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March 27, 2008

VIA Hand Delivery

Mr. Lester Heltzer, Executive Secretary
National Labor Relations Board
1099 14th Street, N. W.
Washington, D.C. 20570

Re: Comments concerning Joint Petitions for Certification Consenting to an Election, Proposed Rulemaking of 29 CFR Parts 101 and 102.

Dear Mr. Heltzer:

On February 26, 2008, the National Labor Relations Board filed a Notice of Proposed Rulemaking concerning Joint Petitions for Certification Consenting to an Election. These comments in opposition to the proposed rules are submitted on behalf of the National Right to Work Legal Defense Foundation, Inc., and individual employees Clarice Atherholt, Sherwood Cox and Mike Ivey.

I. Parties: The National Right to Work Legal Defense Foundation, Inc. ("Foundation") is a nonprofit, charitable organization providing free legal aid to employees whose human or civil rights have been violated by abuses of compulsory unionism. The Foundation was formed to protect the Right to Work, freedoms of association and speech, and other fundamental liberties of ordinary working men and women from infringement by compulsory unionism. As such, the Foundation aids employees who have been denied, or coerced in the exercise of, their right to refrain from collective activity.

The Foundation's staff attorneys have served as counsel for individual employees in many Supreme Court, federal court and NLRB cases involving employees' rights to refrain from joining or supporting labor organizations, and thereby helped to establish important precedents protecting employee rights in the workplace against the abuses of compulsory unionism. These cases include Communications Workers v. Beck, 487 U.S. 735 (1988); Lee v. NLRB, 393 F.3d 491 (4th Cir. 2005); Penrod v. NLRB, 203 F.3d 41 (D.C. Cir. 2000); Lucas v. NLRB, 333 F.3d 927 (9th Cir. 2003); Saint-Gobain Abrasives, 342 NLRB 434 (2004); and Dana Corp., 341 NLRB No. 150 (2004); further proceedings, 351 NLRB No. 28 (2007). The Foundation's legal aid program has been at the forefront of exposing the true nature of so-called "neutrality agreements." See Dana Corp., 341 NLRB No. 150 (2004); further proceedings, 351 NLRB No. 28 (2007); Patterson v. Heartland Industrial Partners, LLP, 225 F.R.D. 204 (N.D. Ohio 2004); Heartland Industrial Partners, 348 NLRB No. 72 (2006).

Clarice Atherholt was formerly an employee of Dana Corporation, an employer that entered into a neutrality agreement with the UAW. Ms. Atherholt was subjected to a coercive union organizing drive conducted under the auspices of a neutrality agreement, and was the Petitioner in Dana Corp., 341 NLRB No. 150 (2004); further proceedings, 351 NLRB No. 28 (2007). Ms. Atherholt has witnessed first hand the harassing and coercive conduct of union organizers armed with special powers provided by a neutrality agreement.

Sherwood Cox is a registered nurse employed by the Western Medical Center, Santa Ana, California. Western Medical Center entered into a neutrality agreement with the California Nurses Association (CNA). Mr. Cox filed a number of successful unfair labor practice charges and spearheaded employee opposition to this neutrality agreement and to representation by the CNA. Mr. Cox has also witnessed first hand the harassing and coercive conduct of union organizers, and has himself been subjected to harassment and coercion as a result of his views and activities.

Mike Ivey is an employee of Freightliner Custom Chassis Corp., a subsidiary of the Chrysler Corporation, in Gaffney, South Carolina. Mr. Ivey's employer entered into a neutrality agreement with the UAW. Mr. Ivey has filed a number of successful unfair labor practice charges and spearheaded employee opposition to this neutrality agreement and to representation by the UAW. Mr. Ivey has also witnessed first hand the harassing and coercive conduct of union organizers armed with special powers provided by a neutrality agreement, and has himself been subjected to harassment and coercion as a result of his views and activities.

II. Summary: The Foundation and employees Atherholt, Cox, and Ivey oppose the NLRB's proposed rules and object to both specific provisions of the rules and to the general effect that they will have on labor relations.

The proposed rules are objectionable because they give control over the election process to union officials and employers, and then apply a rubberstamp of federal

government approval. Employers and their preferred unions are given the power to jointly: (1) schedule rapid-fire elections at will, with no showing of interest that even a single employee desires the union's representation; (2) gerrymander the bargaining unit; (3) refrain from giving advance notice to employees that the election will be conducted, since the notice requirement is inherently unenforceable; and (4) engage in wrongful conduct to coerce employees to support the union, as blocking charges are inapplicable and employees are not parties to the post-election proceedings.

The proposed rules are generally objectionable because they remove the Board from effectively policing the election process. They instead delegate almost all authority to colluding union officials and employers. If adopted, the proposed rules will do little more than give Board approval to a host of abusive top-down union organizing methods. The Board should not "rent out" its representational machinery for these purposes.

III. Specific Objections: The Foundation and employees Atherholt, Cox and Ivey object to the following provisions of the NLRB's proposed rules.

1. "The petition will provide the date on which the parties have agreed for an election, not to exceed 28 days from the date of filing of the petition."

This rule gives union officials and employers almost complete control over the date, place and hours of the election, subject to only "extraordinary circumstances." The rule is tailor-made for abuse, as union officials and employers can manipulate the schedule to ensure that the election results in union officials gaining exclusive bargaining

privileges over employees. For example, an election can be timed to make it more difficult for a shift of employees opposed to union representation to vote. Or, union officials could use a tactic they commonly use in contract ratification votes—schedule the election at an inconvenient time and location so that only union militants participate.

2. "The petition will provide a description of the bargaining unit that the parties claim to be appropriate."

This rule gives union officials and employers almost complete control over the composition of the bargaining unit. This permits union officials and employers to gerrymander bargaining units to ensure union victory in ways that the Board would not allow if it were conducting a full and open certification election. Units of employees with no community of interest can (and most likely will) be lumped together into gerrymandered units. The proposed rules provide no procedure for the employees to challenge the composition of the unit into which they are forced.

3. "No showing of interest is required to be filed with the petition."

This rule gives union officials and employers complete control over whether an election will be conducted, irrespective of the wishes of employees. Union agents and employers can conspire to thrust union representation onto employees via a rapid-fire election, even though not a single employee has sought or desires such representation.

This is a severe abuse of the Board's traditional election processes, which have always required a showing of interest. In Dana Corp., 351 NLRB No. 28 (2007), the

Board rejected the General Counsel's argument that employees seeking a decertification should have to make a 50% showing of interest. The Board reiterated its 30% showing of interest standard as fair to all parties. Yet here, the proposed rule scraps that standard, and substitutes nothing more than the discretion and collusion of self-interested union officials and employers as the equivalent of a "showing of interest."

The inequity of this proposal is highlighted by the fact that any intervenors wishing to get on the ballot must meet the Board's traditional showing of interest standards in less than fourteen (14) days. Coupled with the rapid-fire nature of this election process and the fact that notice of the election may never reach the employees in a timely fashion, it is difficult to imagine that any other union or group of employees could muster themselves in time to meet the standard "showing of interest" requirement to get on the ballot. In essence, the Board is giving a free pass for an employer to choose a specific union for its employees, with no practical opportunity for employees to voice even a modicum of dissent or organize themselves against the anointed union.

In any event, an election petition without any showing of employee interest is impermissible under the plain language of § 9(c)(1)(A) of the Act, 29 U.S.C. § 159(c)(1)(A), which requires that a "substantial number of employees . . . wish to be represented for collective bargaining." While the Board has discretion to interpret the NLRA, it cannot adopt a rule under which "substantial number of employees" is construed to mean no employees whatsoever.

4. "Notice must be posted by the employer," but "failure to post these notices" shall be grounds for setting aside the election" only when "proper and timely objections are filed under the provisions of Sec. 102.69(a)."

This rule permits employers and union officials to have elections conducted without any advance notice to employees whatsoever, because the notice posting "requirement" is inherently unenforceable and illusory. Failure to post a notice is only grounds for setting aside an election if an employer or union objects to the lack of the notice.[1] Of course, union officials and employers that collude to force a rapid-fire election are not going to object to their own failure to post a notice. For all practical purposes, the notice requirement in the proposed rule may as well not exist.

5. "Any motion to intervene . . . must be filed within 14 days from the docketing of the petition" and "the Board's traditional intervention policies" will be applicable.

Rival unions or groups of employees will be unable to organize themselves in fourteen (14) short days to get themselves on the ballot after an "RJ Petition" is filed. This is particularly true considering the total control that the employer and its preferred union have over the timing of the election, and the fact that the notice posting requirement is illusory.

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[1] As noted above, the only parties that can file an objection to the rapid-fire elections proposed in this rule are the union and employer. See NLRB Rules and Regulations, §§ 102.8 and 102.69(a).

This rule serves only to ensure that employees will be represented by the union of their employer's choice. For example, as these comments are being written, the SEIU and the California Nurses Association (CNA) are fighting over employees of the Catholic Healthcare Partners in Ohio, where the CNA (with much justification) has accused SEIU and the employer of signing an illicit secret deal to conduct rapid-fire consent elections and thereby cut out of the process all other interested unions and employee groups. See Daily Labor Reporter (BNA), SEIU, Ohio Hospitals Cancel Elections Following Campaign by CNA/NNOC, (Mar. 12, 2008); Daily Labor Reporter (BNA), CNA/NNOC Campaign Could Derail Elections for 7,700 Hospital Workers in Ohio, (Mar. 11, 2008). If the Board adopts these proposed rules, the new face of American labor law will be this: secret deals between employers and their chosen unions that preclude other unions or groups of individual employees from asserting their rights or stating their preferences.

6. "Unfair labor practice charges . . . will not serve to block the election or cause the ballots cast in the election to be impounded."

This rule is inequitable because it will squash only unfair labor practice charges filed by *employees* or rival labor organizations. It is extremely unlikely that an employer and union that file an "RJ Petition" will also file blocking charges against one another, as these entities are already working together. The only ULP charges likely to be filed will come from employees or rival unions alleging that the employer is unlawfully supporting the union in violation of § 8(a)(2), or that the employer and union officials are coercing

employees to support the union. It is only these ULP charges that will be deemed inadequate to block a Board election.

This result is particularly perverse since the principal problem with blocking charges concerns *unions'* efforts to block employees' decertification petitions with frivolous ULP charges. Saint-Gobain Abrasives, 342 NLRB 434 (2004). Yet, the Board does not propose to rescind the blocking charge policy in this circumstance. The Board only seeks to do away with blocking charges – and ensure rapid-fire elections – in the one situation where both the employer and union officials collude to unionize the employees.

Blocking charges should be done away with in *all* elections, not just in the rapid-fire elections proposed under these rules. To only exempt joint employer-union petitions from the blocking charge rule—and thus effectively make only employee unfair labor practice charges incapable of blocking an election—is inequitable and contrary to the purposes of the Act.

7. "Unfair labor practice charges . . . will be handled in conjunction with any post-election proceedings," and "all election and post-election proceedings will be resolved with finality by the Regional Director."

This provision rewrites § 10(b) of the Act, 29 U.S.C. § 160(b), and cuts the full Board and the federal courts out of the election process in favor of unappealable rulings by Regional Directors.

First, § 10(b) explicitly creates a six-month limitations period for the filing of

unfair labor practice charges. In some instances, elections or even certifications can be set aside as a result of these ULP charges. Lunardi-Cent. Dist. Co., 161 NLRB 1443 (1966). However, the proposed rules require that ULP charges related to election conduct be litigated in the expedited post-election objection process. The post-election objection process ends seven (7) days after an election is conducted if no objections are filed by the employer or union. This implies that employees' ULP charges filed more than seven (7) days after an election are untimely, or at least unable to effect the results of the election. This is not only procedurally unfair, but in clear violation of Congress' statutory mandate that ULP charges can be filed for up to six (6) months.

Second, the proposed rules appear to vest the power to decide ULP charges in "final" decisions of Regional Directors, rather than in decisions of Administrative Law Judges, which can be reviewed both by the Board and the federal courts of appeals under 29 U.S.C. § 160(f). This raises a concern that the Act itself is being rewritten by these proposed rules. It also raises a concern that due process rights will be trampled when a Regional Director is granted exclusive and final power to both investigate and adjudicate the issues raised in the ULP charges.

Third, employers and unions should not be allowed to make ULP charges filed against them by *other parties*—such as employees or rival unions—subject to the unreviewable discretion of a Regional Director. It is one thing for an employer or union to waive its own right to appeal a Regional Director's decision to the Board. It is quite

another for self-interested employers and union officials to waive the rights of *other* parties to bring their objections or ULPs to the Board and the federal courts.

IV. General Objections: The overarching problem with the proposed rules is that they give almost complete control over the Board's election processes to employers and union officials that have chosen to collude with one another prior to employees designating the union to be their representative. If adopted, the "RJ Petition" will become nothing more than a way for employers and union officials to put the NLRB's stamp of approval on top-down organizing conducted pursuant to "neutrality" and similar "top-down" agreements.

1. The Proposed Rules Give Self-Interested Employers and Union Officials Excessive Control Over The Board's Election Machinery

The proposed rules give almost complete control over the Board's election processes to employers and union officials. These two parties control when and where an election is conducted and who is eligible to vote. Coercive conduct by the employer and union agents is not grounds for blocking the election, and is extremely unlikely to result in a reversal of the election results because only the employer and union are "parties" that can file objections. Entrusting employee rights to the self-interested desires of employers and union operatives is akin to leaving the foxes to guard the henhouse.

Section 7 of the Act gives rights solely to "employees." 29 U.S.C. § 157; *see* Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992) ("By its plain terms, thus, the NLRA

confers rights only on employees, not on unions or their nonemployee organizers"). Section 8 of the Act exists to protect employee rights *against* misconduct by "employers" and "labor organizations." *See* 29 U.S.C. § 158(a-b). Section 9 of Act gives the Board the responsibility to ensure that elections are fairly conducted and that the results of such elections reflect the free and unfettered choice of employees.

> 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. *It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled.*

General Shoe Corp., 77 NLRB 124, 127 (1948) (emphasis added).

Here, the Board abdicates this responsibility. Under the proposed rules, the Board will merely and ministerially count ballots on behalf of the employer and union – not ensure that "laboratory conditions" conducive to employee free choice are respected.

The Supreme Court has warned of the danger of "plac[ing] in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives." Ladies Garment Workers v. NLRB, 366 U.S. 731 (1961). Indeed, there exists a long and sordid history of employers and union officials colluding to coerce employees into union representation.[2]

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[2] Duane Reade, Inc., 338 NLRB No. 140 (2003) (employer unlawfully assisted Needletrades union with organizing several of its stores); Fountain View Care Center, 317 NLRB 1286 (1995), enforced, 88 F.3d 1278 (D.C. Cir. 1996) (supervisors and other (continued...)

The effect of the proposed rules is particularly perverse considering that the agreement to file an RJ Petition is inherently reached between an employer and a union that *does not represent* the employees who are subject to the petition. Pre-recognition bargaining between employers and unions is unlawful under the Act. See Majestic Weaving Co., 147 NLRB 859 (1964), enforcement denied on other grounds, 355 F.2d 854 (2d Cir. 1966); Ladies Garment Workers v. NLRB, 366 U.S. 731 (1961).

A simple example illustrates the point. Assume that an employer and union filing an RJ Petition conduct a joint captive-audience meeting the day before the election and inform employees that their factory will close if the union loses the election. This

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[2](...continued)
agents of the employer actively encouraged employees to support the union); NLRB v. Windsor Castle Healthcare Facility, 13 F.3d 619 (2d Cir. 1994), enforcing 310 NLRB 579 (1993) (employer provided sham employment to union organizers and assisted their recruitment efforts); Kosher Plaza Super Market, 313 NLRB 74, 84 (1993); Brooklyn Hospital Center, 309 N.L.R.B. 1163 (1992), aff'd sub nom. Hotel, Hosp., Nursing Home & Allied Servs., Local 144 v. NLRB, 9 F.3d 218 (2d Cir. 1993) (employer permitted local union, which it had already recognized as an exclusive bargaining representative, to meet on its premises for the purpose of soliciting union membership); Famous Casting Corp., 301 NLRB 404, 407 (1991) (employer actions unlawfully supported union and coerced the employees into signing authorization cards); Systems Management, Inc., 292 NLRB 1075, 1097-98 (1989), remanded on other grounds, 901 F.2d 297 (3d Cir. 1990); Anaheim Town & Country Inn, 282 NLRB 224 (1986) (employer found to have violated §§ 8(a)(1) and (2) when it actively participated in the union organizational drive from start to finish); Meyer's Café & Konditorei, 282 NLRB 1 (1986) (employer invited union it favored to attend hiring meeting with employees); Denver Lamb Co., 269 NLRB 508 (1984); Banner Tire Co., 260 NLRB 682, 685 (1982); Price Crusher Food Warehouse, 249 NLRB 433, 438-49 (1980) (employer created conditions in which the employees were led to believe that management expected them to sign union cards); Vernitron Electrical Components, 221 NLRB 464 (1975), enforced, 548 F.2d 24 (1st Cir. 1977); Pittsburgh Metal Lithographing Co., Inc., 158 NLRB 1126 (1966).

conduct obviously warrants overturning the results of the election. Yet, under an RJ Petition, who will be able to file an objection to the offensive conduct? Not employees, because they are not "parties." Obviously, the colluding union and employer – the only "parties" – will not file objections to their own coercive conduct.

2. Neutrality Agreements Are Not Favored by Labor Law

If adopted, the proposed rules will be little more than a means for employers and unions to put the Board's stamp of approval on coercive top-down organizing conducted pursuant to organizing agreements, or so-called "neutrality" agreements. The Board should be reticent about "renting out" its representational machinery for this purpose. This is particularly true considering that many organizing agreements require post-election and other disputes to be submitted to an arbitrator, and not to the Board. See, e.g., http://www.ynhhunion.org/PrinciplesAgreement.pdf, the organizing agreement between SEIU and Yale New Haven Hospital. It is almost unimaginable that an employer and union filing an RJ Petition would file post-election objections with the Board.

Moreover, the vast majority of employers and unions that agree to file RJ Petitions will already be signatories to top-down organizing agreements, the provisions of which are not favored by labor law. For example, such agreements usually prohibit all employer speech regarding unionization, even though full and robust free speech is

favored under the NLRA.[3]

Similarly, the agreements often require that the employer directly assist the favored union's organizing campaign against its employees by providing valuable and sensitive lists of information about the employees, special access for union organizers to company facilities, and captive audience meetings conducted on behalf of the union, even though such assistance may be unlawful under § 8(a)(2).[4] It is clear that the vast majority of elections conducted under the proposed rules will be ones in which the employer is contractually committed to assist and support the union's organizing campaign.

Moreover, employees are usually kept in the dark about the so-called neutrality agreement signed by their employer and the union that covets them. The actual terms of most such agreements are held in strict secrecy, and are not shared with the very employees whom they target – even though the labor law condemns secret backroom

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[3] See 29 U.S.C. § 158(c); Linn v. United Plant Guard Workers, 383 U.S. 53, 62 (1966); see also NLRB v. Lenkurt Elec. Co., 438 F.2d 1102, 1108 (9th Cir. 1971) ("It is highly desirable that the employees involved in a union campaign should hear all sides of the question in order that they may exercise the informed and reasoned choice that is their right"); NLRB v. Pratt & Whitney Air Craft Div., 789 F.2d 121, 134 (2d Cir. 1986) (similar); Excelsior Underwear, 156 NLRB 1236, 1240 (1966) (similar); accord Thomas v. Collins, 323 U.S. 516, 547 (1945) (Jackson, J., concurring) (extolling virtues of open debate between management and labor).

[4] See, e.g., Charles I. Cohen, Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?, The Labor Lawyer (Fall 2000); Daniel Yager & Joseph LoBue, Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century, 24 Empl. Rel. L.J. 21 (Spring 1999); Glenn Taubman, "Neutrality Agreements" and the Destruction of Employees' Section 7 Rights, 6 Engage: Federalist Soc'y J. 101 (2005).

arrangements between union officials and employers.[5] Amazingly, the General Counsel's Division of Advice recently ruled that employees have no right to copies of such neutrality or organizing agreements, either before or after the union is certified or recognized. Rescare, Inc & SEIU District 1199P, Case Nos. 11-CA-21422 and 11-CB-3727; and 6-CA-35461 and 6-CB-11371 (Nov. 30, 2007). This makes a mockery of informed consent and employee free choice.

Unions operatives are using "neutrality agreements" and other "top-down agreements" to increase their ranks because those agreements silence employer free speech, eliminate employees' opportunity to hear a full debate on the issues, and hinder employees' ability to organize themselves against union representation if that is their choice. By design, independent-minded employees have few legal protections under these agreements and thus little possibility of protecting their Section 7 rights to resist the union organizing campaigns targeting them. The creation of neutrality agreements and the demise of an open and robust election campaign followed by a well-publicized secret-

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[5] For example, on August 13, 2003, Dana Corporation and the United Auto Workers announced a neutrality agreement that they denominated as a "partnership," except that the "terms of the agreement were not disclosed by agreement of the parties." http://www.dana.com/news/pressreleases/prpage.asp?page=1295. But see Merk v. Jewel Food Stores, 945 F.2d 889 (7th Cir. 1991) (secret agreements violate the federal labor policy); Aguinaga v. United Food & Commercial Workers, 993 F.2d 1463 (10th Cir. 1993); Lewis v. Tuscan Dairy Farms, Inc., 25 F.3d 1138 (2d Cir. 1984) (union breached duty of fair representation by making secret agreement with employer not to enforce seniority rights of employees).

ballot election inevitably lead to an increase in union coercion and intimidation, as employees are pressured into rapid-fire and non-appealable voting without full knowledge of the issues.

Employees' § 7 right to freely choose *or reject* a union is under assault by neutrality agreements between growth-starved unions and compliant (or coerced) employers. This was recognized in a lawsuit brought under 29 U.S.C. § 186 to challenge such a secret "neutrality" agreement as an unlawful transfer of a "thing of value" from an employer to a union. In that case, the federal court denied motions to dismiss and stated that "Heartland Industrial Partners LLP [the employer] has apparently selected and contracted with a union of Heartland's choice," the Steelworkers.[6] The labor law must fully protect employees' right to choose a union or refrain, not the employer's ability to anoint for them a particular union based on its own pecuniary interests or its need to stanch the bleeding caused by a vicious "corporate campaign."

Top-down organizing agreements that place employer and union "labor peace" above the interests of the employees should be condemned (rather than crassly facilitated) in the same way that the courts and the Board have long condemned other collusive arrangements to force employees into unionization. Most neutrality agreements are, in fact, collusive arrangements simply repackaged in an attempt to shield what would

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[6] Patterson v. Heartland Industrial Partners LLC and the United Steelworkers of America, Order Denying Motion to Dismiss at 3, Case No 5:03CV1596 (N.D. Ohio Jan. 12, 2004).

otherwise be unlawful employer support of a chosen labor union.[7]

In short, the proposed rules must be viewed in the context of union efforts to destroy both the full and open debate inherent in traditional election campaigns and the NLRA-established secret-ballot election process, and replace them with "neutrality agreements," forced employer silence, non-existent election campaigns, employees' inability to object or organize a movement to oppose unionization, and union selection via either "card check" or rapid-fire consent elections. In all of these cases, employees are stripped of their basic rights under the Act, and, after renting itself out as a rubberstamp of these coercive and often illegal arrangements, the Board is rendered obsolete.

CONCLUSION: The National Right to Work Legal Defense Foundation, Inc. and individual employees Clarice Atherholt, Sherwood Cox and Mike Ivey oppose the proposed rules and ask the Board to refrain from implementing them.

Respectfully submitted,

Glenn M. Taubman
William L Messenger

Attorneys for the National Right to Work Legal Defense Foundation, Inc., and individual employees Clarice Atherholt, Sherwood Cox and Mike Ivey

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[7] See generally Daniel Yager & Joseph LoBue, Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century, 24 Empl. Rel. L.J. 21 (Spring 1999).