5 percent of all complaints issued by the NLRB, and over 90 percent of all cases tried in hearings of the full Board, addressed illegal behavior by employers.[174]

Illegal Firing, Suspension, and Punishment of Union Supporters

The most egregious form of illegal behavior is the firing, suspension, or demotion of employees in retaliation for union activity. On average, over the past 10 years, nearly 29,000 workers per year received backpay as a result of alleged illegal employer behavior.[175] This number includes those who were fired,

demoted, suspended, denied promotions, or in other ways were subject to economic retaliation. The NLRB's data does not distinguish between offenses committed in the course of an election campaign and those committed in the context of an established bargaining relationship. It is therefore impossible to know exactly how many of these reprisals are related to elections. In the late 1970s, the NLRB General Counsel estimated that 90 percent of all such cases stemmed from election campaigns.[176] However, later analysis by more conservative scholars contends that this figure is exaggerated, and estimates that only 50 percent of such cases occur during elections.[177]

By any measure, the incidence of illegal economic retaliation against union supporters is dramatic. To adopt the most conservative methodology, we might assume that acts of economic retaliation are spread across not only union supporters, but all voters. Furthermore, since many employer campaigns successfully stop union drives before they even reach an election, we might assume that acts of retaliation are spread across all workplaces where a petition for election was filed — whether or not it ultimately led to a vote. While the NLRB only provides data on the number of eligible voters in workplaces that actually had an election, it is possible to extrapolate this number to take account of all companies where petitions were filed.[178] The result, for 2004, is shown in Table 3 (see Appendix). Even assuming that only half of all acts of retaliation occurred during an election campaign, and assuming that this retaliation was spread evenly across the more than 250,000 potential voters in companies where petitions were filed that year, this most conservative methodology suggests that one out of every 17 eligible voters was fired or otherwise financially penalized for supporting unions. By normal political standards, this figure is astounding. If federal elections followed the same practice as workplace elections, we would have seen 7.5 million Americans demoted, suspended, or fired from their jobs for supporting the wrong candidate in 2002 elections to federal office.

If we use more realistic assumptions, the incidence of retaliation is even greater. In 2004, there were 160,000 voters in workplaces that held NLRB elections; just over 70,000 of these voted to form a union.[179] If we assume that management retaliation was focused on 'yes' voters, the data would suggest that one out of every six union supporters was economically punished for expressing his or her political beliefs. In fact, it is likely that many of the 70,000 union voters were quiet supporters, and that the core of union activists who attracted the wrath of management was considerably smaller. If only half those who voted pro-union actually dared to wear a union button or t-shirt, sign a petition or speak out in a meeting, and if management retaliation was concentrated on this smaller group — as seems most logical — then the data would indicate that one out of three actively pro-union employees suffered economic retribution.

One way to make sense of the NLRB data is to compare the incidence of illegal activity under the National Labor Relations Act with that in elections to federal office (see Appendix, Table 4 for such a comparison). Again, making the conservative assumption that only half of all illegal activity takes place in the context of election campaigns, and assuming that only 40 percent of unfair labor practice charges are meritorious, this indicates that there were nearly 4,000 cases of employers breaking the law in the context of workplace elections.[180] If we compare this number of cases with the total number of eligible voters — again using the most conservative assumptions — we find that employers broke the law once for every 64 voters. This is a much less extreme number than the rate of backpay awards. Nevertheless, it is a remarkable figure when compared with federal electoral standards. In the 2001-02 election cycle (the last two-year cycle for which complete data is available), there were a total of 565 Federal Election Commission violations. With 128 million registered voters, this means there was one violation for every 226,000 voters. If we take violations-per-voter as a measure of the "dirtiness" of elections, this means that workplace elections are more than 3,500 times dirtier than federal elections. While this figure may seem hyperbolic, it is in fact based on a series of calculations that, at every turn, applies the most conservative possible assumptions.[181]

The NLRB data may be shocking to those unfamiliar with organizing campaigns, but they come as no surprise to union organizers or management attorneys. Indeed, there is good reason to believe the NLRB data actually understates the true extent of illegal firings. Under the NLRB's evidentiary rules, it

is extremely difficult to prove that a given worker was fired in response to union activity. Since virtually every campaign features regular one-on-one conversations between supervisors and employees, it is easy for managers to convey threats with no witnesses present. In such situations — where a case involves the word of one worker against that of his or her supervisor — the NLRB's policy is that the case will be prosecuted only if the union affirmatively proves that the credibility of the employee in question is superior to that of her supervisor. In cases where it is impossible to tell who is telling the truth, the charges are dropped as a matter of practice.[182] Thus, we would expect the NLRB to document illegal firings only in cases where management is clumsy enough to issue threats in a particularly overt manner. In addition, since it is legal for employees to be fired for any non-discriminatory reason, it is fairly easy for managers to identify some ancillary cause as the official reason for a termination, denying that it was motivated by anti-union strategy. Thus, one survey of anti-union attorneys concluded that it was "common for union activists to be fired since it was generally easy for the attorney and employer to find a reason (e.g. tardiness, insubordination) for firing activists that the NLRB would uphold as lawful."[183] For these reasons, union organizers have become reluctant to file charges even when they believe employees have been illegally fired.[184]

Numerous pundits muse over why the labor movement has been shrinking so steadily for the past several decades. To understand the most fundamental answer to this question one need look no further than the experience of workers in thousands of companies such as Surgical Appliance, Inc., of Cincinnati, where employees petitioned for an election with the NLRB. Shortly after the petition was filed, eight employees stood at the plant gate, passing out leaflets to coworkers. Within one hour, all eight were either fired or had their hours cut. Undaunted, other employees took their place leafleting the following morning — and the same thing happened to them, and to the next wave workers as well, until, over a period of several days, 26 union supporters had been laid off. Six months later, the company agreed on a settlement with the NLRB, and paid a total of $70,000 in backpay. The workers thus won their case, but they failed to win an election and the company remained non-union.[185] This type of behavior — political dissidents threatened with unemployment, and used as an example to terrorize others into submission — is something we would expect from totalitarian regimes. Yet this is a common practice in workplaces across the country.

A Toothless Law: Absence of Penalties Encourages Lawbreaking

Any law is only as good as its enforcement. For this reason, violations of state and federal electoral law are punishable by fines, imprisonment, and denial of commercial licenses, among other penalties. Reform advocates may complain that FEC penalties are not stiff enough, or not enforced with sufficient rigor. The protections provided by the current system may be appreciated, however, if we imagine what American politics would be like if there were no punitive sanctions whatsoever for those who broke the law. If the only response to illegal campaign contributions, for instance, was that the candidate was required to return money to the donor — with no possibility of prison, fines or any other punishment — the system would be immeasurably more corrupt. Powerful donors would break the law over and over again, knowing that if they were caught they would face no real penalty, and indeed that even after being caught they would remain free to try the same strategy again with no fear of sanctions even if they were found to have violated the law repeatedly. With no teeth behind the law, the democratic nature of elections would be fundamentally corrupted. Instead of expressing the will of the people, elections would reflect the law of the political jungle: politicians would be bought and sold; voters would be bribed and bullied; media would be monopolized or blacked out. We might still have votes, but we would not have democracy; elections under these conditions would function as a cynical joke, serving to provide a gloss of legitimacy to those who held power illegitimately.

This is unfortunately a perfectly accurate description of the state of law governing NLRB elections. When an employee is fired for union activism, he or she must first engage in a difficult and lengthy process to prove that her termination was due to anti-union discrimination. One federal commission estimated that going through all the steps of appeal in such a case takes an average of three years to complete; during

all this time, the employee remains fired, with no protection or compensation from her employer.[186] Even if an employee successfully pursues this process and ultimately wins her case in federal court, there is no possibility under the law for the court to impose any sort of fine, prison term, or punishment whatsoever on the employer. Instead, the sole remedy possible under the NLRA is payment of back wages. Specifically, an employer who is found guilty in such a case is liable to pay the back wages of the terminated worker, offset by whatever money the employee earned in any other job he or she landed in the meantime. For employees who live paycheck to paycheck, the first thing one does after being fired is look for a new job. Furthermore, the NLRB requires employees to actively search for a replacement job — those who don't may be denied backpay even if they win their case. If someone is lucky enough to find another job that pays the same amount as the position they were fired from, their employer doesn't need to pay them a cent. If they get a job that pays less than their former position, or they go through a period of unemployment before finding a new position, the employer is merely required to make up the difference.

Thus, even the most egregious offenses result in employers being liable for only a fraction of the wages lost by illegally fired employees. Moreover, this partial restitution is the absolute maximum penalty allowed under law. In the entire canon of employment law — perhaps in American civil law as a whole — this is the only area of law that contains a statutory ban on any possibility of punitive action. With such a toothless law, it is little wonder that employers so frequently decide that it is worthwhile to fire a few activists in order to scare hundreds of employees into abandoning the thought of unionization.[187]

The NLRB's backpay remedy is premised on "making whole" fired employees. In fact, the law does not make employees whole, even on a discounted basis. The law does not provide a remedy for the wide range of catastrophes that may occur when companies illegally fire employees who are supporting families living paycheck-to-paycheck — including, for instance, losing one's car or home, or incurring catastrophic healthcare costs. One case in point is the experience of Vico Products employees in Michigan.[188] In 1997, Vico employees voted to organize a union affiliated with the United Auto Workers. During the course of the campaign, the company committed a number of illegal acts, including direct threats of layoffs in response to unionization. Shortly after the election, the company moved part of its operations from Michigan to Kentucky, summarily laying off 33 workers without a word of negotiation with the new union. Four years later, the NLRB ruled that Vico had acted illegally and required the company to move its machinery back to Michigan and offer to reinstate those it had fired. The company appealed, but in 2003 a federal court upheld the NLRB's finding. Thus, the workers got a measure of justice, but six years after the fact. It is impossible to know how many of these employees lost their homes or cars in the meantime, were unable to care for elderly parents or to maintain children in college, were forced to uproot their families and move out of state, suffered depression, despair or tension-related illnesses, were bankrupted by unaffordable health care costs, or endured any one of a host of other afflictions that commonly confront the unemployed. Despite "winning" their case, there is no way that any of these costs can be "made whole" under labor law.

The NLRB's brand of justice is highly skewed on both ends. For employees, being fired carries a risk of potentially catastrophic costs that will never be made up; thus, they have good reason to be very afraid when hearing even subtle threats from their employers. For companies, on the other hand, the penalties are so slight that they fail to instill real respect for the law. As a simple economic calculation, it is almost always rational for employers to incur the modest costs for firing activists in order to crush a broader organizing movement. As DeMaria explains:

> Let's suppose during [the] early period of card signing you discharge a prime mover, and the NLRB finds that you did it on a discriminatory basis. What are the remedies? Reinstatement, backpay ... and you gotta post a notice saying, We've been bad boys and girls, we won't do it again .... Some companies will just say, 'Hey, where's the check?'[189]

Under these conditions, it is not surprising that so few workers win union recognition through NLRB elections. The surprise is that any group of employees manages to stand up to this level of fear and lawlessness to insist on creating a union.

Stop — or I'll Say "Stop" Again!

There are many ways that employers may break the law apart from firing activists — including threatening layoffs, spying on or interrogating employees, and promising benefits for "no" voters. But none of these other illegal acts carry any possibility of monetary damages — not even the modest compensation required for those illegally fired. Instead, the Board's remedy for employers found guilty of breaking these electoral laws is simply to require companies to post a notice declaring that what they did was illegal and promising not to do it again. If they do repeat the behavior, they simply face the same remedy a second time: posting another notice acknowledging the law and pledging this time that they really won't do it again. This pattern can repeat itself without limit. But no matter how often it repeats, there is no possibility under the law for the NLRB to enforce fines or any other sort of punishment against repeat offenders.

In extreme cases, the NLRB may order an election to be rerun if it believes that illegal actions were so widespread as to change the outcome of a vote; but the Board's policy is that the charging party faces a "heavy" burden to prove that illegal acts affected the outcome, and that without such proof election results will not be "lightly set aside."[190] Yet even when the Board orders a second election, there is no guarantee that the rerun vote will not be marred by the same behavior that invalidated the first round. In one case, an election was overturned after the employer was found guilty of illegal threats, coercion, discrimination against union activists, videotaping workers talking to organizers, following employees into bathrooms, and monitoring employee phone calls. A second election was scheduled for 15 months after the first, and the employer was required to post notices acknowledging the law and pledging to respect it in the future. Yet even while these posters hung on the company's walls, the employer repeated some of the exact behaviors it was pledging to rectify. The NLRB cancelled the second election and charged the employer with more than 100 separate violations of the law. Yet all these workers could look forward to was more signs posted, more promises voiced, and yet another delayed and rescheduled election.[191]

The NLRB has the legal authority to go beyond rerunning elections and enforce a bargaining order, requiring an employer to recognize a union on the spot and immediately commence negotiations. However, such orders are extremely rare; in the past five years — a period that included over 12,000 NLRB elections — it has issued only nine such orders.[192] Thus, with very few exceptions, the worst-case scenario faced by an unscrupulous employer is a rerun of the vote under the same conditions. The incentive for employers has been clearly spelled out in a seminar hosted by Fred Long, president of the West Coast Industrial Relations Association:

> What happens if you violate the law? The probability is you will never get caught. If you do get caught, the worst thing that can happen to you is you get a second election and the employer wins 96 percent of second elections. So the odds are with you.[193]

Long's advice has been borne out repeatedly over the past three decades.[194] In one manufacturing plant, the employer's campaign included asking employees to wear 'Vote No' buttons, claiming that creating a union would inevitably lead to a strike, and wrapping up plant equipment, placing it in the parking lot, and stamping it for shipment to Mexico.[195] The NLRB's remedy was to rerun the election; unsurprisingly, the union lost the second time as well. A similarly disturbing case is that of Domsey Trading Corporation of Brooklyn, NY, which buys and exports used clothing, and had a workforce that was mostly Haitian and Latino. Of the company's 243 workers, 76 percent signed union cards. A 27-year veteran employee went in to tell the boss' son that the union was there to see him and ask for recognition. Within 15 minutes, that employee was fired. According to Hurd and Uehlein, "that afternoon, the employer's attorney told the union's attorney that he was not worried, because even if the employer had to reinstate the discharged worker, the backpay liability would not amount to much." Soon, two more workers were fired, and 90 percent of the employees walked out to protest the firings. Over a seven-month strike, the owner's son placed a "voodoo table" in front of the pickets with bananas, calling to picketers "this is for you monkeys to eat." He and others called women picketers "whores," called all

picketers "lazy" and "stupid niggers," and said they were being sprayed with water to wash off their smells. Over a three-year period, the NLRB found the employer guilty of numerous unfair labor practices. But the practices didn't stop. Ultimately an election was ordered, but the vote by then — with only a third of the original union supporters still working then — was 170-120 not to organize.[196]

The remedy of rerun elections may be analogous to a jury that hears a dramatic and compelling criminal confession and then is instructed by the judge to ignore what they have heard. Once employees have seen how aggressively their employer opposes unionization — once they have seen coworkers spied on, monitored, threatened, and fired, and once they themselves have felt the fear of opposing management in any public manner, there is no way to erase these fears from one's mind simply by scheduling a new vote. Employees are aware that the law does not truly protect them against retribution by their employer. Furthermore, they have just lived through the experience of seeing a majority of their coworkers be intimidated into abandoning their support for organizing; therefore they would logically take no solace in the notion that they will be protected by the strength in numbers of fellow employees. NLRB doctrine calls for elections to be held under "laboratory conditions." But there is no way to establish "laboratory conditions" after such an experience.

The impossibility of reestablishing a level political playing field in the wake of an effective anti-union campaign is evident in two recent cases, drawn from opposite coasts of the country. In California, employees at the largest warehouse for Rite Aid drug stores began organizing a union with the International Longshore and Warehouse Union in the spring of 2006. Over the next several months, employees who were outspoken in support of unionization were fired, suspended, spied on, and forced into multiple mandatory meetings — both in groups and in one-on-one sessions with their personal supervisors — to be told why it was so important to keep the union out. After a 10-month investigation, the NLRB concluded that there was probable cause to prosecute Rite Aid on 49 separate counts of violating federal labor law, including illegally firing and disciplining union supporters; defaming union supporters; threatening employees with retaliation for supporting unionization; and illegally funding a supposedly 'employee' anti-union committee.[197] Facing the prospect of a trial, the drugstore chain agreed to settle the case by hiring back fired employees, paying back wages, and promising not to break the law in the future.[198] California State Senator Gil Cedillo declared Rite Aid a "textbook example" of the need for labor law reform. "Union supporters at [the company's] Lancaster distribution center," he protested, "have endured insults and interrogations, threats and terminations, simply for trying to exercise their legal rights."[199] Yet, upon settling these charges, the company immediately called for the union to agree to an NLRB election rather than agreeing to recognition based on signed statements by a majority of workers. In a letter mailed to workers' homes, the company suggested that the NLRB was the proper way to resolve disputes, insisting that "we support your right to finally cast your secret ballots in an election to decide the issue of possible unionization."[200]

In a similar case on the East Coast, Yale-New Haven Hospital spent nine years opposing employee efforts to form a union. In 2006, when the city government indicated it would withhold approval for the hospital's expansion plans unless it committed to a fair election procedure for its employees, the hospital signed an agreement with the Service Employees International Union that, among other things, prohibited supervisors from holding mandatory anti-union meetings, disparaging the union or its organizers, making false or misleading statements, and engaging in any other act of intimidation or coercion.[201] However, as the vote drew near — and after the hospital had received the city's approval for its expansion plans — hospital administrators systematically violated this agreement, training a corps of 300 supervisors in anti-union rhetoric and holding more than 50 forced-attendance meetings at which employees were variously told the union was mafia-related and threatened with a loss of wages or worsening of job conditions if they voted to form a union. In December 2006, the arbitrator selected jointly by the hospital and union ruled that the hospital had committed numerous violations of both its election agreement and federal law. State Senator Martin Looney termed the hospital's behavior "the worst form of cynicism and bad faith imaginable," and Connecticut Attorney General Richard Blumenthal pointed to the arbitrator's report as "solid, verified, irrefutable evidence of lawbreaking."[202] Even Yale University president Rick Levin — himself a notorious opponent of unionization — declared

himself "dismayed by the recent actions of the hospital that violated the letter and spirit of its agreement."[203]

In the wake of such heavy-handed threats, the union called off the scheduled vote, and it was unclear how workers might ever be able to exercise a free choice in the matter. New Haven Mayor John DeStefano announced that he was "incredibly disappointed in the management of the hospital," and suggested that "they have poisoned the water as to whether there can ever be a free and fair election because of their intimidation and coercion."[204] Union supporters hoped that the arbitrator might require the hospital to recognize the union on the basis of signed statements by a majority of employees. But the hospital's position at this point was to call for an NLRB election. "We have always believed," the hospital declared, "that our employees deserve the right to decide for themselves the issue of union representation in a secret ballot election."[205]

Leaving aside the disingenuousness of trumpeting one's commitment to employees' democratic rights after working so thoroughly to intimidate union supporters, it is simply impossible to conduct anything resembling a "free and fair" election in the atmosphere created by such repression. Once supervisors communicate to their subordinates that they are implacably opposed to unionization; that supporting a union may result in termination, demotion or other retaliation; that creating a union may lead to layoffs and will likely result in an atmosphere of permanent tension, confrontation, and surveillance in the workplace — it is impossible to take this message back. Employees are naturally highly sensitive to even the non-verbal communication of their managers. Even if an election were rerun under conditions of the strictest neutrality, far surpassing NLRB guidelines — say, mandating that management say nothing at all about the subject for the duration of the election campaign — employees cannot erase the knowledge of the virulence with which unionization is opposed by those who control virtually every aspect of their work lives.

It is no surprise that employees remain intimidated — and therefore unlikely to vote for creating a union — after an election marred by threats and reprisals. But it indicates how badly rerun elections fail as a remedy for illegalities, and how systematically workers have been denied access to a truly democratic process.

In this sense, even an improved remedy for illegally fired workers misses something essential. Backpay remedies, at their best, may compensate the individuals who were terminated. But the NLRA does not merely provide rights to individual workers. It establishes a collective right — for employees to decide as a group how and whether they want to represent themselves in negotiating with their employer. The firing or intimidation of union activists does not merely affect these individuals; it poisons the election atmosphere as a whole, and undermines the right of the bargaining unit as a whole to freely choose collective bargaining. While labor law fails to adequately compensate the victims of illegal firings, it even more dramatically fails to address the group rights of employees to a free and fair choice of collective self-representation. This is why state and federal electoral laws include the penalties of fines and imprisonment: they aim not merely to compensate specific individuals who may have been harmed by illegal acts, but to preserve the right of the citizenry as a whole to a free election by using punishment as a deterrent to future illegal behavior. Without any such deterrent, NLRB elections are hopelessly, systematically open to corruption at the whim of employers who have every incentive to ignore the law.

A Well-Documented Problem

Unlike political elections, there has been relatively little scholarly attention focused on National Labor Relations Board elections. The NLRB only collects information on legal procedures — petitions, votes, hearings, and charges of illegal activity. But while these pieces of information are important, they represent the tip of the iceberg of understanding how NLRB election campaigns are run. The vast majority of the issues that go into defining the democratic or undemocratic nature of a campaign — access to voters and media, freedom of speech, control of campaign activities, intimidation or coercion of voters — are not subject to any type of reporting or tracking. Unsurprisingly, employer associations release little if any data on management campaign practices. Thus, the most comprehensive studies rely primarily on the reports of union organizers and employees themselves — taken together with what government data is available — in order to construct a picture of how campaigns are run.

Fortunately, a number of such studies have been published over the past decade, all of which adhere to rigorous social scientific methods. Taken together, these studies represent the best available evidence for documenting typical campaign practices. While each of the studies focuses on a particular sample and is therefore not completely representative of elections as a whole, each sample's analysis is based on rigorous methods.[206] More strikingly, the results of the samples — drawn from different sets of elections in different times and places — are remarkably similar. The fact that the findings reinforce each other so dramatically, coupled with the fact that the results mirror the advice of management consultants and lawyers and the experience of workers as reported in employee surveys, provides strong reason to trust the picture painted by these results.

As summarized in Table 2, these studies paint a troubling picture of election conduct (see Appendix). Well over two-thirds of private employers hire an outside anti-union consultant when workers seek to organize.[207] Bronfenbrenner's 1994 study found that an additional 15 percent of employers retained outside attorneys to help shape management campaign strategy; thus, the data suggest that well over 85 percent of employers run campaigns along the lines described in this study.[208] The tactics favored by employers are exactly those suggested by the consultants whose work has been discussed earlier in this report. Between 80-90 percent of companies forced employees to attend mass anti-union meetings, with an average of 5-10 forced meetings per NLRB election. Between 70-75 percent of employers distributed leaflets in the workplace. Between 75-98 percent of employers had supervisors conduct one-on-one anti-union meetings with their subordinates. Between 25-30 percent of all employers fired union activists during the course of the election campaign, with an average of three employees fired in each case; the great majority of those fired had not been reinstated as of election day. One-third of employers were charged with violating labor law. Yet, according to union organizers, the incidence of illegal employer activity was even higher. Organizers report that between one-third and one-half of employers illegally helped create or support a bogus "Vote No" committee and offered special perks or bribes to anti-union activists; and half issued threats to close all or part of their operations in response to organizing. The discrepancy between the extent of illegal activity reported by organizers and the number of complaints issued by the NLRB may be read in different ways: either that organizers are exaggerating employer hostility, or that the difficulty of proving charges before the NLRB allows employers to evade prosecution. Yet no matter how one interprets or discounts that part of the data, the results remain shocking.

Conclusion

For nearly three decades, opinion polls have consistently shown that roughly one-third of non-union workers wish they had a union in their workplace.[209] If creating a union simply followed the will of workers, an additional 40 million Americans would have union representation.[210]

The reasons American workers give for wanting unions are unsurprising. The single most extensive set of worker surveys is conducted by the Wilson Center, which has conducted polls in hundreds of workplaces where unions were considering launching organizing drives. Since the unions' purpose was to evaluate the worthiness of investing time and resources in a given company, the polls' objective was to obtain the most accurate possible read of workers' attitudes. There is no evidence or suggestion that the data has been skewed in any way. Over a period of 14 years, the Wilson Center conducted in-depth interviews with 150,000 employees.[211] Their findings show that "the most important factor in the desire of nonunion workers for representation is a wide and persistent gap between what they genuinely feel they deserve and what they actually receive for their labor."[212] Another set of researchers sought a more detailed definition of that "gap" by asking workers to identify the issues over which they thought it was "very important" to have "a lot" of influence, and then probing the number of employees who believed they did, in fact, have "a lot" of influence over these issues. The difference between desired and actual control was identified as the "influence gap," and it was most pronounced for the issues one might predict, most importantly wages and benefits.[213] Beyond simple economics, these workers wanted more control over a host of structural issues in the workplace: 67 percent of employees thought they had too little protection against being fired arbitrarily; 64 percent wanted more control over the use of part-time or temporary employees to replace full-time workers; and 63 percent wanted more control over layoffs and plant closings.[214] In this sense, non-union workers have correctly identified the type of issues over which unions have historically proven most effective at influencing employment conditions. Employers opposing union formation often claim that union supporters are misled, and that employers bear the burden of enlightening them regarding the downside of organizing. However, these poll results suggest that workers have an accurate sense of what a union might do. This intuition is borne out in polls of union members themselves, 90 percent of whom state that they would vote for union formation if they had it all to do over again.[215] Thus, it appears that workers have an accurate understanding of what unions do, and many millions of them would like to create such a process in their own workplaces.

While 40 million non-union workers say they wish they had a union, less than 100,000 per year establish unions through the NLRB election process.[216] What accounts for this astounding gap between popular will and political reality, in what is supposed to be a democratic system? The answer lies in the full range of techniques employers use to dissuade, discourage, and frighten employees away from actively supporting — tactics that even non-union employees are well aware of. In one poll, 69 percent of American adults stated their belief that "corporations sometimes harass and fire employees who support unions."[217] Another survey found that 79 percent of adult Americans believed it was likely "that non-union workers will get fired if they try to organize a union." Among non-union respondents, 41 percent believed that "it is likely that I will lose my job if I tried to form a union."[218]

These poll results reflect the reality of widespread retaliation against union supporters. But they also point to the remarkable level of fear that employers have installed in nonunion workers handicaps workers' desire to represent themselves through a union. The Wilson Center reports that, in their extensive survey experience, workers' desire to organize is based on perceived mistreatment coupled with "a belief in the union's ability to win improved conditions."[219] Here, management's hardball

opposition translates not only into individual workers' fears of retaliation, but a perception that any union will be powerless to control the boss, and therefore will be irrelevant. Among workers surveyed before any union organizing campaign had begun, 42 percent expected that their management would "make an all-out effort" to stop employees from creating a union.[220] When the Wilson Center asked workers who had recently been through an election to name "the most important reason people voted against union representation," the most common response was management pressure, including fear of job loss.[221]

When labor law was first established, it held out the promise of introducing democratic principles into the workplace. But the reality of workplace governance as experienced by America's workers bears little resemblance to this democratic vision. Instead, America's employees are subject to a regime of bribes, bullying, threats, terminations, delays, enforced propaganda, and political gag orders that we would not accept for the citizens of any foreign nation. The fact that this is happening in our own country makes the need for democratic reform all the more urgent.

Appendix

Table 1
Estimated Employer Spending on Anti-Union Campaigns, Per Employee
(all figures in $2004)

Source	Year	Amount
Consultants Only		
Levitt	1970	$686
Bureau of National Affairs	1976	$1,660
Levitt	1992	$863
Attorneys Only		
Kaufman & Sephan	1995	$1,240
Consultants & Attorneys		
Levine	1982	$2,447
Levitt	1990	$3,753

Sources:

Bureau of National Affairs, *Labor Relations Consultants: Issues, Trends and Controversies*, BNA Special Report, 1985.

Bruce Kaufman and Paula Stephan, "The Role of Management Attorneys in Union Organizing Campaigns," Journal of Labor Research 16.4 (1995).

Gene Levine, Complete Union Avoidance (Delray Beach, FL: Gene Levine Associates, 2005).

Martin Jay Levitt, Confessions of a Union Buster (New York: Crown Publishers, 1993).

Table 2
Tactics Used in Employer Anti-Union Campaigns

	Bronfenbrenner (1994)	Rundle (1998)	Bronfenbrenner (2000)	Theodore (2005)
Hired management consultant	71%	87%	75%	
Held forced-attendance meetings	82%	93%	92%	87%
number of meetings	5.5	10	11.41	
Mailed letters to homes	79%		70%	
number of letters	4.5		6.51	
Distributed leafets in workplace	70%		75%	75%
number of leaflets	6.0		13.37	
Supervisor 1-on-1's	79%	76%	78%	98%
Promised improvements	56%		48%	59%
Granted unscheduled raises	30%	24%	20%	
Fired union supporters	30%	28%	25%	30%
number fired		2.7	4.09	3.60
% with fired workers not reinstated by election day	18%	27%	22%	
Bribes/Special favors		42%	34%	51%
Aided anti-union committee	42%	50%	31%	
Used anti-union videos			55%	
ULP charges filed against employer	36%		33%	
complaint issued on at least some charges	19%		21%	
Threatened full or partial closing			51%	49%

Sources:

Kate Bronfenbrenner, "Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform," in Friedman, et al (eds.), Restoring the Promise of American Labor Law (Ithaca, NY: Cornell University Press, 1994) 75-89.

Kate Bronfenbrenner, *Uneasy Terrain*, U.S. Trade Deficit Review Commission, 2000.

James Rundle, "Winning Hearts and Minds in the Era of Employee Involvement Programs," in Bronfebrenner, et al. (eds.), Organizing to Win: New Research on Union Strategies, (Ithaca, NY: Cornell University Press, 1998) 213-231.

Nik Theodore, *Undermining the Right to Organize: Employer Behavior During Union Representation Campaigns*, American Rights at Work, 2005.

Table 3
Employer Unfair Labor Practice Charges and Outcomes, 2000-2005

	Total Number	2000-05 Share	Annual Average
Total Charges Filed	114,142	100.0%	19,024
Complaints Issued	12,100	10.6%	2,017
Withdrawals, Adjusted	38,121	33.4%	6,354
Withdrawals, Not Adjusted	36,755	32.2%	6,126
Dismissals, Adjusted	829	0.7%	138
Dismissals, Not Adjusted	27,854	24.4%	4,642
Compliance with Informal Settlement	9,022	7.9%	1,504
Without Full Compliance w/Informal Settlement	60	0.1%	10
Compliance with Formal Settlement	55	0.0%	9
Compliance with Board Decision	904	0.8%	151
Without Full Compliance with Board Decision	122	0.1%	20
Compliance with Court Judgment	298	0.3%	50
Without Full Compliance with Court Judgment	85	0.1%	14
Sum of Meritorious Cases	51,050	40.5%	8,508

Source:

Unpublished data provided to the author by the National Labor Relations Board.

Meritorious cases are those in which complaints were issued or that resulted in adjustment with the charges withdrawn or dismissed.

Table 4
Comparison of Federal Election Commission and National Labor Relations Board Violations

	Elections for Federal Office	Workplace Elections	Ratio of Federal to Workplace Voters per Violation
Eligible Voters	128,154,000	254,905	
Electoral Law Violations	565	3,989	
Voters per Violation	226,821	64	3,550
Economic Retaliation		15,392	
Voters per Economic Retaliation		17	

Sources:

Eligible Voters for Elections for Federal Office are for 2002, as reported by the U.S. Census Bureau, "Reported Voting and Registration By Sex and Single Years of Age."

Eligible Voters for Workplace Elections is a projection based on actual total of eligible voters reported in NLRB FY2004 Annual Report. This number has been projected to include all potential employees in workplaceds in which election petitions were filed; since 40 percent of petitions never lead to elections, this number is considerably larger than the actual number of voters in NLRB elections.

Electoral Law Violations for Elections for Federal Office are totals for 2001-02 election cycle, the most recent cycle for which full data is available. Violations are reported in FEC, *Enforcement Profile*, 20 Sept. 2003.

Electoral Law Violations for Workplace Elections are the total number of employer Unfair Labor Practices, assuming that half of ULPs occur in an election context, and that 40% of ULPs are meritorious.

Economic Retaliation represents the number of employees illegally fired, demoted, suspended, or otherwise discriminated against in ways that resulted in backpay awards, and assumes that half of such awards stem from election contexts.

Figure A
Anti-Union Campaign Schedule for Four Weeks Preceding Election

	Monday	Tuesday	Wednesday	Thursday	Friday
Four Weeks to Go	Receipt of NLRB Decision; Supervisory Meeting	Speech to All Employees	Home Mailing	Handout; Home Mailing	Excelsior List Submitted; NLRB Conference; Bulletin Board Notice
Three Weeks to Go	Home Mailing	Bulletin Board Notice	Home Mailing	Handout	Handout
Two Weeks to Go	Bulletin Board Notice; Small Group Meetings; Home Mailing	Handout; Small Group Meetings	Small Group Meetings; Home Mailing	Small Group Meetings	Small Group Meetings; Home Mailing
Election Week	Bulletin Board Notice; Handout	Speech to All Employees; Home Mailing	Voting Demonstration & Sample Ballot Handout; Home Mailing	Dinner & Speech to All Employees	Election Day

Source:

Robert Lewis and William Krupman, Winning NLRB Elections: Management's Strategy and Preventive Programs, 2nd ed., (New York: Practising Law Institute, 1979).

References

[1] In *Telonic Instruments*, 173 NLRB 588 (1969), the NLRB established the principle that there is "nothing in *Excelsior* which would require the rule stated therein to be mechanically applied." The next year, in *Lobster House*, 186 NLRB 148 (1970), the NLRB further declared that "Generally, the Board will not set an election aside because of an insubstantial failure to comply with the *Excelsior* rule if the employer has not been grossly negligent and has acted in good faith." Thus, there is no hard and fast rule as to how complete a list must be to be judged compliant. In *LeMaster Steel Erectors*, 271 NLRB 1391 (1984), the NLRB decided that the omission of nine percent of the bargaining unit from the employer's list was not sufficient grounds to overturn the election. The most recent policy, articulated in *Woodman's Food Markets*, 332 NLRB 48 (2000), bases compliance on a number of factors, including the percentage of workers excluded, the margin of victory or defeat in the election, and the employer's good faith.

[2] Steven Norwood, Strikebreaking and Intimidation: Mercenaries and Masculinity in Twentieth-Century America (Chapel Hill: University of North Carolina Press, 2002) 247.

[3] Sixty-Ninth Annual Report of the National Labor Relations Board, for the Fiscal Year ended September 30, 2004. (Washington: NLRB, 2005) 10. Page 9 of this report shows that nearly 40 percent of the charges of employer illegality were found by NLRB investigators to have merit.

[4] See discussion following in this article on illegal firing, suspension, and demotion of union supporters; also see Appendix, Table 4.

[5] Sixty-Ninth Annual Report of the National Labor Relations Board, Appendix Table A, 209-210. Backpay was distributed to 30,784 individuals in FY 2004. Using the conservative methodology developed by Robert Lalonde (Robert LaLonde and Bernard Meltzer, "Hard Times for Unions: Another Look at the Significance of Employer Illegalities," *University of Chicago Law Review*, Summer 1991: 953-1014) I estimate that 50 percent of these cases occurred in the context of organizing and election campaigns.

[6] Sixty-Ninth Annual Report of the National Labor Relations Board, Table 11, shows that FY04 saw 2,240 NLRB-sponsored elections covering 159,806 eligible voters. However, the same year saw a total of 3,573 petitions for election filed. Since illegal firings or suspensions may have taken place during organizing drives that were stopped short of election, I have projected a higher number of potential eligible voters, based on the ratio of petitions filed to elections held, and have used the higher number of eligible voters as an outside estimate for the ratio of eligible voters to illegal firings.

[7] Federal Election Commission, Enforcement Profile.(Washington: FEC, n.d.).

[8] For instance, National Right to Work Foundation president Mark Mix has asserted that "The NLRA has established straightforward elections as the 'gold standard' in determining whether employees want a union." Mark Mix, "Why Not Liberate the American Worker," *The Wall Street Journal*, 31 Dec. 2005.

[9] Quote is from letter from Marna Borgstrom to SEIU representative Lawrence Fox, 16 Apr. 2007, provided to the author by Yale-New Haven Hospital. The arbitrator's decision is found in *Yale-New Haven Hospital and New England Health Care Employees, District 1199, SEIU*, Index No. 054, 13 Dec. 2006. For further background on this issue, see Casey Miner, "How to Bust a Union: Yale-New Haven Hospital's handbook for worker intimidation," *New Haven Advocate*, 15 Mar. 2007.

[10] James Rundle, "Winning Hearts and Minds in the Era of Employee Involvement Programs," in Bronfebrenner, et al. eds., *Organizing to Win: New Research on Union Strategies*, (Ithaca, NY: Cornell University Press, 1998) 213-231; Nik Theodore, *Undermining the Right to Organize: Employer Behavior During Union Representation Campaigns* (Washington: American Rights at Work, 2005)

[11] Statement of Modern Management Methods principle Herb Melnick in testimony before Congress, 1979, reported in Robert Smith, From Blackjacks to Briefcases: A History of Commercialized Strikebreaking and Unionbusting in the United States (Athens, OH: Ohio University Press, 2003) 102.

[12] Martin Jay Levitt, Confessions of a Union Buster (New York: Crown Publishers, 1993) 5, 72; Rundle 1998; Kate Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union*

Organizing, U.S. Trade Deficit Review Commission (Washington: 2000). The figures on use of consultants do not include those employers who rely on in-house union-avoidance specialists — either in the legal or HR department — that employ the same techniques as independent consultants.

[13] The firm is also one of the most experienced in the country, having participated in over 3,000 NLRB elections (Louis Jackson and Robert Lewis, Winning NLRB Elections: Avoiding Unionization Through Preventive Employee Relations Programs, 4th ed (Chicago: CCH, 1997) v.

[14] Jackson Lewis, Winning NLRB Elections: Management's Strategy and Preventive Programs (New York Practising Law Institute, 1972); Robert Lewis and William Krupman, Winning NLRB Elections: Management's Strategy and Preventive Programs, 2nd ed. (New York: Practising Law Institute, 1979); Jackson and Lewis, Winning NLRB Elections, 4th ed. (1997).

[15] Alfred T. DeMaria, How Management Wins Union Organizing Campaigns (New Jersey: Prentice-Hall, 1980); Alfred T. DeMaria, How Management Wins Union Organizing Campaigns, Revised ed. (New York: Executive Enterprises, Inc., 1986).

[16] Client list for Gene Levine Associates available at <www.genelevine.com/clientele.htm>.

[17] National Association of Manufacturers and Council for a Union-Free Environment, *Remaining Union-Free: A Supervisor's Guide* (Washington: NAM and CUE, 2004); *Keep the Card Count Down* (Washington: NAM and CUE, 1985). CUE was formed as an educational subsidiary of NAM but has been an independent organization since 1994.

[18] The field of anti-union consulting is widely acknowledged to have been pioneered in the 1940s by former NLRB member Nathan Shefferman. Among Shefferman's most talented protégés was Jack Sheridan, who eventually formed his own firm. Levitt worked for Sheridan, and later for a breakaway firm created by three of Sheridan's top consultants, who constituted themselves as Modern Management Methods. MMM became one of the most prominent anti-union firms in the late 1970s, running nearly 700 counter-organizing campaigns in one three-year period. For a discussion of this history, see Levitt 37-53, 149-151.

[19] U.S. Department of Labor, Office of Labor-Management Standards, "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act; Notice," *Federal Register*, 66.8 (2001).

[20] For instance, U.S. Chamber of Commerce representative Charles Cohen has argued that a system of union recognition based on majority sign-up "would deprive employees of the fundamental right to determine the important question of union representation by casting their vote in a Board-supervised secret ballot election." Subcommittee on Labor, Health and Human Services, and Education, Committee on Appropriations, U.S. Senate, Statement of the U.S. Chamber of Commerce by Charles Cohen, 108th Cong., 2nd Sess. (Washington: GPO, 16 July 2004).

[21] The Burke Group, "Union Free Advantage," accessed 11 Aug. 2005 <http://www.tbglabor.com/services>.

[22] Jackson, Lewis 87. In 2005, the Jackson Lewis website advertised a seminar on "How To Stay Union-Free In the 21st Century," which included a session entitled "Pre-Petition: How to Lawfully and Effectively Shut Down Organizing Once It Starts," accessed 7 July 2005 <www.eeiconferences.com/unionagenda>.

[23] For instance, notorious New York attorney Alfred DeMaria insists that "employers should be prepared to nip union-card signing in the bud." "From the Editor: Speech to Employees at the First Sign of Union Activity," *Management Report for Nonunion Organizations* 27.3 (2004): 4. The newsletter edited by DeMaria regularly includes articles offering advice for how management can prevent a union collecting the 30 percent of cards necessary to trigger an election.

[24] Gene Levine, Complete Union Avoidance (Delray Beach, FL: Gene Levine Associates, 2005) 2; Similarly, John Kilgour Preventive Labor Relations (New York: American Management Association, 1981) 3, notes that "the union organizing drive .... Is something to be prevented if at all possible," and Kilgour 289 jokes that "there is no ready-made prescription for the best day and time to conduct a representation election (except perhaps 'never')."

[25] For example, The Burke Group, "Union Free Advantage," accessed 11 Aug. 2005 <http://www.tbglabor.com/services>, boasts on its web page that its has been "successful in helping business avoid union petitions more than 70 times by working a counter campaign before a petition is filed." As far back as 1984, anti-union consultants Human Resources and Profits Associates, Inc., boasted in its promotional materials of a "99% win rate." Of the firm's 900-plus election campaigns, more than half never actually got to an election because the union was forced to withdraw its petition. The firm's flyer is cited in Smith 105.

[26] Kilgour 60. The Burke Group similarly notes that "The unit determination decision often has a critical impact on the result of a union election." The Jackson Lewis seminar (2005) likewise offers a session that covers "how to have the election held in the voting unit you want and not the unit the union wants."

[27] Kilgour 71. Emphasis in original.

[28] Levitt 13.

[29] West Coast Industrial Relations Association, the nation's second largest anti-union firm in the 1970s and 1980s, advised one client to "pack the unit by hiring several permanent part time employees who are certain company votes." Leonard C. Scott, of WCIRA, confidential memorandum to Ted Vieweg, BLK Steel Company, 25 Oct. 1979. Cited in John Logan, "Consultants, Lawyers, and the 'Union Free' Movement in the USA Since the 1970s," *Industrial Relations Journal* 33:3 (2002): 201.

[30] Kilgour 73 notes that "the company has control over how much supervisory authority is to be delegated to ... quasi-supervisory personnel. Thus it can increase or decrease the number of supervisors to be excluded from the bargaining unit within a fairly wide range." Levitt 174 recalled a nursing home campaign in which he used such methods to get all of the employer's Licensed Practical Nurses defined as supervisors and excluded from the bargaining unit, even though in reality "there was little to suggest that LPNs should be considered part of management."

[31] "Modern Management seminar," Herbert Melnick, 1979, reported in Logan, "Consultants," 201.

[32] The combination of gerrymandering and preventing union organizers from setting foot in the workplace leaves potential organizers unable to even accurately guess at the contours of the electorate. Kilgour 43, 190, stresses that "one important reason for restricting the union's access to the workplace is to hinder it from identifying the appropriate bargaining unit," noting that "if a union organizes the employees within what it considers the appropriate unit and the employer can convince the NLRB that that unit is inappropriate, the union's campaign may end then and there." Thus, in some cases management's power may include the ability to *secretly* gerrymander the electorate, leading union organizers and pro-union workers into a campaign that is fundamentally misguided in ways that will not become evident until it is too late.

[33] These suggestions are all from Kilgour 57-58.

[34] "Preventive Tactics," *Management Report* 24.6 (2001): 5.

[35] Kilgour 114.

[36] Charles Hughes, Making Unions Unnecessary (New York: John Wiley & Sons, Inc., 1990) 11.

[37] Smith 108.

[38] Kilgour 116-117.

[39] Kilgour 117-118.

[40] Kilgour 235.

[41] Kilgour 223. Kilgour 215 also recommends the use of employee opinion surveys in order to detect the types of dissatisfaction that may reveal imminent efforts at unionization.

[42] Lewis and Krupman, Winning NLRB Elections, 2nd ed., 89.

[43] Levine 21.

[44] Levine 9 stresses that it is critical for supervisors to be trained and prepared to "[begin] the employer's campaign as soon as labor activity has been detected."

[45] Levine 1.

[46] A typical example comes from the Sodexho Marriot corporation, whose management anti-union training materials include the instructions that, when employees are considering signing cards, each supervisor should convey to his underlings that "in his opinion the employee does not need a union and accordingly, should not ... even express any interest in the union to the extent of signing 'interest cards' or going to meetings." Sodexho Marriott Services, "Progressive Approach to Labor: Union Avoidance," *Sodexho Marriott Labor Relations Training*, 1998: 9; originally accessed from Colorado College Fair Labor at www.ccfairlabor.com on 4 June 2004, now on file at American Rights at Work. Levine 9 also recommends supervisors meeting one-on-one with each of their subordinates as a core element of a "Don't Sign a Card" campaign.

[47] Levine 9.

[48] Norwood 240. The company was C.R. Bard of Glens Falls, NY.

[49] The Dunlop Commission on the Future of Worker-Management Relations, *Fact Finding Report* (1994) 67 notes that the number of signed authorization cards at the time a petition is filed "usually includes close to two-thirds of the workforce." Lance Compa, *Un fair Advantage*, Human Rights Watch, 2000, puts the figure at between 60-70 percent. Bronfenbrenner, *Uneasy Terrain*, likewise records two-thirds as the average in the elections she studied. Levitt 12 writes about a campaign that started with 80 percent of employees signed on union cards and ended in a vote against unionization.

[50] Levine 12 warns that management must stop employees even from trying to copy down a list of names from a company's time cards. Kilgour 58 suggests that "Christmas card lists, call-in lists, and home telephone directories should be discouraged or prohibited."On page 200 Kilgour warns that "of great aid to the union in conducting a program of home visits is an early and accurate mailing list ... A ready-made list saves the union a great deal of time constructing such information from the memories of union supporters and phone books."

[51] Lewis and Krupman 180.

[52] Dunlop Commission,*Reportand Recommendations*, 47.

[53] For many decades, employers were only required to provide an employee's first initial and last name. In *Laidlaw Waste Systems*, 321 NLRB 760 (1996), the Board changed its policy to require employees' full first and last names.

[54] The NLRB's current policy is that elections will be overturned based on consideration of a number of factors, including the number and percentage of wrong or missing addresses, the margin of victory or defeat in the election, and the employer's good faith in assembling the list. See *Woodman's Food Markets*, 332 NLRB 48 (2000). It is worth noting that, while employer bad faith may be reasonable grounds for overturning an election, good faith should not logically be sufficient to consider the election fair. Even when the employer has acted in good faith — for instance, if the employer itself has incorrect addresses for a number of employees — the result is still that managers may contact these employees every day in the workplace (with or without a correct address), while the union is effectively blocked off from communicating with these individuals.

[55] Lewis and Krupman 162, suggest that when the employer releases its list, it send a notice to employees letting them know this has happened, and stating that "We did not want to turn over this information, which we have always regarded as confidential. We did so only in response to a written instruction from the NLRB. We regret this invasion of your privacy and any annoyance the union may cause you as a result."

[56] Levitt 25. Since 1996, employers have been required to provide full first and last names for employees.

[57] Kilgour 64, recommends that employers research the finances of the union their workers are seeking to join, noting that "if their resources are limited, they can ill-afford an extended effort."

[58] On the absence of reliable data, see U.S. Department of Labor, Office of Labor-Management Standards, "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act; Notice," *Federal Register*, 66.8 (2001). In 1979, a Congressional committee called for more comprehensive reporting of expenditures on anti-union consultants. Indeed, in the Carter administration's last year, the Labor Department opened more than 300 new investigations into management and consultant anti-union activities. However, there were nearly all closed by the incoming Reagan administration, which in its first year called for spending only three percent of the Labor Department's enforcement resources on monitoring the management side of labor reporting requirements (reported in Smith 115-117). In January 2001, the Clinton administration announced new, more stringent reporting requirements for union-avoidance consultants; this policy was quickly undone by the incoming Bush administration. The Dunlop Commission's *Fact Finding Report* 72, notes simply that "firms spend considerable internal resources and often hire management consulting firms to defeat unions in organizing campaigns at a sizable cost."

[59] All figures have been adjusted to 2004 dollars using the CPI-U. Levitt 53 reports being billed out at $250 per day as a starting consultant in 1970, and notes that his firm assigned one consultant for every 100 employees in a client company. I have assumed that an average campaign at this time lasted 50 days, based on the Dunlop Commission's *Fact Finding Report* 67, noting that in the 1970s and 1980s the median time from petition to election was 50 days. I have assumed a modest additional $1,000 monthly expense for consultants, to cover lodging, food, and transportation (Levitt notes that his $250/day fee did not include any expenses). Bureau of National Affairs, *Labor Relations Consultants: Issues, Trends, and Controversies* (Washington: BNA, 1985) estimated that in 1976 employers spent $500 per employee on outside consultants (cited in Kaufman and Stephan 5). Levitt 5 states that "today" consultants bill $1,000-$1,500 per day. I used the figure $1,250 and assumed a 50-day campaign, $1,000 in monthly additional expenses, and the same 1/100 ratio of consultants to employees, and used 1992 as the year designated by "today." Kaufman and Stephan 5 report that based on their interviews with management attorneys, a "small-medium sized firm with one attorney" spends $20,000-$30,000 per campaign; that an "all out campaign" can cost $100,000; and that a large, multi-facility firm might spend $1 million on a campaign. I estimated that these figures together grouped around the level of $1,000 per employee. This is the roughest of the estimates provided here. Levine reproduces an article he authored in the July 1982 issue of *Bobbin Magazine*, titled "Look for the Union Label." The article cites "a study by Michigan State University" which found that a "small" company "might spend over $1,250 per employee for a typical NLRB election." Levitt 5 estimates that, including both consultants and attorneys, union avoidance had become a "$1 billion-plus industry." I took the number of employees in bargaining units with elections in 1990 (reported in Dunlop Commission *Fact Finding Report* 77), inflated it to account for all employees in bargaining units with petitions filed (assuming 40 percent of petitions never lead to elections), and divided the $1 billion by this number.

[60] Levitt 171 reports that, in one campaign, he was paid $15,000 per month over a period of 18 months, in order to defeat organizing efforts in one 250-employee nursing home. Levitt 151-52 states when employees sought to organize at Rockwell International, for instance, the defense contractor spent $1 million in direct anti-union expenses, and up to $3 million in total expenses.

[61] *Enersys Delaware, Inc., v. Jackson Lewis LLP, et. al.*, Complaint, Civil Action 2004-CP-23, Court of Common Pleas, 13th Jud. Cir., filed 23 Apr. 2004.

[62] Kilgour 53. Kilgour 54 notes that the greatest danger comes not from outside organizers, but from "the employee already on the payroll who, for one reason or another, is promoting the union from within. This is the most serious form of union presence to the employer."

[63] Kilgour 54 goes so far as to recommend access rules for unionized employees of supplier or partner companies, noting that "the threat will be posed by comparisons nonunion employees make with the compensation and conditions of union employees." Kilgour 57 notes that access and solicitation rules are mutually reinforcing. "Anything the company can do to reduce the easy access of the outside union organizer, the unionized employee of another firm, or the inside employee union supporter to nonunion employees will reinforced the effectiveness of a no-solicitation rule." The Sodexho corporation's union avoidance manual urges local managers to adopt early rules banning union access, noting that "the

ability of an employer to restrict a union's access to its premises depends greatly on whether policies have been implemented which prohibit outsiders, including non-employee union organizers, access to the premises ... A rule implemented at the onset of an organizing campaign, while not per se invalid, may be considered suspect;" Sodexho Marriott Services, "Progressive Approach to Labor: Union Avoidance," 13, emphasis in original. The Dunlop Commission, *Report and Recommendations*, 47, commenting on the practice of banning organizers from parking lots, complains that "it runs counter to our democratic traditions to bar advocates of independent union representation from these areas."

[64] No-distribution and no-solicitation rules are recommended, among other places, by Lewis and Krupman 31 "to restrict literature distribution in working areas, employers should adopt a no-distribution rule. It may state: 'Distribution of advertising material, handbills, or other literature in working areas of this plant is prohibited at any time;'" *Management Report* 24.3 (2001): 8."A good 'no solicitation/no distribution' rule is essential for controlling union organizing activity on the employer's premises," and in 25.5 (2002): 7, "The right no-solicitation policy can help employers prevent unionization by confiding organizing activities only to certain times." In the Sodexho union avoidance manual, "Insist that any solicitation of membership or discussion of union affairs be conducted outside of employee working time.;" Sodexho Marriott Services, "Progressive Approach to Labor: Union Avoidance."

[65] "From the Editor: The Use of Videos in the Employer Campaign," *Management Report* 28.8 (2005): 3. Likewise, *Management Report* points out that "management has its crucial advantage over the union in its ability to distribute campaign information for employees throughout the workday;" "The Written Campaign and the Importance of Supervisors," *Management Report* 27.10 (2004): 6.

[66] Rundle 219.

[67] "Checklist for "Written Communications During an NLRB Election Campaign,"*Management Report* 27,.11 (2004): 5. It is illegal for management to hand out "Vote No" stickers, buttons or clothing to employees, since employees are considered to be forced into a choice of whether or not to wear the item in question, and this is considered a form of illegal interrogation. However, management is free to make such items available — sitting on a display table in the company break room, for instance — for any employee who chooses to pick one up.

[68] Lewis and Krupman, Ch. 11.

[69] The Sodexho union avoidance manual includes a similar communications strategy, including mandatory small group meetings, anti-union speeches and videos, supervisors giving anti-union messages in one-on-one discussions with their subordinates, payroll stuffers, and letters sent to employees' homes. Sodexho Marriott Services, "Progressive Approach to Labor: Union Avoidance," 2.

[70] Levine 8 notes that the NLRB "usually allows employers the right to allow employee postings **only with** prior management permission. Thus, as a general principle, employers may have prior approval rules for bulletin board notices, but they may use such a rule to disapprove the posting of a union message," emphasis in original.

[71] Ibid. Emphasis in original. In Chapter 7 Levine recommends a similar policy for internal email communications. In *Fleming Cos., Inc. v. NLRB*, 173 LRRM 2621 (7th Cir. 2003), the court found that employers were within their rights to maintain a policy that allowed personal notices (such as items for sale) to go on bulletin boards, while banning union information. This case is discussed in "Court rejects Board Rule on Union Access to Employer's Bulletin Boards," *Management Report* 27. 2 (2004): 1.

[72] "Campaign Workshop," *Management Report* 26.5 (2003): 4, includes a subsection on the "Payroll Stuffer," noting that "one of the many opportunities management has to communicate its opposition to unionization is with payroll stuffers. *Management Report* 27.11 (2004): 5, includes "pay envelope stuffers" under the "Checklist for Written Communications During an NLRB Election Campaign." Sodexho Marriott Services, "Progressive Approach to Labor: Union Avoidance," 2, includes "payroll stuffers" among the types of literature to be distributed to employees. Kilgour 289 actually recommends schedule the election to be on or near a pay day partly so that employers can take advantage of "the inclusion of a pro-company message in the employee's pay envelope."

[73] Lewis and Krupman 187 suggest that "some employers prefer to dramatize the cost of union membership by a deduction from the paycheck equivalent to the amount of monthly dues. The deducted amount is placed in a separate envelope and handed out with the paycheck. Appropriate comments may be printed or typed on the envelope, such as 'This envelope contains $10.00 of your money, the minimum amount the union would take out of your paycheck every month.'"

[74] "From the Editor: The Use of Videos in the Employer Campaign," *Management Report* 28.8 (2005): 3. *Management Report* notes that "the showing of anti-union videotapes has become so prevalent during NLRB campaigns;" "Must Employer Allow Pro-Union Employees to Show Videotapes on Employer TV Screens?" *Management Report* 24.4 (2001): 7.

[75] Cingranelli, 2004: 13-14, notes that unions can rarely gather a large group of employees together in one place, not only because they cannot compel attendance but because many low-wage workers do not own their own cars, so that attending meetings anyplace but at the workplace itself is difficult.

[76] Levitt 255. Levitt 30 describes his standard strategy for building momentum toward election day: "I knew that many workers would decide how to vote in the last couple of weeks, so I wanted the words *Vote No* everywhere the men looked. Typically, the way I did that was through such election campaign paraphernalia as T-shirts, hats, buttons, and patches.... The ubiquitous Vote No message ... had a powerful psychological effect on the voters."

[77] Richard Hurd and Joseph Uehlein, *The Employer Assault on the Legal Right to Organize* (Washington: AFL-CIO, Industrial Union Department, 1994) 63. The NLRB ruled in this case that the employer's posters did not constitute an illegal threat of layoffs. The union lost the election 275-222, despite a majority of employees having originally signed union authorization cards.

[78]On this point, see Masson 2004.

[79] "Question and Answer: Why Not Debate the Union?" *Management Report* 26 8 (2003): 8. DeMaria's The Supervisor's Handbook on Maintaing Non-Union Status (New York: Executive Enterprises, Inc., 1986) 53-54 likewise urges that managers "avoid debates on the pro's and con's of unions in general," noting the danger that workers may have "unanswerable questions" and advising that "you're going to end up looking silly if you get into a debate with them. Similarly, Lewis and Krupman 76 explain that "In large group meetings employers usually find it undesirable to answer questions from the floor. Experience shows that it is best to state that questions will be answered through individual conversations following the talk. The employer can thereby avoid the embarrassment of being forced to make an unprepared response to a 'shop lawyer's' provocative, and often union-inspired, questions .... Occasionally, a union representative will request an opportunity to reply to the employer's talk or to 'debate the issues.' As a general rule such requests should be rejected."

[80] It is telling that, outside of labor law, the federal courts have recognized employees' right to protection against captive audience communications in other aspects of their work lives. For instance, in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Suppl. 1486 (M.D. Fla. 1991), the court ruled that sexist speech created a hostile work environment for female employees because they were a captive audience, and therefore the speech must be restricted. Thus, there is precedent for restricting workplace and employer speech under federal law, without unduly restricting employers' first amendment rights — but while this principle has been enacted in other areas of the employment relationship, it has not been applied to federal labor law. On this point generally, see Masson 2004.

[81] For example, Kilgour 115 notes that "while it is illegal to take any direct action against pro-union employees, it may be desirable to restrict their effectiveness."

[82] Statement of Judy Ray, 1 Jan. 1994, in Dunlop Commission, *Fact Finding Report*, Exhibit III-8: 84.

[83] Statement of Mrs. Florence Hill, who worked at Highland Yarn Mills in High Point, NC, 1 Jan. 1994, in Dunlop Commission, *Fact Finding Report*, Exhibit III-8: 84.

[84] The NLRB ruled that this was permissible speech. See "Question and Answer: 'The Enemy Within,'" *Management Report* 26.5 (2003): 8.

[85] Quoted in *Management Report* 24.4 (2001): 4.

[86] Larry Cohen and Richard Hurd, "Fear, Conflict and Union Organizing," Organizing To Win: New Research on Union Strategies, Bronfenbrenner, et al. (Ithaca, NY: Cornell University Press, 1998) 184. This campaign started off with 62 of 83 employees signing a union petition and ended up with a 36-31 vote against the union.

[87] In *Fern Terrace Lodge*, 297 NLRB 8 (1989), the NLRB found this speech to be permissible language. The case is discussed in "From the Editor: Proper and Improper Communications," *Management Report*. 27.6 (2004): 3.

[88] In "From the Editor: Learning Lesson (Good and Bad) From a Real-Life Campaign," *Management Report* 24.4 (2001): 3-5, DeMaria describes the "themes commonly used by employers" as including "threat to remove jobs," "disparaging the moral character of union supporters," "inevitability of strikes," and "threat to reduce wages." "Campaign Threat of Plant Closure," *Management Report* 24.4 (2001): 5 notes that "predicting the future of a business if it becomes subject to an obligation to bargain with the union, is a recurring campaign theme."

[89] Thomas Jefferson, "Notes on Virginia" (1785), reprinted in Kenneth M. Dolbeare, ed., American Political Thought (Chatham, NJ: Chatham House, 1989) 182.

[90] Since it is illegal, employers generally avoid using the word "futile" when attacking unionization. However, this doesn't stop them from talking about futility as a communication goal in internal communications. The Sodexho corporation's manual for managers, for instance, suggests a list of "potential disadvantages of union membership" for supervisors to convey to their subordinates, including "Futility of Bargaining Process." Sodexho Marriott Services, "Progressive Approach to Labor: Union Avoidance,"1.

[91] "Mock Negotiations: An Excellent Campaign Tactic,"*Management Report* 23.2 (2000): 5. In *Palm Garden of North Miami*, 327 NLRB 195 (1999), the NLRB ruled this tactic illegal. However, 6th Circuit Court of Appeals overturned the NLRB and found that the skit was within the employer's legal rights.

[92] This statement was from the owner of Lundy Packing, in Clinton, NC, cited in Cohen and Hurd 183.

[93] Statement is from owner of Home Style Foods in Hamtrack, MI, quoted in Hurd and Uehlein 63. In a memo to employees of Crown Cork and Seal, reproduced in Hurd and Uehlein 65, employees were warned well before the vote that "if there is an election and the [union] win[s], the company would challenge the results.... This means that the company would nullify the need to negotiate with the [union];" Hurd and Uehlein 7 states "If the [union] does not like the company's refusal to negotiate, it would have to file ULP charges — the company would appeal to the NLRB and the court of appeals. This process could take two years or more."

[94] Levine , "Supervisor's Guide to Union Avoidance,"(2005) Ch. 2: 2. Emphasis in original.

[95] Ibid 16.

[96] Levine's first claim is a direct contradiction of the law. Once employees vote to create a union, even before a first contract is signed, employers are prohibited by law from making any unilateral changes in the terms and conditions of work — including acts of individual discipline. Thus, following a vote to create a union, employers are banned from disciplining or firing individual employees without first negotiating with the union.

[97] "From the Editor,"*Management Report* 27.3 (2004): 3-4.

[98] "Sample 25-Hour Speech,"*Management Report* 27.11 (2004): 6.

[99] Lawrence Mishel and Matthew Walters, How Unions Help All Workers (Washington: Economic Policy Institute, 2003). Mishel and Walters's analysis is based on a series of studies of the union premium, drawing primarily on data from the Current Population Survey of the U.S. Census Bureau.

[100] "Inevitability of Strikes," *Management Report* 24.4 (2001): 5, notes that "the strike theme is a common one in any union campaign." The segue between futility and strikes can be seen, among other places,

in Levine Ch. 8: 20, in an outline of a campaign strategy titled "The Only Guarantee In the Collective Bargaining Process is Union Dues." Levine suggests companies explain to their employees that "as you know, during negotiations, wages and benefits may go up but they can also go down depending on how good a negotiator you are;" supervisors are then urged to remind their subordinates that "'The truth is that a union has only two things it can guarantee its members — the right to economic strike and making its members pay dues and assessments.'"

[101] *Management Report* 27.1 (2004): 4, notes that "One of the most effective arguments an employer has against unionization is the possibility that where there is a union there can be a strike, which can have devastating economic consequences for employees."

[102] "From the Editor: Communicating About the Threat of Strikes in the Event of Unionization," *Management Report* 25.5 (2002): 3.

[103] *Management Report* 24.9 (2001): 5.

[104] Cited in *Management Report* 24.4 (2001): 5. This statement is presented in the newsletter as a positive example of effective arguments.

[105] Levitt 17. DeMaria gives similar advice, counseling employers on how to stay within the letter of the law. "A couple of changes of words here," he explains, "substitution of one word for another word — you would get the absolute same message across, as powerful as it was before, with no risk of an unfair labor practice [charge]." Quoted in Kim Phillips-Fein, "A More Perfect Union Buster," *Mother Jones*, Sept.-Oct. 1998.

[106] Lewis and Krupman 72 cite *Lord Baltimore Press*, 145 NLRB 888, 44 LRRM 1068 (1964) as the basis for advising clients to frame their warning to employees in the following terms: "If a union imposes uncompetitive conditions on an employer, it can make it almost impossible for the company to secure enough sales to provide full and regular employment."

[107] "De-Unionization: A Report on a Recent Seminar by Francis T. Coleman," quoted in Logan (2002): 204.

[108] Both statements are provided by DeMaria in "From the Editor: Proper and Improper Communication," *Management Report* 27.6 (2004): 3. *Management Report* 27.10 (2004): 6 similarly provides a "Sample Opening Discussion With Employees in NLRB Campaign," to be delivered to employees by the CEO, that includes the warning that "the subject of whether or not to have a union is a very important one to me. It is also one that affects your future as well as mine and the future of our company."

[109] For instance, *Management Report* 27.10 (2004): 6 suggests a "Sample Opening Discussion With Employees in NLRB Campaign" that includes the following statement: "You should know now that even if the union were to get in, and I am certain it will not be voted in, it cannot force me to agree to anything that I am unwilling or unable to accept because I cannot afford it."

[110] Bronfenbrenner, *Uneasy Terrain*, 18, 52.

[111] NAM and CUE, *Remaining Union-Free* (2004) 3.

[112] *Management Report* 24.2 (2001): 8.

[113] *Management Report* 26.6, (2003): 7.

[114] "From the Editor: Speech to Employees at the First Sign of Union Activity," *Management Report* 27.3 (2004): 3. A nearly identical argument is made in "Discussing How the Union Spends Its Money," *Management Report* 28.8 (2005): 7.

[115] *Labor and Management Reporting and Disclosure Act*, section 501(a).

[116] Dunlop Commission, *Report and Recommendations*, 36.

[117] Bush first used this term to characterize his narrow win over Ronald Reagan in the 1980 Iowa Republican party caucuses. Cited in Mark Hatfield, Senate Historical Office, Vice Presidents of the United States, 1789-1993 (Washington: GPO, 1997) 529-538.

[118] Levitt 13. Similarly, Kilgour 192-93, 260, notes that "It is important to the union that its efforts peak at the time of the election. Should the union campaign peak out too early, it will start to lose support due to a loss of interest or because of the management countercampaign .... Anything the employer can do to throw the union's timing off will work to the company's advantage .... the [most] important way to throw a union's timing off is for the company to delay the election for as long as is necessary."

[119] Kilgour 259 notes that longer elections help whittle away union support. "Some [loss of union support] may be due to the employees becoming discouraged as the elections is postponed. And some may be due to the replacement of union supporters by more carefully selected nonunion employees as a result of normal turnover."

[120] *UnionkNOw*, Sept. 2001, quoted in Logan "The Long, Slow Death of Workplace Democracy at the Chinese Daily News," (American Rights at Work 2003): 8, fn. 28.

[121] Levitt 175 notes that "It was a bread-and-butter delay tactic to argue that the labor board had no business overseeing union elections at a company for some obscure legal reason. But the stratagem was no less effective for its ordinariness. As long as the NLRB went on debating and deliberating on that issue, the union would not get the Excelsior list, making it hard from them to contact all the potential voters, and no election date would be set. All the while, we would have the run of the place."

[122] Kilgour 261.

[123] In 2002, for instance, EcoLab argued that the International Association of Machinists and Aerospace Workers (IAMAW) was not a "labor organization," despite the union's having been recognized in employer contracts going back more than one hundred years. The NLRB actually held a hearing on this question, ultimately concluding that the IAMAW is, in fact, a labor organization, but delaying the election by one month in order to settle this issue. This case is discussed in Theodore 14.

[124] Kilgour 193. He stresses that challenging the bargaining unit definition may be useful even when the union ends up getting exactly the unit it proposed. In another case, he cites a bank that dragged out arguments over the bargaining unit definition for 13 months. In the end, "the union won its preferred unit, but by the time the elections were held ... it had long since lost its majority by attrition."

[125] Kilgour 270. For this reason, the Dunlop Commission *Report and Recommendations*, 41-42 notes that "many board hearings are held despite the absence of significant legal issues, simply because one of the parties seeks a tactical advantage." And calls for an end to frivolous election challenges as "pivotal to ... improving the representation process."

[126] Kilgour 261 reports that consent elections were 46.1% of all NLRB elections in 1962, and 7.3 percent in 1978. NLRB Election Report for October 2004 through March 2005 (Washington: NLRB, 2005) Table 1, reports that there were 1,076 total NLRB elections during this six-month period; 13 of these were consent elections.

[127] Quoted in *Pressure Hearings* 1, 196, reprinted in Smith 114. Kilgour, 260 likewise states that employers' "most powerful delaying tactic" is simply refusing to agree on a consent election; "this means that it will take longer for the NRLB to hold the election should the company wish to postpone it until it is better prepared." Lewis and Krupman 151-152, give the same advice.

[128] Levitt 58.

[129] Ibid.

[130] Cohen and Hurd 1998. The study is based on interviews with 320 NCR computer technicians. There had been both a history of anti-union communication from the company, and deunionization within NCR over the previous decades, as well as CWA organizing efforts ongoing. So by the time the campaigns happened in which these workers were interviewed, they'd already been operating in an atmosphere framed by efforts on both sides. Out of 1,500 customer engineers in the nine regions of NCR that had active union-affiliated employee associations, the authors drew a representative sample of 500, of whom 320 completed interviews.

[131] Cohen and Hurd 182. Case is *Teksid Aluminum* in Dickson, TN.

[132] Cohen and Hurd 190. 39.4 percent gave this response.

[133] Cohen and Hurd 191.

[134] Under the Federal Election Commission Act, corporations are free to campaign to their "restricted class" of employees, comprising managers and supervisors, but are prohibited from engaging in any communication to rank-and-file employees that includes express advocacy for a specific candidate or party (2 USC 441b(b)(2)(A); 11 CFR 114.3, 114.4). According to the FEC, "express advocacy" can be either an explicit message to vote for or against a given candidate, or a message that doesn't use such explicit language but that "can only be interpreted by a 'reasonable person' as advocating the election or defeat of one or more clearly identified candidates;" Federal Election Commission, Campaign Guide for Corporations and Labor Organizations (Washington: GPO, 2001) 31. If this standard were applied to NLRB elections, employers would not only be banned from urging workers to "Vote No," but also prohibited from many of the most common campaign themes such as "a union would be bad for our company," "we are committed to operating union-free," or "unions lead to many costs and few benefits."

[135] For example, Bronfenbrenner, "Uneasy Terrain" 26, quotes from an "Employee Information Bulletin" published by the Daiken Clutch Corporation during an election campaign. The company answered the question of why supervisors were telling workers that unions were bad by asserting that "even the labor law permits constitutional free speech and personal expression by managers and supervisors."

[136] The problem of how to deal with pro-union supervisors has long been recognized by management consultants. See, for example, Kilgour 223; and Lewis and Krupman 88. One Chamber of Commerce manual reminds managers that it is "not unlawful for an employer to discipline or terminate a supervisor who refuses to follow the employer's instructions to oppose unions" (cited in Logan, "Consultants" (2002) 202). Union avoidance guru Charles Hughes suggests that if a supervisor won't fully commit to the anti-union campaign, upper management should "get him a job with a competitor." (cited in Logan "Consultants" (2002) 202). Levitt 52 recalls the veteran consultant who mentored him as being particularly ruthless on this score: "when Nick ran a counterorganizing drive, he made sure supervisors went home wondering if they would have a job in the morning." Levitt 56 recalls confronting a supermarket manager who was secretly sympathetic to the union drive: "Gary, I hear you're fucking us ... It would sure be a shame if you lost your job at Super Value. You'd be pretty hard-pressed to find another one. Where are you going to go?"

[137] This area of law is articulated in *Southern Pride Catfish Corp.*, 331 NLRB No. 81 (2000), and discussed in "Campaign Workshop: Discharging Supervisors for Being Poor Campaigners," *Management Report* 24.8 (2001): 4.

[138] Levine Ch. 2: 13-14. DeMaria, Supervisor's Handbook, 43-44, uses a similarly Orwellian formulation in providing supervisors with an outline to "Your Right of Free Speech." "You have the full right to campaign on behalf of your company," DeMaria explains. "You have a perfect right to express your opinions about the union that's trying to organize your plant... **You can and must** tell your employees why a union is not necessary in your plant." Emphasis in original. DeMaria goes on to advise supervisors that they "are free to talk to [subordinates] about the company, the union, your own opinions and views. You can ask them not to sign authorization cards; you can tell them why you think they should not vote for the union."

[139] For example, Levine Ch. 8: 5 writes that "the most effective method for gaining the support of employees is one-on-one, eyeball-to-eyeball conversations between supervisors and employees." Lewis and Krupman 95 note that "face to face communications between supervisors and employees" are key to management's efforts. "If instructed properly, trained supervisors can be the most effective means of lawfully influencing employee attitudes." DeMaria, Supervisor's Handbook, 37, states that "the most important factor influencing the individual's choice of 'Union' or 'Non-Union' is his supervision — how well his supervisor communicates the company's views during the organizing campaign." *Management Report* 27.1 (2004): 7, states that "the success of union prevention depends greatly on the ability of supervisors to influence their employees." Bruce Kaufman and Paula Stephan, "The Role of

Management Attorneys in Union Organizing Campaigns," *Journal of Labor Research* 16.4 (1995): 8, reported that the management attorneys they interviewed believed that "effectively marshalling the cooperation and support of the supervisors was the single most critical ingredient to defeating the union." As one of management attorneys concluded, "without [supervisors'] support, the employer's chance of victory is substantially reduced" (Kaufman and Stephan 4).

[140] Levitt 10 explains why he used supervisors rather than upper management as the "front line" of anti-union campaigns: "the words and the warnings would have to come from people they worked with every day ... from the people they counted on for that good review and that weekly paycheck."

[141] DeMaria, "From the Editor: Proper and Improper Communication," *Management Report* 27.6 (2004): 3, notes that it is legal for managers to warn subordinates that a union "could hamper the employees' personal relations with the company."

[142] Logan, "Consultants" (2002) 202 cites Cornfield and Canak (2000) as describing the role of supervisors as "precinct captains," with 10-20 assigned employees and responsibility for daily one-on-one conversations. Norwood 239 reports that an average employee may be confronted with up to 30 anti-union conversations with his or her personal supervisor in the course of a typical campaign.

[143] See, for instance, DeMaria, Supervisor's Handbook.

[144] Levine Ch. 8: 5.

[145] DeMaria, Supervisor's Handbook 3, explains that supervisors must learn to "properly answer [employees'] questions in ways that do not amount to unfair labor practices and yet keep their persuasive force." Levitt 14 notes that he had letters distributed twice a week in one campaign; 96 in a more intensive campaign he had managers distributed 2-3 letters per week; DeMaria, Supervisor's Handbook, describes a "daily dialogue" on union issues between supervisors and their subordinates. Levitt 191, describes the intensity of this process, sending supervisors into the workplace "complete with the memorized explanations and probing questions and relentless follow-up." Those who oversaw particularly active union supporters were forced into an even heavier schedule of painfully intense confrontations with their subordinates — over and over again, often torturing both supervisor and supervised, until the worker was so stressed and beaten down as to be ineffective. In extreme cases, supervisors who were sympathetic to the union cause — but whose own job security had been made dependent on convincing their underlings to abandon it — begged their subordinates to vote against it in order to save the supervisor's own job. Levitt 24 recalls foremen who would "approach workers and say 'Hey, I know you need this union, but please don't vote for it. If the union wins, that's the end of me. You and me are like brothers, and I just couldn't go on."

[146] "The Written Campaign and the Importance of Supervisors,"*Management Report* 27.10 (2004): 6-7. Levitt 26 likewise explains that it is too easy for workers to give a noncommittal response to questions like "what do you think" about a given leaflet. Instead, he trained supervisors to ask more pointed questions — such as 'Hey, I didn't know unions could fine their members and take people to trial, did you?' — because these were more likely to force a revealing response from employees.

[147] Levine Ch. 8 states that "supervisors should be able to evaluate the union sympathies of each of their employees as a result of the one-on-one conversations." Levitt 24 describes his practice where "at the end of each week the [management] team met ... to chart out progress [and] tally up the growing number of potential anti-union votes ..."

[148] Levitt 21. Similar accounts are common among other management-side practitioners. One management attorney told Kaufman and Stephan 11, fn. 4, about "a campaign at a large multi-plant utility where eight attorneys/consultants compiled a book with a detailed analysis of the likely voting behavior of each employee in the election unit." Smith 112 recalls a campaign run by the West Coast Industrial Relations Association in which consultants had supervisors compile a list of all employees supporting or sympathetic to unionization. *Management Report* 23.2 (2000): 6, notes that "rather than asking employees directly, which is unlawful, the employer asks supervisors for their opinions on how employees are likely to vote."

[149] Quote is from Levitt 138. Levitt. 141 reports that "I learned how the purportedly anonymous poll could be designed and administered in order to allow the employer to identify, if not the individuals responsible for planting the alleged pro-union sentiments within the work force, then certainly the departments in which the culprits worked." Levine, Appendix A, likewise provides a model "Confidential Employee Survey" in which workers identify their supervisor by name and then answer over 100 questions, including 18 questions about their specific experience with their supervisor. A variant of attitude surveys are group meetings in which employees are invited to voice their concerns and complaints over working conditions. Kaufman and Stephan 8 report that "the attorney will typically organize individual and group meetings with supervisors and foremen .... The purpose of the audit is to discover the issues driving the campaign, the extent of the union's support among the employees, who the activists are..."

[150] It is illegal for management to spy on workers' union activities or conversations. However, as with other labor law prohibitions, the Board has left many avenues for employers to collect such information within the confines of the law. DeMaria's Supervisor's Handbook 43, for instance, includes the warning that "you may not encourage those you supervise to ... reveal who is for or against the union," and cautions that they should "not imply, even in a joking manner, that you are receiving information about union activities .... these statements can be viewed by the NLRB as creating the impression of surveillance." It is telling that while DeMaria offers a number of warnings against creating the impression or evidence of surveillance, his discussion does not include a direct prohibition against surveillance itself, leaving the impression that surveillance may be desirable as long as it cannot be proven; DeMaria, Supervisor's Handbook, 2, stresses the "extremely important" role of supervisors as "the 'eyes and ears' of management." DeMaria, Supervisor's Handbook, 42 similarly informs supervisors that while it is illegal to spy on union meetings, they "may continue to visit local bars, pubs, restaurants and other establishments, even if a union meeting is taking place there, as long as you have had a frequent practice of attending these places" in the past. Levitt 181 recalls a campaign in which he "set to work establishing a network of rank-and-file employees who would serve as spies, informants, and saboteurs. Those so-called loyal employees would be called upon to lobby against the union, report on union meetings, hand over union literature to their bosses, tattle on their coworkers, help spread rumors..."

[151] It is illegal for supervisors to directly hand such anti-union paraphernalia to employees. Since the act of handing someone a button, for instance, forces them to make an immediate choice to either wear it or not wear it, this is considered a form of illegal interrogation. However, it is fully legal for supervisors to put a pile of buttons on a break room table and track which employees choose to take them.

[152] It is important to note that even in these cases, such individuals may be able to vote their conscience in the privacy of the voting booth, but they will remain fearful of signing petitions, wearing buttons, or engaging in any other normal campaign activity that involves a public show of support for unionization.

[153] Levitt 29.

[154] While it is illegal for companies to hold mandatory meetings in the last 24 hours before a vote, it is standard practice for employers to invite all workers to a company dinner the night before the vote, at which they engage in last-minute anti-union politicking. Although the dinner is paid for by the company, and employees are urged to attend, attendance is not mandatory, and therefore the NLRB rules that such events are legal even within the final 24-hour period. A sense of why employees may feel compelled to attend these non-mandatory dinners may be gleaned from the text of an invitation suggested by members of the Jackson Lewis firm in Lewis and Krupman 200: "Dear Fellow Employee: You and your spouse are cordially invited to attend a special Employee Dinner Meeting to be held next week on Thursday evening starting at 6:00 pm. Important announcements of special significance to all employees and their families will be made immediately following the dinner. The program will be concluded at 9:00 pm. Tickets are enclosed. Sincerely, ... General Manager."

[155] Jackson Lewis, et al. 205, explain that "the employer should arrange to escort the union representatives to the conference to avoid any last-minute union campaigning."

[156] *Quest International*, 338 NLRB 123 (2003), discussed in "Campaign Workshop: Stationing Security Guard and Guard Dogs on Premises During Election," *Management Report* 26.12 (2003): 4. A regional hearing officer ruled the employer's behavior illegal, but the full Board overturned this decision on appeal, partly by insisting that it was up to the union to prove that a determinative number of employees changed their votes as a result of the increased security presence.

[157] Until relatively recently, it was common for employers to hold an election-day raffle in which every employee who showed up to vote would be entered in a drawing for company-bought prizes. This was ruled illegal in 2001, but was widely practiced until that time. "Get-Out-the-Vote Raffle is Unlawful," *Management Report* 24.5 (2001): 8.

[158] Kilgour 291, for instance, concedes that "an election conducted on 'neutral' ground would probably reduce the size of the vote in the wrong quarters." This is so, he surmises, because "union supporters are, almost by definition, more determined or dedicated than company supporters and those who remain uncommitted." Likewise, *Management Report* 24.5 (2001): 8 notes that "a high turnout on election day generally favors the employer."

[159] Jackson Lewis, et al. 196. Jackson Lewis notes that it is legal for employer to pay the expenses to transport absentee employees to the polls.

[160] Sodexho Marriott Services, "Progressive Approach to Labor: Union Avoidance," 9.

[161] Dan Hildebrand, representative of CCComplete, conversation with the author, 8 Aug. 2005. CCComplete is the firm that provides NMB the software, technology and voting systems to run union elections. The NMB's own acting director of the Office of Legal Affairs, Mary Johnson, explained that NMB had "done a lot of research and feel the system is very secure." Quoted in "NMB Will Launch Telephone Balloting in Representation Elections Sept. 30," *Daily Labor Report*, Bureau of National Affairs, 26 Sept. 2002.

[162] Oregon adopted vote-by-mail as the sole and universal form of voting for all elections in 1998. A recent assessment concluded that vote-by-mail systems "result in a more accurate count" than other systems. Paul Gronke, *Ballot Integrity and Voting by Mail: The Oregon Experience*, Early Voting Information Center, Reed College, June 2005, 2. There are now 25 states that place no restrictions on vote-by-mail, aka "absentee" balloting. "Voting by mail," editorial, *San Diego Union-Tribune*, 2 May 2005.

[163] Hildebrand, 8 Aug. 2005 interview, reports that his firm conducted a presentation for NLRB staff on the merits of their system, including reviewing the NMB's experience with it. As of this writing, the NLRB has shown no interest in adopting the NMB system. NLRB current policy is that elections are held on-site unless there is a significant logistical reason for doing otherwise — e.g. if the employees are truck drivers who work on the road spread out over a large area and it is not feasible for them to report to a central location at a designated time. The fact that on-site elections provide an advantage to the employer, or that mail ballots would be cheaper, is not enough in itself to warrant an off-site election under current Board doctrine. See *London's Farm Dairy*, 323 NLRB 186 (1997); and *San Diego Gas and Electric*, 325 NLRB 218 (1998).

[164] Richard H. Wessels, "NLRB Makes Mail Ballots Easier," Wessels & Pautsch, P.C., 16 May 2002, accessed 5 Aug. 2002 <www.w-p.com/page.asp?type=articles&id=121>. Employer opposition to mail ballots is also discussed in Levitt 108, 112; and Levine 25-26.

[165] "Reasons Employers Should Resist Mail Ballots," *Management Report* 23.4 (2000): 4-5.

[166] E.g., Kilgour 2 notes that "the pages of administrative and judicial journals are filled with decisions concerning employers who have broken the law and were caught." Longtime unionbuster Marty Levitt, who worked with the leading consultants and attorneys of his day, likewise opens his confession with the explanation (Logan, "Confessions," (2002) 2) that "the only way to bust a union is to lie, distort, manipulate, threaten, and always, always, attack."

[167] U.S. Senate, "Interim Report of the Select Committee on Improper Activities in the Labor or Management Field," S. Report No. 1417, 86th Cong., 2nd Sess. (Washington: GPO, 1958). See related

discussion in Levitt 38. Among other documents turned up by Congress was a "Master Plan" provided to the Whirlpool Corporation by the firm of Nathan Shefferman — the preeminent post-WWII labor advisor, whose firm spawned the modern union-busting industry through a series of spinoffs. Shefferman's plan began with the illegal creation and support of an "employee" anti-union committee: "Find a lawyer and guy who will set up a vote no committee, find leaders and sway them ... get material to turn over to vote no committee..." Quoted in Smith 99. Shefferman had nearly 400 clients in the 1950s, including some of the nation's largest corporations.

[168] Levitt 181.

[169] Levitt 3.

[170] Fred Long of the West Coast Industrial Relations Association told one seminar that after a union petitioned for an election, "you got at least sixty days to hire a hell of a lot of people you need to." In the same seminar, Long advised backdating payroll memoranda in order to legitimate illegal wage increases given in the runup to an election. Both statements are reported in Smith 108. Levitt 22 recalls calling employees into personal interviews in which he guaranteed that anything said would remain strictly confidential; "that, of course, was a bold and cruel lie." In a grocery campaign, Levitt tapped the motel telephone of the union organizer running the campaign (Levitt 56). In a nursing home (Levitt 195), he "dispatched a contingent of commandos to scratch up the cars of high-profile pro-company workers and to make threatening phone calls to others. I [then sent out] a letter from [the CEO] taking the union to task for such barbarous scare tactics." Smith 114, reports on the campaign at BLK Steel run by the West Coast Industrial Relations Association where employees were paid to vote against the union, promised a pay raise if the union lost, and threatened with loss of benefits if the union won.

[171] Steven Greenhouse, "How Do You Drive Out a Union? South Carolina Factory Provides a Textbook Case," *The New York Times*, 14 Dec. 2004: A26.

[172] Ibid.

[173] Unpublished data provided to the author by the NLRB. Complaints are the NLRB's equivalent of an indictment, indicating that Board agents have found sufficient evidence of wrongdoing that they are prepared to pursue the case in a trial before a Board-appointed judge.

[174] Sixty-Ninth Annual Report of the National Labor Relations Board 10-11. The Dunlop Commission, *Fact Finding Report*, 70, likewise reported that in 1990, 81 percent of meritorious charges were against employers.

[175] NLRB Annual Reports, various years, Appendix Table 4. The 10-year average for the years 1995-2004 is 23,839.

[176] Subcommittee on the Departments of Labor and Health, Education and Welfare, Committee on Appropriations, U.S. House of Representatives, "Statement of NLRB General Counsel John S. Irving," 95th Cong., 2nd Sess. (Washington: GPO, 1978) 761, cited in Weiler 1827, fn. 35.

[177] Lalonde and Meltzer 987-990. This analysis focused specifically on illegal terminations, rather than all backpay awards. It seems likely that suspensions, demotions or denied promotions are even more concentrated in election contexts, since where there is an established bargaining relationship these issues are generally arbitrated under the existing contract and therefore are resolved before reaching the Board level.

[178] Roughly 40 percent of petitions never lead to an election. Therefore, I have inflated the number of voters in elections by this ratio in order to yield an estimate of the total number of eligible voters in companies where petitions were filed.

[179] Sixty-Ninth Annual Report of the National Labor Relations Board Tables 13-14.

[180] The number of meritorious charges of labor law violation is smaller than the total number of individuals owed backpay because many charges cover more than one employee.

[181] It is, of course, always possible to argue with numbers. It may be asserted that FEC and NLRB violations are not comparable, because the FEC regulates only certain aspects of federal elections,

whereas the NLRB regulates all aspects of workplace elections. There is clearly some merit to this idea — a comprehensive comparison would need to compare ULPs with the combination of all federal, state and local electoral violations in a given election cycle. However, since such data seems is unlikely to significantly change the overall ratio of violations per voter, and since many of the acts that would be illegal under state and local law are permitted by the NLRB, I believe that the figures reported here are broadly accurate.

[182] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). For a more recent discussion of this principle, see *Tomatek, Inc.*, 333 NLRB 156 (2001).

[183] Kaufman and Stephan 12, fn. 14.

[184] On this point see, among others, Kaufman and Stephan 9, 13.

[185] The case of Surgical Appliance is discussed in Hurd and Uehlein 67. On the same page, the authors discuss the case of Sheridan Manor Nursing Home, in Buffalo, NY. After this employer discovered that the union drive was strongest among the licensed practical nursing staff, it fired 16 of its 21 LPNs, and effectively crushed the organizing campaign.

[186] Dunlop Commission, *Fact Finding Report*, 70, explains that "The 'in kind' relief of reinstating workers who were illegally fired often takes a long time to effectuate. Before an employer is legally obligated to reinstate a discharged employee, the case goes through a four-stage procedure. The employee's charge must first be judged meritorious by the Board's regional office, then by an Administrative Law Judge following a full-scale trial, then by the board itself, and then by a federal appeals court — a process that takes an average of three years to complete."

[187] Because it takes so long to work through the full process of appeals, and because fired employees are so often left in desperate economic straits, employees often choose to accept a reduced settlement if companies agree to pay more quickly rather than prolong the process. In this case, employers' ultimate payout is reduced even below the already marginal amount of backpay they would normally owe. Indeed, regional NLRB offices frequently encourage employees to accept such discounted settlement. In part, Board agents encourage employees to settle early out of genuine concern that it will be better for employees to get a smaller settlement in a timely fashion than to wait years for a complete accounting. The result of quicker settlements is that workers receive less than they are due and the cost imposed on lawbreaking employers is even lighter than that warranted by law. In 2004, for example, the NLRB secured backpay settlements for 30,000 workers, totaling $205 million. There is no way of knowing, however, to what extent this figure was discounted by early settlements taken under pressure of economic distress, or what the true total of unpaid back wages amounted to.

[188] *Vico Products Company, Inc., v. NLRB*, 333 F. 3d 198; 2003 U.S. App. LEXIS 13184 (D.C. Cir. 2003). This case is discussed in "NLRB Imposes Costly Remedy for ULP's," *Management Report* 27.5 (2004): 6.

[189] DeMaria presentation to seminar on Maintaining Nonunion Status, quoted in Phillips-Fein.

[190] *Delta Brands, Inc.*, 344 NLRB 10 (2005). In this case, the company handbook included a clearly illegal ban on solicitation within the workplace, and the union lost an election by a 2-vote margin. Despite agreeing the rule was illegal, the Board upheld the election results, ruling that for the outcome to be overturned, the union would have to prove three things: that employees knew about the rule, that it affected their behavior, and that it had a "reasonable tendency to affect the outcome of the elections." Apart from the general difficulty of meeting this burden of proof, the union may face a particularly uphill effort in getting employees to publicly testify against their employer in the aftermath of a contentious election and union defeat. The case is discussed in "Unlawful Solicitation Rule Not Grounds for Setting Aside Election," *Management Report* 28.7 (2005): 2. Bronfenbrenner, *Uneasy Terrain*, 30, notes that of all the campaigns in her sample where employers issued threats of layoffs and unions filed charges of labor law violation, only 11 percent resulted in rerun elections. She notes that this remedy was limited to "the most egregious cases ... where the plant closing threats were clear and unambiguous and were coupled with numerous other egregious violations including repeated discharges, surveillance, threats, and harassment of union activists and supporters."

[191] This case is *Dayton Hudson Corporation* of Fairlane, MI, described in Hurd and Uehlein 69.

[192] Data on bargaining orders if from Arthur Rosenfeld, *End-of-Term Report on Utilization of Section 10(j) Injunction Proceedings, Memorandum GC 06-02* (Washington: NLRB Office of the General Counsel, 6 Jan. 2006). This report covers the period 1 June 2001 through 31 Dec. 2005. Annual election data is from NLRB FY2003 and FY2004 Annual Reports, and from Gerald Mayer, *Labor Union Recognition Procedures: Use of Secret Ballots and Card Check* (Washington: Congressional Research Service, 23 May 2005).

[193] Transcript of Tape Recording Made by Joel D. Smith of Presentation of Fred R. Long, SCIRA, at Century Plaza Hotel, Los Angeles, 28 July 1976, reproduced in Logan 207. "Companies Win More Second Elections — But Not Always," *Management Report* 27.11 (2004): 1, likewise advises its readers that "Companies that win the first election are more successful in a second election. One might think that an employer that committed unfair labor practices and had to face the union again in the second election would be less likely to succeed because of its previous unfair labor practices. Yet NLRB statistics show that, overwhelmingly, the party that wins the first election (whether it be the union or the employer) wins the second election handily, often by a greater margin."

[194] Bronfenbrenner, *Uneasy Terrain*, 50, notes that unions won only 23 percent of the elections in her sample that were rerun following charges of illegal employer behavior; however, p. 30, of the campaigns that were rerun following employer threats of layoffs, unions lost 100 percent of the rerun elections.

[195] *ITT Automotive v. NLRB*, 188 F.3d 375 (1999). This case is discussed in "Case Tests Employer's Right to Campaign Aggressively," *Management Report* 23.4 (2000): 6-7. A similar example is *Ogihara America Corp.*, 343 NLRB 91 (2004), where an employee was fired for wearing a t-shirt with a union insignia, the union lost the election, and the Board ordered a rerun. This case is discussed in "Solicitation and T-Shirt Ruled Problematic for Another Employer," *Management Report* 28.3 (2005): 5-6.

[196] This account, including quotes, is from Hurd and Uehlein 69.

[197] *Rite Aid Insider*, newsletter produced by the International Longshore and Warehouse Union, Issue No. 1, May 2007.

[198] *Settlement Agreement: In the Matter of Rite Aid Corporation*, NLRB Region 31 Office, Los Angeles, 22 May 2007; provided to the author by the ILWU.

[199] Quoted in *Rite Aid Insider*.

[200] Letter from Rite Aid to employees of the company's Lancaster, California Distribution Center; contents shared with the author by a Rite Aid employee, 29 May 2007.

[201] *Hospital and Union Representation Election Principles Agreement*, 13 Apr. 2006; copy provided to the author by Yale-New Haven Hospital.

[202] Quoted in Melissa Bailey, "An Outraged City Confronts a Hospital's Betrayal," *New Haven Independent*, 14 Dec. 2006.

[203] Quoted in June Torbati, "Union election postponed at Yale-New Haven Hospital," *Yale Daily News*, 14 Dec. 2006.

[204] Quoted in Paul Bass, "Union Election Off; Arbitrator Says Hospital Broke Law," *New Haven Independent*, 13 Dec. 2006.

[205] "YNHH signs Agreement with National Labor Relations Board," Yale-New Haven Hospital news release, 16 May 2007.

[206] Bronfenbrenner and Juravich, "Impact," is based on a random sample of 261 NLRB certification elections that took place between July 1986 and July 1987, all single-unit elections involving more than 50 employees and an AFL-CIO affiliated union. The sample amounts to roughly one-third of all elections in units of this size during the period in question, and is representative across industries, regions, and types of unit. The data on employer tactics is based on surveys of the lead union organizer on each campaign, plus ULP data from the NLRB. Rundle 1998 sent surveys to lead organizers of a random sample of 200

election campaigns drawn from 1994 NLRB elections in units of 50 employees or more. Of these 200, 135 surveys were returned, a 68 percent response rate. Rundle further found 30 cases during this time period and of this unit size in which petitions were withdrawn, but elections later were held. These 30 cases were also surveyed, raising the total number of surveys to 165. Bronfenbrenner, *Uneasy Terrain*, is drawn from a random sample of 600 single-unit NLRB certification elections that took place in 1998-99, all in units with 50 or more employees. Surveys were sent to the lead union organizers for each campaign, and 407 responses were received; the author then matched NLRB and employer financial data to each case. Theodore 2005 is based on all petitions for election filed in workplaces in the Chicago metropolitan area in 2002, in workplaces that had never previously been organized. Surveys were sent to lead union organizers in all 179 petitions in this category, and 62 surveys were received back. The responses represent campaigns that were slightly more likely to have led to an election than the universe of petitions as a whole (76 percent vs. 69 percent) and significantly more likely to have resulted in a union victory (61 percent vs. 45 percent). In addition to the survey, the authors conducted in-depth interviews with 25 lead organizers and 11 employees involved in these campaigns. The three studies that are limited to units of 50 or more employees are, to some extent, a skewed sample; the NLRB FY04 Annual Report shows that the smaller units accounted for 65 percent of all representation elections held that year. However, the same report shows that, of all employees involved in NLRB elections in 2004, only 16 percent were in units of less than 50. Thus, while a study of 50+ units is not representative of all elections, it does capture the experience of the vast majority of American workers involved in union organizing campaigns.

[207] Bronfenbrenner and Juravich, "Impact," 80, suggests that these figures may understate the extent of union-busting; since many large employers have developed in-house staff that run similar by-the-book union avoidance campaigns without relying on outside consultants. When the federal government's Dunlop Commission studied this issue, it estimated that 70 percent of employers used consultants, but concluded that, due to the laxness of federal reporting requirements, "there are no accurate statistics on consultant activity" (Dunlop Commission, *Fact Finding Report*, 67).

[208] Bronfenbrenner and Juravich, "Impact" 80.

[209] Dunlop Commission, *Fact Finding Report*, 75 reports that over the period 1977-91, roughly 30 percent of nonunion workers stated that if an NLRB election were held at their workplace, they would vote "yes." The Commission's own survey (*Fact Finding Report* 39) found that 32 percent of unorganized workers would vote for a union. Cingranelli (2004) 8, reports that a 2002 poll conducted for the AFL-CIO found that half of all non-managerial employees would vote for a union if they had the opportunity. Interestingly, Richard Freeman and Joel Rogers, What Workers Want (Ithaca: Cornell University Press, 1999) 59, found that an even higher share of workers supported the substance of unionization if it was not called a "union." A majority of all workers they surveyed said they want an organization in which "either management or employees can raise problems for discussion as opposed to one in which management alone decides the problems that should be discussed; "employees and management have to agree on decisions as opposed to one in which management makes the final decision about issues;" "conflicts are resolved by an outside arbitrator rather than by management;' and "employee representatives are elected or volunteer themselves rather than being chosen by management."

[210] Based on total employment of 142 million in Sept. 2005, as reported in "The Employment Situation: September 2005," Bureau of Labor Statistics News Release; and 15.5 million union members in 2004, as reported in "Union affiliation of employed wage and salary workers by selected characteristics," 7 Oct. 2005 , accessed 11 Oct. 2005 <www.bls.gov/news.release/union2.t01.htm>, and assuming that 30 percent of non-union workers wish they had a union.

[211] Phil Comstock and Maier B. Fox, "Employer Tactics and Labor Law Reform,"in Sheldon Freidman, et al. (eds.), Restoring the Promise of American Labor Law (Ithaca, NY: Cornell University Press, 1994).

[212] Comstock and Fox 95.

[213] Freeman and Rogers 48-49. The survey, conducted in 1994, was based on a nationally representative sample of 2,408 adults. 83 percent of workers reported that they have less influence over benefits than they want; the corresponding figure regarding wages was 76 percent.

[214] Freeman and Rogers 130.

[215] Dunlop Commission, *Report and Recommendations*, 36.

[216] Sixty-Ninth Annual Report of the National Labor Relations Board 16, shows that 94,565 employees won union recognition in their workplaces in that year.

[217] 1988 Gallup poll, reported in Dunlop Commission, *Fact Finding Report*, 72.

[218] 1991 Fingerhut poll, reported in Dunlop Commission, *Fact Finding Report*, 72.

[219] Comstock and Fox 92.

[220] Comstock and Fox 99.

[221] Comstock and Fox 98. Freeman and Rogers 62 likewise found that, among non-union workers who wished they had one, 55 percent believed that "management opposition" was the central reason why they had been unable to organize.

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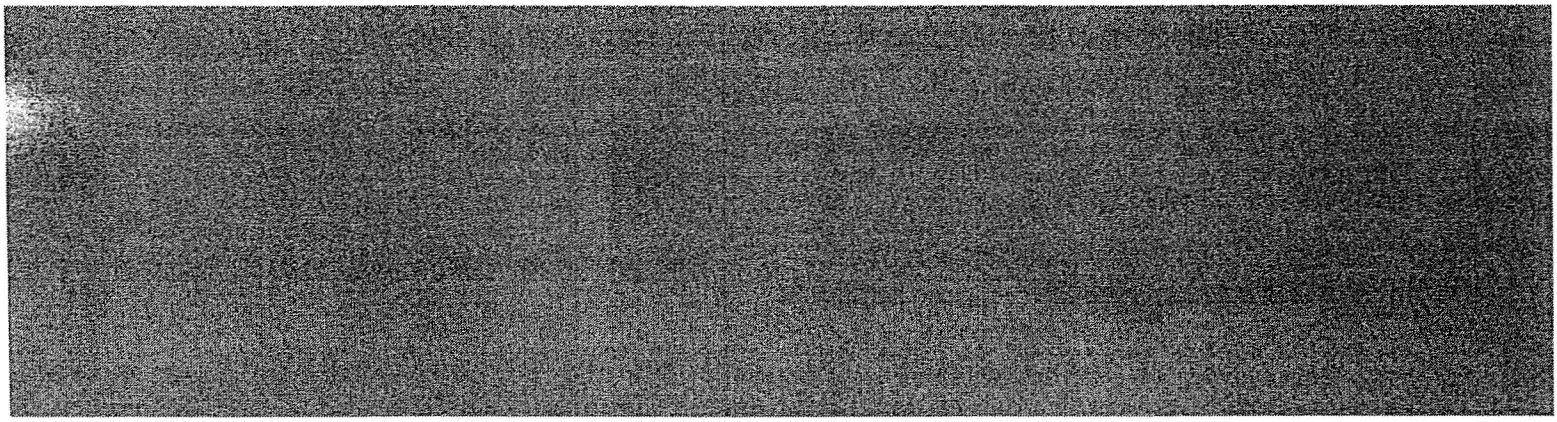

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LATE

MAUI CHAMBER OF COMMERCE

OUR BUSINESS IS MAUI BUSINESS

Testimony to the House Committee on Labor & Public Employment
Friday, March 20, 2009 at 9 a.m.
Conference Room 309

RE: SENATE BILL NO. 1621 "Card Check" Bill

Dear Chair Rhoads, Vice Chair Yamashita,
and Members of the Committee:

I am writing today on behalf of the Maui Chamber of Commerce's membership in strong opposition to Senate Bill No. 1621, relating to Labor. Plain and simple, this bill will hurt businesses, particularly small business, at a time when we need to strengthen all our businesses and improve the economy.

The Maui Chamber of Commerce is the business champion and advocate for businesses on Maui, representing over 900 members, 88% of which are small businesses with fewer than 25 employees, that collectively employ approximately 21,000 people. Our mission is to advance and promote a healthy economic environment for business, advocating for responsive government and quality education, while preserving Maui's unique community characteristics.

This bill, known as the "Card Check" bill, would change the current law which entitles workers to a secret ballot election when determining whether or not they are interested in union representation. This is the same freedom and right that we are afforded when choosing elected officials and should each be afforded when choosing anyone to represent us. It is one of the basic freedoms that makes this country great. Do not strip workers of this right to privacy and expose them to a process whereby they can be pressured into signing a card stating that they support a union when they do not.

This Card Check bill also includes a "binding arbitration" provision that would let state government appointed arbitrators dictate wages and benefits under a union contract, and then deprive workers of the chance to vote on that contract. This expansion of government power is almost like reestablishing wage and price controls in our economy, and could put many employers out of business. We cannot afford this type of legislation in Hawaii, especially when we are struggling to weather this economic storm.

Furthermore, at a time when the state is trying to become more self sufficient for food and produce, available research indicates this legislation is counter productive. The simple fact is that unionization would increase the cost of locally produced food, impair

the growth and survival of Hawaii's shrinking agricultural industry and block new efforts to grow food locally.

After decades of decline, unions have now turned to the Legislature to help them recover what is the natural progression of progressive management. The pending Legislation will impose fast track unionization on all Hawaii agricultural operations and very small businesses and non-profits not subject to the National Labor Relations Act, as well as submit their business assets and operational procedures to the dictates of a government appointed arbitrator. That is not right, nor fair! And, it is viewed by many businesses as a government takeover of businesses.

Last legislative session, this bill was fast tracked by a number of legislators, many of whom later told us they had not fully understood the bill and were surprised by the business community's outcry. Please do not let this happen again.

Back then, when the Governor's veto was being sought and we were asking legislators not to override her veto, we surveyed our members to get their thoughts on this bill. In just a day and a half, we had 116 responses from very busy business leaders who made the time to ring in on this issue. A day later, we had 148 total responses. Of those who responded, 97% said they oppose the Card Check Bill, with 3% saying they did not. However, all (100%) who participated in the survey did ask the Governor to veto the bill and that same 100% asked the legislature not to override her veto of this bill. Thankfully, they did not.

While there were several responses from medium and large businesses in our survey, the majority of responses came from small businesses. And, out of 148 responses, only 9 chose to remain anonymous—a great indication of how important this matter is to small businesses.

We've heard legislators say that small businesses won't be targeted, but this legislation doesn't have a meaningful exemption for them. A company can be unionized with just two non-management employees. That fact, which surprises most, is important! And, the current system is fine.

This bill is not new and legislators are now or should be well informed about the negative impacts this bill will have on the business sector. One can no longer say they did not understand it. Further, why take it up here and now when it is being addressed at the national level?

The business community has been clear and consistent in asking you to oppose this bill. This is the wrong time for such legislation to be imposed. Every business in Hawaii counts and each needs your help now! Please understand their plight, help, and hold SB 1621.

Sincerely,

Pamela Tumpap
President

LATE

House of Representatives
Committee on Labor and Public Employment
March 20, 2009
9:30 a.m. in Conference Room 309

Chair Rhoads, Vice Chair Yamashita and Members of the Committee: I am Keoni Wagner, vice president for public affairs of Hawaiian Airlines.

Hawaiian Airlines opposes Senate Bill 1621, SD 2, and we respectfully request that you hold this bill.

As summarized in the news media, Senate Bill 1621, SD 2, also known as "the card check bill," eliminates traditional secret-ballot elections by allowing employees to sign cards indicating they'd like to organize under a labor union. If a majority of a company's workers sign the cards, the union is automatically recognized and free to bargain with management. The measure also mandates binding arbitration in collective bargaining and removes private-property rights for business owners if the unions want to picket on sidewalks and near entry ways of their establishments. It also establishes legal immunity for unions in actions relating to collective bargaining. (Pacific Business News 2/26/09.)

The proposal to eliminate secret ballots contravenes the principles of individual self determination by subjecting employees to the pressure of their peers. Whether there is pressure from business or those seeking to unionize, the right of an employee to state their preference in a secret ballot is crucial to a democracy. If these principles were to be allowed in public elections, one can understand the devastating effect it would have on the rights of individuals. In a state which has prided itself on protecting the rights of the minority, such a bill is an anathema.

More importantly, our state and nation are facing declines not seen in decades. This downturn is not a matter of a few business failures but of a worldwide financial crisis. We are all in the same economic boat and it is counter-productive for the leadership of the state to increase the costs of doing business in this state. One need only read the headlines from yesterday's newspapers to see that real property values are plummeting, health insurers are facing massive losses, and taxpayers are being asked to pay more taxes. And this bill will place business in a position of being unable to bargain with the union. This is a zero-sum game. Every cost added onto business must be reflected in the price of a product. From rice to roses, the cost of this bill will be felt.

This is not meant as an affront to unions or their ability to lobby for this legislation. This committee and this legislature must be the final policy arbiter in this decision, and as such must bear the burden of the effects.

We believe that the negative impacts of this measure both in terms of the elimination of a secret ballot, and the increase in costs from its implementation far outweigh the stated reasons for it—to make unionization easier.

We strongly ask that you hold this bill. Thank you for the opportunity to testify.

LATE

UNITED FILIPINO COUNCIL OF HAWAII

P.O. BOX 498, Honolulu, Hawaii 96809-0498

TESTIMONY IN STRONG SUPPORT OF SB 1621 SD2

House Committee on Labor
March 20, 2009, 9:30 a.m.
Hawai'i State Capitol, Rm. 309
Measure Title: Relating to Collective Bargaining

To: Honorable Rep. Karl Rhoads, Chair
Honorable Rep. Kyle Yamashita, Vice-Chair
Honorable Members of the House Committee on Labor

From: Eddie Agas, President, United Filipino Council of Hawaii

Description: Provides a union representation privilege to protect the functions of the union as an exclusive bargaining representative to allow the union to perform its role in negotiations and contract enforcement; allows certification of union representatives through a card-check authorization; requires collective bargaining to begin upon union certification; sets certain deadlines for initial collective bargaining agreement procedures and conciliation of disputes; sets civil penalty for unfair labor practices; extends certain authorities to labor organizations representing employees for collective bargaining; allows labor disputes to be defenses against prosecution for certain violations of law. (SD2)

My name is Eddie Agas. I am the president of the United Filipino Council of Hawaii (UFCH). I submit this testimony to strongly support this bill. UFCH is an umbrella organization with member organizations from six islands. UFCH membership is comprised of nearly 5,000 individual members.

We stand in solidarity with workers in the hotel, agricultural, service, and other industries, which this bill will help by clarifying and protecting collective bargaining practices.

Thank you for hearing this important bill, and for the chance to offer our written testimony in support of workers' equity. Your consideration to pass this bill is much appreciated.

Respectfully submitted,

Eddie Agas, President, United Filipino Council of Hawaii

Filipino Coalition for Solidarity
A HAWAII RIGHTS ADVOCACY GROUP • FOUNDED IN 1990
c/o 728 Nunu St. · Kailua, HI 96734 · http://www.philippinesonline.org/thecoalition/

LATE

TESTIMONY IN STRONG SUPPORT OF SB 1621 SD2

House Committee on Labor
March 20, 2009, 9:30 a.m. | Hawai'i State Capitol | Room 309

To: Honorable Rep. Karl Rhoads, Chair
Honorable Rep. Kyle Yamashita, Vice-Chair
Honorable Members of the House Committee on Labor:
Rep. Henry J.C. Aquino, Rep. Karen Leinani Awana, Rep. Faye P. Hanohano,
Rep. Marilyn B. Lee, Rep. Mark M. Nakashima, Rep. Scott K. Saiki, Rep. Joseph M. Souki,
Rep. Roy M. Takumi, Rep. Kymberly Marcos Pine

From: Charlene Cuaresma, President, Filipino Coalition For Solidarity

Measure Title: Relating to Collective Bargaining

My name is Charlene Cuaresma. I am submitting testimony in strong support of this bill. As president of the Filipino Coalition for Solidarity, I want to express appreciation to you for hearing this important bill. Since its inception in 1990, the Coalition has represented more than 50 Filipino community leaders, whose aim is to work for social justice issues to empower Filipinos to make socially responsible contributions to Hawai'i and our global neighbors through education, advocacy, and social action.

Filipinos and immigrant groups comprise a large segment of the hotel and agricultural labor force. Filipinos are also hardest hit by unemployment, even before this recent downturn in the economy. As staunch supporters of Pacific Beach Hotel workers, our Coalition has learned from the workers themselves, that provisions of this bill are essential to safeguard a worker's right to determine union representation, because clearly, some employers resort to tactics that create a climate of intimidation that amounts to "union busting.

There are many lessons learned from the Pacific Beach Hotel. For example, workers' attempts to unionize and negotiate a contract were thwarted by a "shell game" of changing owners and management that not only disregarded the workers' desire for union representation, but also dismissed progress made toward contract negotiations that were ultimately not recognized when "new" ownership ensued. This bill addresses this type of labor injustice, and affords workers the confidence to speak up to improve work conditions without fear of losing their job. We believe that this bill will strengthen Hawai'i's work force, and thereby strengthen our economy for all to benefit.

Your consideration to support this bill is appreciated. Thank you for the opportunity to provide this written testimony.

Respectfully,

Charlene Cuaresma, MPH
President, Filipino Coalition for Solidarity

LATE

Filipinos for Affirmative Action

3432 B-1 Kalihi Street· Honolulu, Hi 96819

TESTIMONY IN STRONG SUPPORT OF SB 1621 SD2

House Committee on Labor
March 20, 2009, 9:30 a.m.
Hawai'i State Capitol, Rm. 309
Measure Title: Relating to Collective Bargaining

To: Honorable Rep. Karl Rhoads, Chair
Honorable Rep. Kyle Yamashita, Vice-Chair
Honorable Members of the House Committee on Labor

From: Amy Agbayani, Ph.D., Filipinos for Affirmative Action

Description: Provides a union representation privilege to protect the functions of the union as an exclusive bargaining representative to allow the union to perform its role in negotiations and contract enforcement; allows certification of union representatives through a card-check authorization; requires collective bargaining to begin upon union certification; sets certain deadlines for initial collective bargaining agreement procedures and conciliation of disputes; sets civil penalty for unfair labor practices; extends certain authorities to labor organizations representing employees for collective bargaining; allows labor disputes to be defenses against prosecution for certain violations of law. (SD2)

My name is Amy Agbyani. As co-chair of Filipinos For Affirmative Action, I submit strong support for this bill. The mission of Filipinos For Affirmative Action is to advocate for civil rights for all.

Now more than ever, working people need support for fair labor practices and leveraged representation to ensure that accountability, recourse, and workers' equity are intact. This bill is an integral step in that direction, especially for workers whose first language is not English. We respectfully request your support to prevent the potential exploitation of immigrants and other vulnerable groups in Hawai'i's work force who work in either small or large companies. If they all stayed home for a day, Waikiki would shut down. Thank you for the opportunity to provide our strong support. Please consider voting yes at this critical juncture in Hawai'i's economic recovery.

Sincerely,

Amy Agbayani, Ph.D.
Filipinos For Affirmative Action

LATE

HAWAII BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO
GENTRY PACIFIC DESIGN CENTER, STE. 215A • 560 N. NIMITZ HIGHWAY, #50 • HONOLULU, HAWAII 96817
(808) 524-2249 • FAX (808) 524-6893

March 20, 2009

Honorable Representative Karl Rhoads, Chair
Honorable Representative Kyle T. Yamashita, Vice Chair
Members of the House Committee on Labor & Public Employment
Hawaii State Capital
415 South Beretania Street
Honolulu, HI 96813

RE: IN SUPPORT OF SB 1621, SD2
RELATING TO COLLECTIVE BARGAINING
Hearing: Friday, March 20, 2009, 9:30 p.m.

Dear Chair Rhoads, Vice Chair Yamashita and the House Committee on Labor & Public Employment:

For the Record my name is Buzz Hong, the Executive Director for the Hawaii Building & Construction Trades Council, AFL-CIO. Our Council is comprised of 16-construction unions and a membership of 26,000 statewide.

The Council SUPPORTS the passage of SB 1621, SD2 that provides a union representation privilege to protect the functions of the union as an exclusive bargaining representative to allow the union to perform its role in negotiations and contract enforcement; allows certification of union representatives through a card-check authorization; requires collective bargaining to begin upon union certification; sets certain deadlines for initial collective bargaining agreement procedures and conciliation of disputes; sets civil penalty for unfair labor practices; extends certain authorities to labor organizations representing employees for collective bargaining; allows labor disputes to be defenses against prosecution for certain violations of law.

Thank you for the opportunity to submit this testimony in support of SB1621, SD2.

Sincerely,

W. Hong / bg

William "Buzz" Hong
Executive Director

yamashita1- Kathy

From: mailinglist@capitol.hawaii.gov
Sent: Thursday, March 19, 2009 8:15 AM
To: LABtestimony
Cc: jbarnett@hawaii.rr.com
Subject: Testimony for SB1621 on 3/20/2009 9:30:00 AM

Testimony for LAB 3/20/2009 9:30:00 AM SB1621

Conference room: 309
Testifier position: oppose
Testifier will be present: No
Submitted by: Dr. John J. Barnett
Organization: Individual
Address: 81-6630 Kekaa Pl Kealakekua, HI 96750
Phone: 808-323-2141
E-mail: jbarnett@hawaii.rr.com
Submitted on: 3/19/2009

Comments:
Secret ballots are essential to effective leadership and individual rights of employees and workers.

yamashita1- Kathy

From: Johno Clayton [johno@valluzzipoteet.com]
Sent: Thursday, March 19, 2009 1:03 PM
To: LABtestimony
Subject: Card Check Bill, SB 1621 SD2.

Good afternoon,

I am opposed to Card Check Bill, SB 1621 SD2

Regards,

Johno Clayton
Valluzzi-Poteet Building Co., LLC
1001 Bishop Square, ASB Tower, Suite 1190
Honolulu, Hawaii 96813
(808) 590-8032

yamashita1- Kathy

From: Vincent Doran [vince@veshawaii.com]
Sent: Thursday, March 19, 2009 2:41 PM
To: LABtestimony
Subject: Senate Bill 1621

To Whom It May Concern:

I'm strongly apposed to Senate Bill 1621. We are free people in the United States, and we should be able to work as free people for and whom we like. Senate Bill 1621 goes against what our founding fathers of this country had in mind at the time of the writing of the constitution.

Vince Doran
President: VES INC.

March 19, 2009

EMAILED TESTIMONY TO: CPNtestimony@Capitol.hawaii.gov

Hearing Date: Friday, March 20, 9:30 a.m., Conference Room 309
(House Committee on Commerce & Consumer Protection)

Representative Karl Rhoads, Chair; Kyle Yamashita, Vice Chair; and Members of the House Committee on Labor and Public Employment

Subject: SB 1621 SD 2, Relating to Collective Bargaining

Dear Chair Rhoads, Vice Chair Yamashita, and Committee Members,

I strongly oppose SB 1621, Relating to Collective Bargaining.

The individual secret ballot is the foundation of American democracy and has a long tradition in this country. The concept of each one of us voting our conscience without coercion is the basis of maintaining our individual rights.

This bill removes the right to make our decisions in private, without anyone looking over our shoulder. SB 1621 is contrary to all democratic ideals and should be opposed.

Please oppose SB 1621 and support American democratic ideals.

Richard Frey
Pearl City

yamashita1- Kathy

From: kaeo@koolinalm.com
Sent: Wednesday, March 18, 2009 5:03 PM
To: LABtestimony
Subject: Employees would be the real losers under this one.....

Follow Up Flag: Follow up
Flag Status: Completed

Testimony to the House Committee on Labor & Public Employment March 20, 2009 9:30 a.m.
Room 309, State Capitol

Re: SB 1621, SD2 relating to Collective Bargaining

Chair Rhoads, Vice Chair Yamashita and members of the committee:

My name is Ka'eo Gouveia and I have the pleasure of running Mokulua Contracting LLC. I respectfully request that you hold SB 1621, SD2. As the operator of a small business employing 67 people performing grounds, building and janitorial maintenance, I feel this bill is completely counter-productive for the development of small business.

Simply, this measure will increase the likelihood of small businesses not surviving the additional costs, lost productivity, and bureaucratization of the workplace that come with procedures mandated by this measure. Small businesses need to be focusing on getting our local economy back on a path of growth.

Our state has been focused on sustainability. This measure will undermine our efforts. Unionization will increase the cost of doing business locally and send the wrong message to prospective businesses that are looking at Hawaii to plant roots. Who would start a business in a state that would be virtually run by the unions?

Additionally, fundamentally, this measure dilutes every employee's right to a secret ballot in determining whether to have union representation. We maintain a workforce that is consistent with poor english speaking skills and I fear that they would be completely taken advantage of under this bill. They should have the right to make their decision in private, not in the open.

Finally, the binding arbitration will hurt both employees and employers as for the former, they would be denied the ability to vote on the pay and benefits. For the employer, it could be stuck with a contract that is compeletely incompatible with the cost structure and business model. Thus, this could have a huge impact on the livelihood of the business and the security of jobs.

We should be focusing on finding ways to revitalize Hawaii's economy, not hinder it.

For the above reasons, I strongly ask that you hold this bill. Thank you for the opportunity to submit written comments.

yamashita2 - Kristen

From: Byron Graper [biffmimi@yahoo.com]
Sent: Thursday, March 19, 2009 11:08 AM
To: LABtestimony
Cc: Byron Graper
Subject: Opposition to SD 1621 SD2

HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT Committee chair Karl Rhoads Vice Chair Kyle T. Yamashita

RE: Testimony in opposition to SD 1621 SD2

Would the Unions permit the decertification of union representation based upon the same standards and procedures as put forth in this bill? We all know the answer.

Doing away with the secret ballot takes away the real freedom of choice for workers.

The workers of Hawaii deserve better. This Bill should not be passed.

Thank you,

Byron R. Graper
An Individual

yamashita1- Kathy

From: mailinglist@capitol.hawaii.gov
Sent: Thursday, March 19, 2009 12:50 PM
To: LABtestimony
Cc: bossfrog@maui.net
Subject: Testimony for SB1621 on 3/20/2009 9:30:00 AM

Follow Up Flag: Follow up
Flag Status: Completed

Testimony for LAB 3/20/2009 9:30:00 AM SB1621

Conference room: 309
Testifier position: oppose
Testifier will be present: No
Submitted by: Phillip Kasper
Organization: Frogman Charters
Address: 156 Lahainaluna Rd
Phone: 808-264-2450
E-mail: bossfrog@maui.net
Submitted on: 3/19/2009

Comments:
This bill is a job killer. It is the worst possible nightmare for small business. It is a struggle to stay in business now. It will make growing a business and increasing employment next to impossible.

yamashita1- Kathy

From: Bill Lindemann [billl@lcihawaii.com]
Sent: Thursday, March 19, 2009 2:09 PM
To: LABtestimony
Subject: SB 1621 -- Card Check Bill

Gentlemen --

I would like to state that the above referenced "Card Check Bill" would state a dangerous precedent if it passed because it would deny the worker his right to make a private choice on whether to join a union or to not join a union.

I would greatly appreciate your support by not voting in favor of said bill.

Thank you,
William Lindemann
Lindemann Construction Inc.

yamashita2 - Kristen

From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, March 18, 2009 10:37 AM
To: LABtestimony
Cc: schumanj001@hawaii.rr.com
Subject: Testimony for SB1621 on 3/20/2009 9:30:00 AM

Testimony for LAB 3/20/2009 9:30:00 AM SB1621

Conference room: 309
Testifier position: oppose
Testifier will be present: No
Submitted by: judith schuman
Organization: kona pacific view
Address: 73-1084 hamanamana st. kailua-kona, HI
Phone: 808-325-7947
E-mail: schumanj001@hawaii.rr.com
Submitted on: 3/18/2009

Comments:
I am dismayed that this is even a consideration.
As a former employer in California, I swore to have as few, if any, employees as possible. Times have changed but legislatures don't seem to acknowledge that, burdening and punishing businesses in every way. Then they complain that businesses move out of the country. It is time to realize that we have a shared fate, and encouraging an adversarial relationship is deadly for our economy and our citizens.

yamashita2 - Kristen

From: Leroy [leroy@valluzzipoteet.com]
Sent: Thursday, March 19, 2009 4:00 PM
To: LABtestimony
Subject: SB 1621 SD2

To the Senators and Representatives of the Hawaii state legislature,

Dear Ladies and Gentlemen,

My name is LeRoy Seifert. Simply put "I OPPOSE all Card Check Bills." This legislation will have an adverse affect on the freedom of choice and the right to the secret ballot.

It is an unfair pressure tactic that will affect the stability of any business. Workers will be intimidated and harassed into doing something their free will would not normally allow them to do.

We are at a critical juncture of harsh economical times. Businesses cannot afford to deal with a card check bil.

Please vote **NO** on SB 1621 SD 2.

Sincerely,
LeRoy Seifert
94-1066 Puana Street
Waipahu, HII 96797
Ph: (808) 352-5213

Testimony to the House Committee on Labor & Public Employment
March 20, 2009
9:30 a.m.
Room 309, State Capitol

Re: SB 1621, SD2 relating to Collective Bargaining

Chairman Rhoads, Vice Chair Yamashita and members of the committee:

I respectfully request that you hold SB 1621, SD2.

Hawaii has historically been viewed as a place that is "unkind" toward business due to the high cost of government. Now it seems that cost is going to ratchet higher as a result of this legislation. The businesses that will be impacted by SB 1621 cannot afford the extra costs of compliance in this current stressed environment and I would highly question the wisdom of this bill. It certainly is not the result of any broad based grassroots movement that we are aware of on the neighbor islands, let alone Oahu.

Aside from the fact the highly treasured right of a secret ballot is being infringed, this bill will substantially shift traditional responsibilities in the workplace between employers (the risk takers) and employees. I submit to you that the criteria for determining whether this is good legislation should be "what are the economic benefits derived?"

If you cannot demonstrate that concretely, then you are adding additional weight to the already laboring "economic engine" of this state and ultimately, the heath of its people and government. As a 29 year resident of Hawaii, I believe I know what I'm talking about.

If anything, your legislative activities should be focusing on lightening the load of those who create the wealth (jobs) in Hawaii, not increasing it.

Mark R. Spengler
75-346 Hualalai Rd., B203
Kailua-Kona, Kona, HI 96740
Tel. 808-329-7701 E-Fax: 925-369-7701
E-Mail: mspengler@earthlink.net

Character - the embracing of the inward motivation to do whatever is right, whatever the cost.

yamashita1- Kathy

From: Rick Valluzzi [valluzzi1@hawaiiantel.net]
Sent: Thursday, March 19, 2009 12:14 PM
To: LABtestimony
Subject: SB 1621 CARD CHECK

Follow Up Flag: Follow up
Flag Status: Completed

Dear Senators, Representatives,

My name is Rick Valluzzi , I OPPOSE all Card Check Bills. This legislation will have a adversed affect on THE CITIZENS' RIGHT TO CHOOSE AND OUR RIGHT TO SECRET BALLOTS.

Sincerely,
Rick Valluzzi

yamashita2 - Kristen

From: Darren Wada [darren@qualitydesignbuild.net]
Sent: Thursday, March 19, 2009 3:33 PM
To: LABtestimony
Subject: SB 1621 SD2

To Whom it May Concern:

As a small business employee, I am strongly against SB 1621 SD2. This bill will not only hurt the small businesses that are barely getting by, but also the general public. If all companies are tricked into joining union status, then who is going to pay for the increase in wages? The cost will be passed on to the consumers. I know a lot of union construction workers that are out of work. This is due to their high hourly cost and their knowledge of only specific areas of the trade.

Again, I urge you to think about the 'little guys' and vote against this bill.

Aloha,

Darren

LATE

Vicky T. Caytano
P.O. Box 161060
Honolulu, Hawaii 96816

March 19, 2009

Subject Line: Opposition to SB 1621 SD2

HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT
Committee Chair Karl Rhoads
Vice Chair Kyle T. Yamashita

Committee Members,

RE: Testimony in opposition to SB 1621 SD2

The secret ballot is the foundation of our democratic system and one that all employees should be entitled to. Basing the decision to use collective bargaining with a card check procedure may allow fear of retribution to enter into the process. Please do not take away the right of an employee to make this important decision in private through a secret ballot.

Each business is unique and binding arbitration may not recognize this which in turn would jeopardize the ability of a business to continue operating in an economically feasible manner. Enough businesses are failing; we need to do everything to support business employment for our workers.

Laws regarding property rights should not be permitted to be compromised for any reason by anyone.

While there may be a need to simplify the process by which employees determine their right to collective bargaining, SB1621 SD2 is contrary to basic democratic and constitutional principles and should not be passed.

Thank you very much. for your attention.

Sincerely,

Vicky Caytano

Vicky Caytano

808-842-5994

yamashita2 - Kristen

LATE

From: Aldrin Villahermosa [aldrinvillahermosa@mac.com]
Sent: Thursday, March 19, 2009 10:11 PM
To: LABtestimony
Cc: A M I; Aldrin Villahermosa; Ken Ancheta
Subject: OPPOSITION TO SB1621

Aloha my name is Aldrin M. Villahermosa, I am the President, Founder and RME of AMV Air Conditioning Inc. As the owner of a small business that my wife and I built to its current state with our own personal savings and blood and sweat - since 1997, I would like to state my "OPPOSITION" to Senate Bill 1621. With the business climate in limbo due to the sagging economy legislation like this SB1621 serves only one purpose but to increase the labor unions authority to increase their ability to control the workforce of all business's large and small.

I strongly support any type of legislation that benefits the small business community that supports a large majority of the employed people in our state, but I am sorry this SB1621 has not been drafted to support our business community but rather to support the agenda of our local labor organizations.

On behalf of your constituents, I kindly ask that you rethink your reasons for even considering a vote in favor of this SB1621.

Please include my wife and business partner, Amibelle D. Villahermosa, also opposing SB1621.

Respectfully,

Aldrin Villahermosa, President and RME

AMV AIR CONDITIONING INC.
"With AMV You're Living Comfortably"
2290 Alahao Place Bay #402
Honolulu, Hawaii 96819
Telephone: 845-3149 office / 847-3148 fax
Email: aldrin@amvair.com
Website: www.amvair.com

Serving Hawaii's HVAC Industry since 1997.

Hours of operation:
8:00 am - 4:00 pm Monday - Friday

After hours repair service available for contract customers only....

yamashita2 - Kristen

From: cliff poteet [cliff@valluzzipoteet.com]
Sent: Friday, March 20, 2009 6:29 AM
To: LABtestimony
Subject: Card check

LATE

I'am opposed to card check bill, SB 1621 SD2 please vote no on this bill

Mahalo,

Cliff Poteet
Valluzzi Poteet Building Co., LLC
(808)-478-8951

yamashita2 - Kristen

LATE

From: everytdh@hawaii.rr.com
Sent: Friday, March 20, 2009 6:46 AM
To: LABtestimony
Subject: SB 1621 SD2.

Dear Senators and Representatives of the Hawaii State Legislature

My name is Sharon Seifert. I would like to express my opposition to the card check bill SB 1621 SD2. This legislation will have an adverse affect on our right to choose and our right to secret ballot. It will only allow the trade unions to use intimidation and harassment to achieve the right to choose.

Please vote NO to SB 1621 SD2.

Sincerely,

Sharon Seifert
94-1066 Puana Street
Waipahu, HI 96797
PH: (808) 676-9404

yamashita2 - Kristen

From: Shshohetvln@aol.com
Sent: Thursday, March 19, 2009 11:58 PM
To: LABtestimony
Subject: CARD CHECK BILL

LATE

Dear Senators, Representatives,

My name is Sheryl Shohet. I OPPOSE all Card Check Bills. This legislation will have an adverse affect on THE CITIZENS' RIGHT TO CHOOSE AND OUR RIGHT TO SECRET BALLOTS.

Sincerely,
Sheryl A. Shohet

Concerned Citizens List #1

Same Written Testimony in Opposition to: SB 1621, SD 2

(See attached for a sample of the written testimony. All testimony will be available online.)

Updated 3/19/09 4:30pm

	First Name	Last Name	Title/Position	Company	Notes
1	Larry	Bush			
2	Chris	Robbins			
3	Jason	Lippert			
4	Kay	Lorraine			
5	Eric	England			
6	Mike	Sands			
7	Shelley	Wilson	President	Wilson Homecare	
8	Peter	Anderson		The Peter Anderson Co.	
9	Darrel	Tajima		Meadow Gold Dairies, Hawaii	
10	Clinton	Owen			
11	Gail Ann	Chew			
12	Virginia	Holmes		New Penny Cleaning Svc LLC	
13	Brian	Murdock			
14	Marlene	Nations			
15	Donna	Char		Best Publishing-Big Island	
16	Wayne	Houseright		Deep Seawater International, Inc.	
17	Brian	Arkle			
18	Jasmine	Lopez-Silva	General Manager	Kauai Coast Resort	
19	Dr. John	Barnett		Barnett Consulting Group	
20	Patrick	Bustamante	President	Pacific LightNet	
21	Michael	Jokovich			
22	Sai	Chantavy			
23	Maribel	Sicat		Maunalani Nursing & Rehab Center	
24	Scott	Nair		Kukio Golf & Beach Club	
25	Ernie	Pasion			
26	Gino	Gabrio			
27	Debbie	Padello			
28	K.	Okamura			
29	Rebecca	Ward		Ward Research	
30	Robert	Spencer		R.M. Towill Corporation	
31	Bob	McDermott			
32	Wayne	Hamano			
33	Kimi-Anne	Huston-Sur			
34	Rodney	Ito			
35	Bob	Singlehurst			
36	Larry	Bush			
37	Neil	Ishida			
38	Mitchell	Tam		AT & AMP; T Mobility	
39	Alison	Misajon			
40	Concerned Citizen				
41	Sam	Gridley	Owner	Integration Technologies, Inc.	Add'l Comments

42	Cindy	Fujioka		Doubletree Alana Hotel Waikiki	Add'l Comments
43	Mitch	Sipiala	Dir. of Human Resources	Four Seasons Resort Hualalani	Add'l Comments
44	Paul	Saito			Add'l Comments
45	Louis	Darnell	President	Intergrated ComTel, Inc.	Add'l Comments
46	Lisa	Wong			Add'l Comments
47	Monica	Toguchi	VP of Admin. & Planning	Highway Inn Inc.	Add'l Comments

yamashita2 - Kristen

From: lbush@ymcahonolulu.org
Sent: Tuesday, March 17, 2009 2:33 PM
To: LABtestimony
Subject: Take Action Now

Larry H. Bush
1441 Pali Highway
Honolulu, HI 96813-2050

Testimony to the House Committee on Labor & Public Employment March 20, 2009 9:30 a.m.
Room 309, State Capitol

Re: SB 1621, SD2 relating to Collective Bargaining

Chair Rhoads, Vice Chair Yamashita and members of the committee:

I respectfully request that you hold SB 1621, SD2.

The entities that will be affected by this measure will increase the likelihood of them not surviving the additional costs, lost productivity, and bureaucratization of the workplace that come with procedures mandated by this measure.

Our state has been focused on sustainability. This measure will undermine our efforts. Simply unionization will increase the cost of locally produced food and weaken Hawaii's valuable but shrinking agricultural industry. Furthermore, this bill will hurt certain small businesses and entities.

Additionally, fundamentally, this measure dilutes every employee's right to a secret ballot in determining whether to have union representation. They should have the right to make their decision in private, not in the open.

Finally, the binding arbitration will hurt both employees and employers as for the former, they would be denied the ability to vote on the pay and benefits. For the employer, it could be stuck with a contract that is compeletely incompatible with the cost structure and business model. Thus, this could have a huge impact on the livelihood of the business and the security of jobs.

We should be focusing on finding ways to revitalize Hawaii's economy, not hinder it.

For the above reasons, I strongly ask that you hold this bill. Thank you for the opportunity to submit written comments.

Concerned Citizens List #2

Same Written Testimony in Opposition to: SB 1621, SD 2

(See attached for a sample of the written testimony. All testimony will be available online.)

Updated 3/19/09 4:30pm

	First Name	Last Name	Title/Position	Company	Notes
1	Brian	Arkle	General Manager	Steiner Hawaii Inc dba Alsco	
2	Thomas	Jones	President & Co-Owner	Gyotaku Japanese Restaurants	
3	Gary	Manago	President	Sergio's LLC	
4	Glenn	Waki	President	Glenn Co. Hawaii Inc.	
5	Kenton	Tom	Vice President	Wailana Coffee House	
6	Joanna	Leong	Secretary/Treasurer	Wailana Coffee House	
7	Fred	Remington	Vice President	E & J Lounge Operating Co., Inc.	
8	Chester	Kaneshiro	President	Tanaka of Tokyo Restaurants Ltd., Corporate Offices	
9	S. Alexander	Screen	Corporate V.P./General Mngr.	Tanaka of Tokyo Restaurants Ltd., Central	
10	Ray	Liu	General Manager	Tanaka of Tokyo Restaurants Ltd., Central	
11	Nio	Tang	Assistant Manager	Tanaka of Tokyo Restaurants Ltd., Central	
12	Lester	Nishida	Executive Head Chef	Tanaka of Tokyo Restaurants Ltd., Central	
13	Andy	Huang	General Manager	Tanaka of Tokyo Restaurants Ltd., East	
14	Roy	Shikamura	Manager	Tanaka of Tokyo Restaurants Ltd., East	
15	Hiroshi	Lamansky	Manager	Tanaka of Tokyo Restaurants Ltd., West	
16	Marc	Akiyoshi	Executive Chef	Tanaka of Tokyo Restaurants	

yamashita1- Kathy

From: Brian Arkle [barkle@alsco.com]
Sent: Thursday, March 19, 2009 6:42 AM
To: LABtestimony

Subject Line: Opposition to SD 1621 SD2

HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT
Committee Chair Karl Rhoads
Vice Chair Kyle T. Yamashita

Committee Members,

RE: Testimony in opposition to SD 1621 SD2

The secret ballot is the foundation of our democratic system. Basing the decision to use collective bargaining using a card check procedure may allow coercion or fear of retribution to enter into the process. ALL employees deserve the chance to make this important decision in private with a secret ballot.

Employers should be afforded the opportunity to address employees prior to a secret vote and offer their concerns and ideas.

Each business is unique and binding arbitration could put the determination of the details of a union contract in the hands of persons not fully able to understand the complexities of each business.

Laws regarding property rights should not be permitted to be compromised for any reason by anyone.

While there may be a need to simplify the process by which employees determine their right to collective bargaining, SD1621 SD2 is contrary to basic democratic and constitutional principles and should not be passed.

Sincerely,
Brian Arkle
General Manager
Steiner Hawaii Inc dba Alsco
808-834-7503