21-16220

United States Court of Appeals
for the Ninth Circuit

CORNELE A. OVERSTREET,

Petitioner-Appellee,

v.

NP RED ROCK, LLC,

Respondent-Appellant.

On Appeal from the United States District Court
for the District of Nevada
Case No. 2:20-cv-02351-GMN-VCF

AMICUS CURIAE BRIEF OF RAYNELL TESKE IN SUPPORT OF NP RED ROCK, LLC'S PETITION FOR REHEARING EN BANC

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Ms. Raynell Teske has been an employee of NP Red Rock, LLC ("Red Rock") since 2006. Local Joint Executive Board of Las Vegas ("Union") has been attempting to unionize Ms. Teske's workplace for many years and she has long been a leader of hundreds of employees opposed to the Union's representation. In late 2019, during its latest push to unionize Ms. Teske's workplace, the Union gathered a sufficient number of signatures to file for a certification election with the National Labor Relations Board ("NLRB") to determine whether a majority of employees wanted the Union's representation. NLRB Regional Director Cornele Overstreet ("Regional Director") scheduled a secret-ballot election for December 2019. Based upon her independent judgment, Ms. Teske voted against the Union, and a majority of Red Rock employees agreed with her—the Union lost the election by a vote of 627–534. (ER0008). Rather than accept the stated choice of the employees, the Regional Director filed a petition with the district court for, and was granted, an affirmative bar-

[1] In accordance with Fed. R. App. P. 29(b)(4) and 29(a)(2), Ms. Teske states that both parties, Petitioner-Appellee Cornele Overstreet and Respondent-Appellant NP Red Rock, LLC, have consented in writing to the filing of this brief. Also, in accordance with Fed. R. App. P. 29(b)(4) and 29(a)(4)(E), Ms. Teske states that no counsel for any party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the amicus or her counsel have made a monetary contribution to this brief's preparation or submission.

gaining order installing the Union as the employees' representative, based on unproven allegations of unfair labor practices and a "card check" arranged by the Union. Ms. Teske believes the ballots cast should count, and the district court was wrong to install the loser of the secret-ballot election—the Union—as the employees' exclusive bargaining representative. Ms. Teske maintains her own personal motivations for opposing the Union's representation, independent of any actions or statements her employer, Red Rock, is alleged to have made.

Compelled union representation "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). Ms. Teske does not wish to see her individual employment rights diminished by the installation of an unwanted representative. She supports en banc review of the district court's bargaining order to oppose any diminution of her individual workplace rights, including her right to deal with her employer without an unwanted third-party intermediary a majority has rejected.

ARGUMENT IN SUPPORT OF REHEARING EN BANC

As the Panel's concurring opinion shows, *Overstreet v. NP Red Rock, LLC*, No. 21-16220, 2021 WL 5542167, at *2 (Miller, J., concurring) (9th Cir. Nov. 26, 2021), en banc review is warranted because *Scott ex rel. NLRB v. Stephen Dunn & Assocs.*, 241 F.3d 652 (9th Cir. 2001), was wrongly decided and conflicts with decisions of

two other circuit courts. Moreover, the Panel's affirmance of the district court's bargaining order undermines employee free choice by: (1) elevating a speculative "card check" over a government run secret-ballot election and (2) essentially banning any re-run election. The Panel's unanimous concurrence correctly notes that a bargaining order is an "extraordinary and disfavored remedy for violations of the NLRA" that "is rarely, if ever, appropriate 'based solely on the grant of economic benefits.'" *Overstreet*, 2021 WL 5542167, at *2 (Miller, J., concurring) (citations omitted). Red Rock's petition for rehearing en banc should be granted so this Court can overrule *Scott* and reverse the district court's erroneous bargaining order.

1. **A grant of benefits is not a hallmark violation of the Act that prevents a re-run election from being held.**

The majority in *Scott* relied on a narrow exception found in *NLRB v. Gissel Packing Co*., 395 U.S. 575, 614 (1969), which allows a union to be imposed after losing a secret-ballot election "when the Union shows that it once had a majority and its support was 'undermined' by unfair practices that 'impede[d] the election process.'" *Scott*, 241 F.3d at 661 (quoting *Gissel*, 395 U.S. at 614). But even under those circumstances, a court must still determine that the alleged unfair labor practices "prevent a free and fair second election from being held." *Scott*, 241 F.3d at 665. Because bargaining orders perversely undermine the core principle of the Act, employee free choice, they are traditionally reserved for extreme and "hallmark" violations, such

as "discharge, withholding benefits, and threats to shutdown the company operation." *See Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640, 650 (D.C. Cir. 2013). But a unilateral *grant* of benefits is the opposite of "withholding" benefits and does not warrant a bargaining order. While granting benefits may be an unfair labor practice in some instances, *see NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964), that alone does not make it a "hallmark violation" that supports throwing out a secret-ballot election and imposing a union by bureaucratic fiat without a re-run election. Two other circuits rejected the argument that a grant of benefits during an election campaign alone justifies a bargaining order. *See NLRB v. Gruber's Super Market, Inc.*, 501 F.2d 697, 705 (7th Cir. 1974); *Skyline Distrib. v. NLRB*, 99 F.3d 403 (D.C. Cir. 1996).

In contrast to these circuits, *Scott* offers scant reasoning as to why a unilateral grant of benefits necessitates a bargaining order and the halting of a re-run election. It ultimately relies on language in *Exchange Parts* suggesting that employees receiving benefit increases are threatened by "a fist inside the velvet glove" when they receive what they are ostensibly demanding. *Scott*, 241 F.3d at 666 (citing *Exchange Parts*, 375 U.S. at 409). *Scott* curtly concludes: "it is unlikely that those who received such benefits or who heard of them, will forget that it is the Company that has the final word on wage increases and decreases." *Id*. (quoting *NLRB v. Anchorage Times Publ'g. Co.*, 637 F.2d 1359 (9th Cir. 1981)).

But *Exchange Parts*' logic is incorrect. Employees are not threatened by an *increase* in benefits. "Hallmark violations" are punishments (discharges and threats of plant closure), not wage increases. In reality, an increase of benefits during an election campaign is more likely to suggest the employer is operating from a weak position than implying a threat. This is because a union can claim a substantial victory from the increased benefits, saying to employees: "we have not even won the election and just the threat of our victory caused the employer to treat you better; imagine what we can do when we actually win." In fact, that is precisely what the Union did in this instance. (ER0388; ER0723).

This is why the D.C. Circuit called *Exchange Parts*' rationale "counterintuitive" and noted that scholars have found employees could not "infer a threat of reprisal" solely from a grant of benefits. *Skyline Distrib.,* 99 F.3d at 409 (quoting Julius G. Getman, Stephen B. Goldberg & Jeanne B. Herman, UNION REPRESENTATION ELECTIONS LAW AND REALITY, 119 (1976)). Similarly, the granting of benefits cannot be taken as a serious threat because even if an employer later rescinds those benefits, "the employees are not foreclosed from restarting a union campaign and insisting on a representation election." *Skyline Distrib.*, 99 F.3d at 408 n.1.

Since a grant of benefits cannot be classified as a "hallmark" violation, "it almost goes without saying" it cannot be the "basis upon which to issue a *Gissel* bargaining order." *Id.* at 410. Consequently, there is no reason why Red Rock's alleged unfair

labor practice cannot be alleviated by the Board's traditional remedies, including a re-run election if appropriate. *See Gruber's Super Market*, 501 F.2d at 705 (describing how the Board's traditional remedies "will decrease the likelihood of the recurrence of misconduct by the employer"). The Court should rehear this case en banc and use this opportunity to overrule *Scott* and bring its precedents in line with the other circuits.

2. The district court's injunction undermines employee free choice.

By filing for the Section 10(j) injunction, the Regional Director is attempting to substitute his representational choice for that of the employees who voted by secret ballot. The Regional Director's actions and the district court's bargaining order undermine the purpose of the National Labor Relations Act ("NLRA" or "Act"). "The Act's twin pillars are freedom of choice and majority rule in employee selection of representatives." *Scomas of Sausalito, LLC v. NLRB*, 849 F.3d 1147, 1151 (D.C. Cir. 2017) (internal quotations & citations omitted). A preference for elections over bargaining orders reflects the policy that employees should not have union representation imposed on them when they might choose otherwise. *See, e.g., Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1461 (D.C. Cir. 1997) (noting "[b]ecause affirmative bargaining orders interfere with the employee free choice that is a core principle of the Act," courts "view[] them with suspicion" (internal quotation omitted)); *NLRB v. Chatfield–Anderson Co*., 606 F.2d 266, 268 (9th Cir. 1979)

("A bargaining order based on authorization cards is less desirable than the free expression of employees in a fair election.").

This is why the Supreme Court has commanded "there could be no clearer abridgement of the Act" than to grant "exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority." *Ladies' Garment Workers Union v. NLRB*, 366 U.S. 731, 738–39 (1961). Yet, that is precisely what occurred here. The injunction imposed by the district court and reluctantly upheld by the Panel imposes a minority union upon the employees at Red Rock. The Panel recognized as much, but was bound by *Scott*, which wrongly allows bargaining orders based solely upon an employer's unilateral grant of benefits before an election.

Imposing a minority union on employees via a bargaining order has long lasting effects. Employees who do not want a union are barred from calling for a new election for at least six months and up to one year after the employer and union begin to bargain. *See Lee Lumber & Bldg. Material Corp.*, 334 NLRB 399 (2001). If a petition to decertify the union is filed during the period between six months and one year after negotiations have begun, the Board only orders an election if the union has been given a "reasonable time to bargain" under a complex five-factor test. *Id.* at 401–05. And if the employer and union agree on a contract before a petition is filed, employees are barred from calling for an election to rid themselves of the union for

the length of the contract, up to three years. *General Cable Corp.*, 139 NLRB 1123 (1962) (establishing three-year contract bar). If this bargaining order is upheld, it may take up to four years for Ms. Teske and her fellow employees to even call for another election. Employee free choice is diminished, not protected, by this system.

3. Bargaining orders must be limited because union authorization cards are not reliable gauges of majority support.

Scott should be overturned for another reason: it expands the category of cases under which bargaining orders may be issued based on a union's collection of "authorization cards." Under *Gissel* and *Scott*, a regional director must show a union achieved majority status to support a bargaining order. *Overstreet*, 2021 WL 5542167, at *1 (citing *Scott*, 241 F.3d at 661). Here, the district court found the Union's authorization cards, collected during its year-long organizing campaign, sufficient to establish the required majority support. (ER0022). Union authorization cards, however, are notoriously unreliable for determining majority support and they should not be elevated over the gold-standard of NLRB-conducted secret-ballot elections. Instead, the Court should trust the secret ballot process and limit the "extreme" remedy of bargaining orders to only the most heinous unfair labor practices. *See Skyline Distrib.*, 99 F.3d at 411 (noting courts should be "strict in requiring the Board to justify *Gissel* bargaining orders").

Union "card check" campaigns are unreliable because they are conducted without safeguards to prevent coercive conduct. Unions can and often do engage in conduct

during card check campaigns that would not be tolerated in Board-conducted elections. For example, the following activity has been held to upset the laboratory conditions necessary to guarantee employee free choice in NLRB-conducted elections: electioneering at the polling place, *see Alliance Ware Inc.*, 92 NLRB 55 (1950) and *Claussen Baking Co.*, 134 NLRB 111 (1961); prolonged conversations with prospective voters in the polling area by union or employer representatives, *see Milchem Inc.*, 170 NLRB 362 (1968); electioneering among employees waiting in line to vote, *see Bio-Medical Applications*, 269 NLRB 827 (1984) and *Pepsi Bottling Co.*, 291 NLRB 578 (1988); speechmaking by a union or employer to massed groups or captive audiences within 24 hours of the election, *see Peerless Plywood Co.*, 107 NLRB 427 (1953); and a union or employer keeping a list of employees who entered the polling place (other than the official eligibility list), *see Piggly-Wiggly*, 168 NLRB 792 (1967).

Yet, conduct of this type occurs in almost every "card check" campaign. The place where an employee signs (or refuses to sign) an authorization card is the functional equivalent to a polling place in an election, because it is where the employee makes his or her choice. When an employee signs (or refuses to sign) a union authorization card, he or she is not likely to be alone. Indeed, this decision is likely made in the presence of one or more union organizers soliciting—or, worse, pressuring—the employee to sign. This also could occur during or immediately after a

union mass meeting. In any event, the employee's decision is not secret, as in an election, because the union clearly knows who signed a card and who did not. *See Gruber's Super Market*, 501 F.2d at 705 (noting "pressures to sign authorization cards are not unknown, and, because of personal factors arising out of the daily working relationship among fellow employees, are not always easily resisted."). In this case, even the Union-supplied evidence of majority support demonstrates the unlawful tactics used during card check campaigns, as the cards the Union submitted and the district court relied upon are facially illegal "dual-purpose" cards.[2] (*See, e.g.*, ER2594).

In sharp contrast, each employee participating in NLRB-conducted elections makes his or her choice in private—secret from both the union and the employer. Once the employee has made the decision by casting a ballot, the process is at an end. This is not true for an employee caught in the maw of a year-long card check campaign, who may be solicited repeatedly and, perhaps, coercively, month after month until she signs. The Union's campaign here ran in fits and starts for a year

[2] Signing this Union card requires employees to do *all* of the following in one fell swoop: (1) approve the Union as exclusive representative; (2) request membership in the Union; and (3) authorize the deduction of union dues. The Board has consistently held such cards to be unlawful. *See Luke Constr. Co.*, 211 NLRB 602 (1974) (striking down dual purpose membership and dues authorization forms); *CWA Local 1101 (N.Y. Tel. Co.)*, 281 NLRB 413 (1986); *Local 32B-32J SEIU (Star Sec. Sys., Inc.)*, 266 NLRB 137 (1983).

(ER2605–38)—during which time employee sentiment could have changed for entirely lawful reasons. *See, e.g.*, *Johnson Controls, Inc.*, 368 NLRB No. 20 (2019). Consequently, authorization cards do not provide an accurate snapshot of employees' true sentiment.

The Board and federal courts, including the Ninth Circuit, have consistently recognized the superiority of secret-ballot elections. "Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions." *Levitz Furniture*, 333 NLRB 717, 723 (2001) (citing *Gissel*, 395 U.S. at 602 and *NLRB v. Cornerstone Builders, Inc*., 963 F.2d 1075, 1078 (8th Cir. 1992)); *see also NLRB v. J. Coty Messenger Serv., Inc.*, 763 F.2d 92, 99 (2d Cir. 1985) ("Our preference is always that the union be chosen in a free election."); *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 304, 307 (1974); *NLRB v. W. Drug*, 600 F.2d 1324, 1326 (9th Cir. 1979) ("[E]lections are the preferred method for ascertaining employee sentiment." (Citation omitted)). As the Fourth Circuit observed long ago: "[i]t 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. The one is no more reliable than the other." *NLRB v. S.S. Logan Packing Co.*, 386 F.2d 562, 565 (4th Cir. 1967).

Here, the district court's bargaining order rests upon Union-collected cards of a bare majority of unit employees, and incorrectly disregards the results of the Board-

conducted election. *Overstreet*, 2021 WL 5542167, at *1. But these authorization cards—collected at various times over the course of a year—are unreliable when compared to the results of the secret-ballot election that was held. Even if the Union did possess majority support at some point prior to the election, its support was slight and tenuous—only 54% of employees. (ER0022). Unions claiming majority support via authorization cards often lose when tested in the crucible of a secret-ballot election. *See Lamons Gasket*, 357 NLRB 739, 751 (2010) (Member Hayes, dissenting) (noting that when employees requested a secret-ballot election after an employer granted voluntary recognition to a union based on a majority showing of authorization cards, the union lost the ensuing election 25% of the time).[3] Thus, it should be no surprise that some Red Rock employees chose to vote differently when given the comfort of a private voting booth. The Union did not "lose" an overwhelming

[3] In one well-publicized case, the United Auto Workers ("UAW") tried to unionize Volkswagen workers in Chattanooga, Tennessee in 2013–14. The UAW publicly proclaimed that it possessed a majority of authorization cards, and asked Volkswagen for "voluntary recognition." *UAW: Most at VW plant have signed union cards*, The Blade (Sept. 11, 2013), https://www.toledoblade.com/Automotive/2013/09/12/UAW-Most-at-VW-plant-have-signed-union-cards-Copy.html. Volkswagen declined, but did not oppose the UAW's representation, thereafter signing a neutrality agreement and filing with the NLRB for a secret-ballot election. NLRB Case No. 10-RM-121704 (Feb. 2, 2014). When that secret-ballot election was held just one month later, the UAW lost decisively, 712–626, with almost 90% of eligible voters casting ballots—notwithstanding the UAW's claimed card majority. Stephen Greenhouse, *Volkswagen Vote Is Defeat for Labor in South*, N.Y. Times (Feb. 14, 2014), https://www.nytimes.com/2014/02/15/business/volkswagen-workers-reject-forming-a-union.html. The UAW's "card check" proved less than accurate.

amount of support, but lost the secret-ballot election because some attrition is to be expected given authorization cards' inherent unreliability. In short, the evidence of actual majority support underlying the district court's bargaining order was underwhelming at best, and bargaining orders based on dubious card checks should not be encouraged.

CONCLUSION

The Court should grant Red Rock's Petition for Rehearing En Banc in order to reconsider its holding in *Scott* and reverse the district court's erroneous bargaining order.

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Dated: January 20, 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type limitations provided in Federal Rule of Appellate Procedure 32(a)(7). The foregoing brief was prepared using Microsoft Word 2016 and contains 2,856 words in 14-point proportionately-spaced Times New Roman font.

/s/ Glenn M. Taubman
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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2022, I electronically filed the foregoing Amicus Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Glenn M. Taubman
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