U.S. Chamber of Commerce

Beyond Belief

Does Current Law Require "Card-Check" Union Recognition?

The Importance of Employee Free Choice and Secret-Ballot Elections

The cornerstone of U.S. labor law is the right of employees to make their own decisions about whether to have union representation. For more than 85 years, a secret-ballot election conducted by the National Labor Relations Board ("NLRB" or Board") has been the preferred way to ascertain employee sentiments regarding union representation.

The New Theory That Existing Labor Law Requires "Card-Check" Recognition

The NLRB General Counsel has proposed a theory that *existing* law already requires card-check union recognition—eliminating the right of employees to vote in many NLRB secret-ballot elections—if "the employer is unable to explain its reason for doubting majority status in rejecting the union's demand." This theory relies on an NLRB case, decided in 1949, called *Joy Silk Mills, Inc.*[2]

Does Current Law Require "Card-Check" Union Recognition? For many reasons, it is clear that existing law does not require card-check union recognition:

The Board is not the Supreme Court. Mandatory card-check recognition has been rejected by the U.S. Supreme Court. In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Court upheld NLRB bargaining orders, in the absence of an election, only when there was proof of "outrageous," "pervasive" or other unlawful conduct that seriously impeded having a fair election. In *Linden Lumber v. NLRB*, 419 U.S. 301 (1974), the Court reiterated that an employer can lawfully refuse to recognize a union unless it prevailed in a secret-ballot election.

Court and Board Repudiation of Mandatory Card-Check Recognition. Numerous courts of appeals have held that employers are not required to grant card-check recognition in the absence of unlawful conduct, and for the past five decades, the NLRB has taken this same position. Although the Board in the *Joy Silk* case, decided more than 70 years ago, ruled that an employer unlawfully denied a request for card-check union recognition, the Board based this finding on the employer's unlawful conduct, which prompted the Board to find that the employer lacked a good faith doubt regarding the union's majority status. Subsequently, the Board itself completely abandoned the *Joy Silk* approach.

The Board is not Congress. Congress has never enacted a law requiring union recognition based on signed authorization cards. Legislative efforts to require card-check union recognition have repeatedly been proposed without being enacted. Conversely, the Wagner Act, enacted in 1935, originally provided that the NLRB could certify unions based on "a secret ballot of employees or any other suitable method,"[3] but the reference to "any other suitable method" was dropped in 1947, and the current language states that the Board "*shall direct an election by secret ballot.*"[4] Most recently, the USMCA—adopted by Congress with overwhelming bipartisan House and Senate majorities—requires Mexican labor laws to resolve union representation issues based on a "secret ballot vote." Notably, the USMCA was enacted to create a "level playing field" between the U.S. and Mexico. Yet, NLRB-mandated card-check recognition, without a secret-ballot election, would make U.S. employee rights *inferior* to what the USMCA provides for Mexican employees.

Importance of Protecting Employee Rights. Federal law protects the right of all employees to decide for themselves whether to support or oppose union representation. The "preferred" and "favored" method for giving effect to this right is voting an NLRB-conducted secret-ballot election, and the Board cannot properly deprive employees of this right without the existence of unlawful conduct that would "seriously impede" a fair election. *Gissel,* 395 U.S. at 600, 602; *Linden Lumber*, 419 U.S. at 307.

Introduction

This paper describes the process that governs whether or not employees have union representation. In the United States, the National Labor Relations Act ("NLRA" or "Act") governs how most employees can exercise the right to have union representation if they choose. The NLRA—originally enacted in 1935, with important amendments in 1947 and 1959—protects the right "to form, join, or assist" a union, and it also protects "the right to refrain from any or all of such activities…"[5]

The NLRB is the agency responsible for enforcing the NLRA, which gives the NLRB two main responsibilities. First, after a union representation petition is filed, the NLRB is required to investigate the petition and conduct a secret-ballot election to determine whether a majority of employees supports or opposes union representation. Second, if a charge is filed alleging that an employer or union has violated the Act, the NLRB decides whether the employer or union engaged in unlawful conduct, which is called an unfair labor practice. In unfair labor practice cases, the Board's General Counsel functions as the agency's prosecuting attorney.[6] However, the Board decides whether any alleged violations have merit, and the Board's decisions can be appealed to the federal courts of appeals, and possibly, the U.S. Supreme Court.[7]

An NLRB case called *Joy Silk Mills, Inc.*, decided in 1949, indicated that employers could lawfully refuse to grant union recognition, even if a union produced authorization cards signed by a majority of employees, where the employer had a "*bona fide* doubt as to the union's majority."[8] However, the Board held it was unlawful for an employer to refuse to bargain based on "a rejection of the collective bargaining principle" or "a desire to gain time within which to undermine the union," which the Board evaluated by examining "unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct."[9]

As explained below, the *Joy Silk* approach—which focused on an employer's "good or bad faith" in refusing to bargain with a union that has never prevailed in the NLRB election[10]—was subsequently abandoned by the Board. And two more recent Supreme Court cases—*Gissel* (decided in 1969) and *Linden Lumber* (decided in 1974)—reaffirmed that NLRB-conducted secret ballot elections are the "preferred" and "favored" method of determining employee sentiments about unions. In these cases, the Court described signed union authorization cards as being "admittedly inferior," and upheld NLRB bargaining orders in the absence of an election only when "outrageous," "pervasive" or other unlawful conduct seriously impedes the possibility of having a fair NLRB-conducted election.[11]

In the past eight decades, Congress, the Supreme Court, other courts, and the NLRB have given substantial attention to the rights of employees, employers, and unions. Likewise, the NLRA and relevant cases clearly establish whether and when an employer is required to extend recognition to a union as the exclusive representative of employees. As discussed more fully in this paper, the consistent answer has been uniform: a union is entitled to recognition as the "exclusive" representative of employees only when it prevails in an NLRB-conducted secret ballot election, unless an employer voluntarily decides to extend recognition (based on a showing of majority support). The only exception recognized by the Supreme Court in *Gissel* (and by the Board decision in *Joy Silk*) are situations where unfair labor practices are pervasive or extensive to a degree that warrants a finding that a fair election cannot be conducted.

Employee Free Choice—The Bedrock of U.S. Labor Law

The focus on "majority rule" places great importance of what is found to be an "appropriate" bargaining unit, because this determines (i) what employees can participate in the decision about union representation, and (ii) what employees are *bound* by the decision.

The core principle underlying the NLRA is the right of employees to make their own decisions about whether to have union representation. Section 7 of the Act states that 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…"[12]

The Act's other provisions give effect to the protection in Section 7. For example, Section 9(a) establishes the dual concepts of "majority rule" and "exclusive representation"—it states that any union selected by the *majority* of employees in an appropriate bargaining unit becomes the exclusive representative of *all* employees in the unit for purposes of collective bargaining.[13] The focus on "majority rule" places great importance of what is found to be an "appropriate" bargaining unit, because this determines (i) what employees can *participate* in the decision about union representation, and (ii) what employees *are bound* by the decision. Here again, the focus is on what type of bargaining unit assures employees their "fullest freedom" in exercising this right.[14]

The NLRB union representation process starts with the filing of a representation petition. Section 9(c) states that, if the Board finds that "a question of representation exists, it shall direct an election by secret ballot…"[15] If a union is supported by a majority of bargaining unit employees, an employer also has the option of extending voluntary recognition to the union.[16]

For more than 85 years, however, a secret-ballot election has been the preferred way for ascertaining employee sentiments regarding union representation. And the Act since 1947—in cases involving union certification—has explicitly required the Board to "direct an election by secret ballot." Conversely, the NLRA has never, at any time, given unions the right to become the exclusive representation of employees merely by obtaining signed authorization cards from majority of employees.

As indicated below, the NLRB and the courts have repeatedly reaffirmed the importance of NLRB secret-ballot elections. Efforts in Congress to require employers to grant "card-check" recognition—eliminating the employee right to vote in NLRB secret-ballot elections if a majority of employees have signed authorization cards or petitions—have consistently failed.

The New Theory That Existing Labor Law Requires "Card-Check" Recognition

The NLRB General Counsel functions as the Agency's prosecuting attorney. In a General Counsel Memorandum ("GC Memo") issued on August 12, 2021, the current General Counsel, Jennifer Abruzzo, instructed all of the Board's Regional Offices to identify cases in which the General Counsel will argue that employers, under existing law, are legally *required* to grant card-check recognition when "the employer is unable to explain its reason for doubting majority status in rejecting the union's demand."[17] This theory relies on an NLRB case called *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949). As suggested by the GC Memo, on April 11, 2022, the General Counsel filed a brief in *Cemex Construction Materials Pacific, LLC* urging the Board to overrule its decision in *Linden Lumber* (notwithstanding the Supreme Court's own decision in that case) and reinstate the *Joy Silk* doctrine.[18]

Does Current Law Require "Card Check" Union Recognition? If the NLRB started to require employers to grant union demands for card-check recognition (or if the NLRB prevented an employer from insisting on a secret-ballot election unless it articulated what the Board considers to be a satisfactory "reason for doubting majority status"), this would be a dramatic change from existing law. For countless employees, this would also effectively extinguish the employee right to vote in secret-ballot elections conducted by the NLRB.

Such a change would also be contrary to the consistent position taken by the Congress, the Supreme Court, other courts and the Board itself, which have repeatedly stated that secret-ballot elections are the "preferred" and "favored" method of ascertaining whether a union has majority support[19] and which have acknowledged that authorization cards are "admittedly inferior" and susceptible to potential abuses.[20] Most importantly, requiring card-check recognition would fundamentally undermine the cornerstone of U.S. labor law, which is the right of employees to make their own decisions regarding union representation without any type of restraint or coercion.[21]

A. The Supreme Court (Twice) Has Rejected Mandatory Card-Check Recognition. The NLRB cannot write on a blank slate regarding the subject of NLRB secret-ballot elections versus union authorization cards. These issues were addressed in two Supreme Court decisions, both of which pointedly favored NLRB secret-ballot elections, except when "outrageous" and "pervasive" unfair labor practices or other unlawful conduct "seriously impede" having a fair election.[22]

1. The *Gissel* decision. In *NLRB v. Gissel Packing Co.*[23] the Supreme Court decided multiple cases[24] involving union demands for card-check recognition that three employers denied. The Board found that each employer was required to recognize the union even though no election occurred (and, in one case, the union lost the election), but these findings were based on "the fact that the employers had committed *substantial unfair labor practices* during their antiunion campaign efforts to resist recognition."[25]

The NLRB cannot write on a blank slate regarding the subject of NLRB secret-ballot elections versus union authorization cards. These issues were addressed in two Supreme Court decisions, both of which pointedly favored NLRB secret-ballot elections, except when "outrageous" and "pervasive" unfair labor practices or other unlawful conduct "seriously impede" having a fair election.

Significantly, the Court did not pass on whether an employer could be required to bargain based exclusively on authorization cards in the *absence* of serious unfair labor practices that "made the holding of a fair election unlikely or which... in fact undermined a union's majority."[26] However, in three respects, the *Gissel* decision indicated that authorization cards were disfavored in comparison to NLRB secret-ballot elections.

First, the union in *Gissel* argued that, when an employer was "confronted with a card-based bargaining demand," it could insist on an election only by "immediately" filing an NLRB election petition, or if the Court applied a "good faith doubt" rule, the employer should be required "to make an affirmative showing of his reasons for entertaining such doubt." Neither of these positions were adopted by the Supreme Court in *Gissel*, which placed no burden on an employer to articulate "affirmative" reasons when it denies a union demand for card-check recognition.

Secondly, the Court described with approval the *abandonment* of the card-check recognition principles articulated by the NLRB in the *Joy Silk* case. The Court noted that, under the "*Joy Silk* doctrine," an employer could refuse to extend card-check union recognition based on a "good faith doubt" about the union's majority status, but the Board could dispute that good faith doubt—and order the employer to bargain notwithstanding the absence of an election—based on either of two rationales:

1. The Board could find "that the employer's *independent unfair labor practices* were evidence of bad faith, showing that the employer was seeking time to dissipate the union's majority";[27] or

2. The Board could reason "that the *employer had come forward with no reasons for entertaining any doubt and therefore that he must have rejected the bargaining demand in bad faith*."[28]

Most importantly, requiring card-check recognition would fundamentally undermine the cornerstone of U.S. labor law, which is the right of employees to make their own decisions regarding union representation without any type of restraint or coercion.

The Court observed: "The Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support.

In *Gissel*, the Court noted that, in 1966, the NLRB substantially changed the second principle above in *Aaron Brothers*,[29] in which the Board "shifted the burden to the General Counsel to show bad faith and that an employer 'will not be held to have violated his bargaining obligation...*simply because he refuses to rely upon cards, rather than an election, as the method for determining the union's majority,*'"[30] and the Board in *Aaron Brothers* held "that an employer *no longer needed to come forward with reasons for rejecting a bargaining demand.*"[31] Ultimately, another shift occurred during the Supreme Court oral argument in *Gissel*, where the Board indicated that "it had virtually abandoned the *Joy Silk* doctrine altogether." Thus, the Supreme Court in *Gissel* described, with approval, the Board's complete retreat from the *Joy Silk* "good faith doubt" principle as follows:

> Under the Board's current practice, *an employer's good faith doubt is largely irrelevant,* and the key to the issuance of a bargaining order is *the commission of serious unfair labor practices* that interfere with the election processes and tend to preclude the holding of a fair election. Thus, an employer *can insist that a union go to an election, regardless of his subjective motivation,* so long as he is not guilty of misconduct; *he need give no affirmative reasons for rejecting a recognition request,* and *he can demand an election with a simple 'no comment' to the union.*[32]

Thirdly, the Court repeatedly stated that, when ascertaining whether a union had majority support among bargaining unit employees, NLRB secret-ballot elections were more reliable than authorization cards. Thus, the Court observed: "The Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory—*indeed the preferred—method* of ascertaining whether a union has majority support."[33] In comparison to authorization cards, the Court stated that the election process had "*acknowledged superiority.*"[34]

Conversely, although the Court upheld the limited use of authorization cards, this was only when the employer engaged in serious unlawful conduct making it likely that a fair election could never occur. Even in this limited context, the *Gissel* opinion emphasized the low threshold of reliability being applied by the Court when evaluating authorization cards. For example, the Court stated it was evaluating whether authorization cards were "*such inherently unreliable indicators* of employee desires" which warranted finding that they "may *never*

be used to support an order to bargain."[35] The Court stated that cards were "*admittedly inferior* to the election process,"[36] but this did not mean cards were "thereby rendered totally invalid."[37] Regarding arguments that cards were susceptible to misrepresentation and coercion, the Court stated: "We would be closing our eyes to obvious difficulties if we did not recognize that *there have been abuses,* primarily arising out of misrepresentations by union organizers,"[38] although the Court stated that "some instances of irregularity" did not mean "cards can *never* be used."[39] Indeed, the Court in *Gissel* did not decide that authorization cards were "a freely interchangeable substitute for elections."[40] Instead, only when the severity of an employer's unlawful conduct meant "a fair election probably *could not have been held,* or where an election *[was] set aside,*" the Court in *Gissel* indicated that cards were "*reliable enough* to support a bargaining order."[41]

Regarding arguments that cards were susceptible to misrepresentation and coercion, the Court stated: "We would be closing our eyes to obvious difficulties if we did not recognize that there have been abuses, primarily arising out of misrepresentations by union organizers.

2. The *Linden Lumber* decision. In *Linden Lumber v. NLRB*,[42] the Supreme Court again addressed the superiority of NLRB secret-ballot elections and the limitations associated with authorization cards. However, unlike *Gissel*—where the Court upheld issuance of an NLRB bargaining order when the employer unfair labor practices were likely to "seriously impede the election"[43]—there was no claim in *Linden Lumber* that the employer engaged in unlawful conduct that interfered with a fair election, other than its refusal to grant the union's demand for card-check recognition.[44]

The Board in *Linden Lumber* addressed whether, in the absence of unfair labor practices that warranted a bargaining order under *Gissel*, the employer violated the Act "by refusing to recognize and bargain with the Union following the Union's proffer of authorization cards from a majority of Respondent's employees."[45] The Board answered this question in the negative, and held that the employer "should not be found guilty of a violation of Section 8(a)(5) solely upon the basis of its refusal to accept evidence of majority status other than the results of a Board election."[46]


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On appeal, the Court of Appeals for the D.C. Circuit reversed the Board, and held that an employer violated the Act by refusing to grant card-check recognition unless the employer "asserting a doubt of majority status" took the initiative to file a petition for an NLRB election. The court reasoned that "some alternative must be put in its place to prevent an employer's deliberate flouting and disregard of union cards without rhyme or reason."[47]

Thus, according to the Court, "unless an employer has engaged in an unfair labor practice that impairs the electoral process, a union with authorization cards purporting to represent a majority of the employees, which is refused recognition, has the burden of taking the next step in invoking the Board's election procedure."

The Supreme Court in *Linden Lumber* rejected the D.C. Circuit's analysis, and the Supreme Court upheld the right of employers to deny union requests for card-check recognition *without* any requirement that the employer articulate a reason for the refusal. The Court also held that the employer confronted with such a demand had no obligation to petition the NLRB for an election. Thus, according to the Court, "unless an employer has engaged in an unfair labor practice that impairs the electoral process, a union with authorization cards purporting to represent a majority of the employees, which is refused recognition, has the burden of taking the next step in invoking the Board's election procedure."[48]

Similar to *Gissel*, the Supreme Court in *Linden Lumber* stated that "the policy of encouraging secret elections under the Act *is favored*" and "the election process had *acknowledged superiority* in ascertaining whether a union has majority support..."[49] The Supreme Court in *Linden Lumber* also reiterated the problems that existed under the *Joy Silk* doctrine, in which an employer's refusal to grant card-check recognition had to be supported by a "good faith doubt that the union represented a majority," and the Court stated: "A different approach was indicated."[50] Thus, the Court found that *Gissel* approved the "retreat" from inquiries into the employer's "good faith," because many legitimate reasons justified an employer's potential refusal to grant card-check recognition. To this effect, the Court stated:

> *An employer concededly may have valid objections to recognizing a union on that basis.* His objection to cards may, of course, mask his opposition to unions. On the other hand *he may have rational, good-faith grounds for distrusting authorization cards in a given situation*. He may be convinced that the fact that a majority of the employees strike and picket does not necessarily establish that they desire the particular union as their representative. Fear may indeed prevent some from crossing a picket line; or sympathy for strikers, not the desire to have the particular union in the saddle, may influence others. These factors make difficult an examination of the employer's motive to ascertain whether it was in good faith. *To enter that domain is to reject the approval by Gissel of the retreat which the Board took from its 'good faith' inquiries.*[51]

B. The Courts of Appeals and the NLRB Have Rejected Mandatory Card-Check Recognition. The Board has never imposed a blanket card-check recognition requirement. Even in *Joy Silk*—which the Board abandoned more than 50 years ago[52]—the employer could lawfully refuse to recognize a union based on the union's failure to demonstrate majority support in an NLRB-conducted election, provided that the "insistence on such an election" was motivated by a "bona fide doubt as to the union's majority." Also, consistent with the focus in *Gissel* on unlawful conduct as the basis for any bargaining order, the factors listed in *Joy Silk* as bearing on the employer's "good or bad faith"—when insisting on an election—focused on any "unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct."[53]

The Board's "retreat" from *Joy Silk* not only received "approval" in *Gissel* and *Linden Lumber*, the Board had good reasons for eliminating inquiries into an employer's "good faith" when the employer refused to grant card-check recognition and required that a union prevail in a Board-conducted election. As former Board Member Howard Jenkins explained:

> [T]he concept of "good-faith doubt of majority," whatever its relevance in other types of Section 8(a) (5) violations, has become *irrelevant* to the decision of cases of this type, where the employer rejects the card showing but engages in no violations of the Act, no undermining of the union, no interference with the employees' freedom of choice, and does not otherwise exhibit bad faith. *Retention of this concept in such cases can only confuse the parties, the bar, and the Trial Examiner, and thereby increase the Board's own workload.*[54]

Not only are authorization cards "admittedly inferior to the election process,"[55] the Act confers protection on employees regardless of whether they choose to "form, join, or assist labor organizations" or "refrain from any or all of such activities."[56] The purpose of elections is to eliminate doubt regarding which of these choices is supported by the majority of employees. Thus, it hardly interferes with these protected rights for an employer to require a union to survive "the crucible of a secret ballot election,"[57] which is nothing more than the same "preferred" process[58] that the Board must use before certifying any union.[59]

Separate from the Supreme Court *Gissel* and *Linden Lumber* decisions, existing case law indicates that the Board would face renewed opposition in the courts of appeals if the Board creates an obligation that employers must extend card-check union recognition unless they articulate a "reason" acceptable to the NLRB. For example, as the Supreme Court recognized in *Gissel*, the Court of Appeals for the Fourth Circuit concluded that authorization cards were "were so *inherently unreliable* that their use gave an employer virtually an *automatic, good faith claim that a dispute existed [as to union majority support*], for which a secret election was necessary."[60] More detailed reasoning regarding the deficiencies in authorization cards was presented in *NLRB v. S.S. Logan Packing Co.*[61] where the same court of appeals stated "a card check is *not a reliable indication* of the employees' wishes,"[62] and explained:

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. The one is no more reliable than the other. No thoughtful person has attributed reliability to such card checks.

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The unsupervised solicitation of authorization cards by unions is subject to all of the criticisms of open employer polls. It is well known that many people, solicited alone and in private, will sign a petition and, later, solicited alone and in private, will sign an opposing petition, in each instance, out of concern for the feelings of the solicitors and the difficulty of saying 'No.' This inclination to be agreeable is greatly aggravated in the context of a union organizational campaign when the opinion of fellow-employees and of potentially powerful union organizers may weigh heavily in the balance.

As the affidavits tendered by the employer in this case indicate, *unsupervised solicitation of cards may also be accompanied by threats which the union has the apparent power to execute.* Few employees would be immune from a frightened concern when threatened with job loss when the union obtained recognition unless the card was signed. Whether or not the organizers could ever obtain the power to procure the discharge of uncooperative employees is beside the point as long as they claim the power and the employee is without a basis for a firm disbelief of it...[63]


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Other courts of appeals have expressed similar sentiments:

First Circuit. In *NLRB v. Hannaford Bros. Co.,*[64] although the employer was found to have committed certain unfair labor practices, the court reversed the Board's finding that the employer unlawfully refused to grant card-check recognition, and stated "there is a vast difference between such a choice registered as a result of a secret ballot, and such a choice established by the introduction into evidence of signed cards…[65]

Second Circuit. In *NLRB v. Flomatic Corp.,*[66] the court stated that "it 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," and the court held that a card majority could support a bargaining order only "where the employer's conduct has been so flagrantly hostile to the organizing efforts of a union that a secret election has undoubtedly been corrupted as a result of the employer's militant opposition."[67]

Third Circuit. In *NLRB v. Quality Markets, Inc.,*[68] the court stated that "authorization cards are 'a notoriously unreliable method of determining majority status of a union,'" and held that the court would "sanction refusals to bargain on the basis of authorization cards where there is no indication that the employer's rejection was based on a desire to illegally subvert the union's majority…"[69]

Fourth Circuit. As indicated above, the Fourth Circuit held that authorization cards "were so inherently unreliable that their use gave an employer virtually an automatic, good faith claim that a dispute existed [as to whether a union had majority support], for which a secret election was necessary."[70]

Fifth Circuit. In *NLRB v. Southland Paint Co.,*[71] the court described as "persuasive" the arguments against requiring union recognition "based on cards alone,"[72] and in *NLRB v. Great Atlantic & Pacific Tea Co.,*[73] the same court stated (in reliance on Board precedent) that "the offer of a cross-check of authorization cards does not impose a duty upon the company to submit to the check or suffer the consequences of a refusal-to-bargain charge."[74]

Sixth Circuit. In *NLRB v. Ben Duthler, Inc.,*[75] the employer engaged in certain violations, but the court denied enforcement of the Board's bargaining order and instead ordered an election based in part because authorization cards were "notoriously unreliable," and explained that "bargaining interests of a union are protectable only insofar as those interests coincide with the interests of the employees [and] that coincidence of interests cannot be determined until a majority of the employees clearly express their desire that the union be their bargaining representative."[76]

Seventh Circuit. In *NLRB v. Village IX, Inc.,*[77] the court denied enforcement to the Board's bargaining order even though the employer engaged in certain unfair labor practices, and stated that the existence of a "card majority, by itself has little significance. 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."[78]

Eighth Circuit. In *NLRB v. Arkansas Grain Corp.,*[79] the court disagreed with the Board's characterization of the employer's refusal to grant card-check recognition as "an outright and adamant refusal to bargain without a good faith doubt of majority status." The court stated it was "mindful of the vices and pressures inherent in their unsupervised solicitation," and indicated that authorization cards could be "a totally unreliable indication of majority status and constitute a sufficient basis for the employer to entertain a good faith doubt as to that status."[80]

Ninth Circuit. In *NLRB v. Sonora Sundry Sales, Inc.,*[81] the court denied enforcement to the Board's bargaining order, finding that the employer lawfully refused to grant card-check recognition, where the employer believed the union representatives were misleading employees and expressed doubt "that such cards would truly reflect representation desires of the employees." The court held that the basis for the employer's refusal to recognize the union was confirmed when employees "expressed their wish that representative status be ascertained by election rather than by card."[82]

Any new requirement mandating card-check recognition by an employer—or mandating that the employer express a "reason" that the Board deems satisfactory when an employer denies card-check demands—would also be contradicted by other well-established principles.

First, a finding that the Act *mandates* card-check recognition by employers would be irreconcilable with decades of Board and court cases holding that describe "*voluntary*" recognition as the option available to an employer when a union makes a bargaining demand based on a claim of majority support. See 85 Fed. Reg. 18366, 18366-18367 (2020) ("it is well established that the Act permits voluntary recognition of labor organizations") (emphasis added); *Lamons Gasket Co.*, 357 NLRB 739 (2011) (addressing the period following "an employer's voluntary recognition of a union" will bar a representation or decertification petition) (emphasis added); *Raymond F. Kravis Ctr. for Performing Arts, Inc. v. NLRB,* 550 F.3d 1183, 1188 (D.C. Cir. 2008) ("A union can achieve the status of a majority collective bargaining representative through either Board certification or voluntary recognition by the employer") (emphasis added); *Dana Corp.,* 351 NLRB 434, 434-35 (2007) (addressing the period in which "an employer's *voluntary* recognition of a union" bars an employee or rival union petition, which the Board refers to as the "voluntary recognition-bar doctrine"); *Vic Koenig Chevrolet, Inc. v. NLRB,* 126 F.3d 947, 948 (7th Cir. 1997) (referring to the "bar against holding a decertification election within a reasonable time after the voluntary recognition of the union as bargaining agent by the employer") (emphasis added); *Keller Plastics Eastern, Inc.,* 157 NLRB 585, 586 (1966) ("Collective-bargaining relationships normally arise out of a Board certification or, as here, from voluntary recognition of a majority union") (emphasis added). It is implausible to suggest that employers have an *obligation* under the NLRA to grant card-check recognition, based on a union showing of majority support, after decades of Board and court decisions have consistently described this option as "voluntary" recognition.

Second, any finding that employers violate the Act unless they articulate a particular "reason" for denying card-check recognition, with the NLRB passing judgment on which reasons are acceptable and which are not, would raise substantial First Amendment concerns, including (among other things) potential infringement on the constitutional prohibition against compelled speech.[83] Indeed, these serious First Amendment issues were acknowledged by the Supreme Court in *Gissel*, which stated that constitutional problems were "not so easily resolved" when the Board's requirements involved "speech alone," and the Court indicated that the Board "eliminated some of the problem areas by *no longer requiring an employer to show affirmative reasons for insisting on an election...*" In numerous other contexts, the Board and the courts have emphasized the importance of avoiding interpretations of the Act that would raise serious questions about potential infringement on First Amendment rights.[84]

C. Congress Has Consistently Refused to Enact Mandatory Card-Check Recognition. The Board is responsible for applying the National Labor Relations Act "to the complexities of industrial life."[85] Yet, the Board is also constrained by what Congress has—and *has not*—included in the Act. As the Supreme Court has stated: "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."[86]

Congress has never enacted a law requiring union recognition based on signed authorization cards. Moreover, legislative efforts to require card-check union recognition have repeatedly been proposed without being enacted, and these proposals demonstrate that nobody in Congress believed existing law already imposes a card-check recognition requirement.

1. Taft-Hartley Act: Requiring Secret-Ballot Elections in Union Certification Cases. Congress has already cast its vote in favor of secret-ballot elections in Board certification proceedings. As noted previously, the Wagner Act, as adopted in 1935, provided that the NLRB could certify unions based on "a secret ballot of employees or...*any other suitable method.*"[87] However, based on the Taft-Hartley Act amendments adopted in 1947, the reference to "any other suitable method" was dropped, and the current language states that the Board "*shall direct an election by secret ballot.*"[88]

2. Recurring Unsuccessful Efforts to Amend the NLRA by Requiring Card-Check Recognition. Equally relevant are legislative proposals that Congress has never enacted.[89] Since 1978, there have been recurring unsuccessful legislative attempts to amend the NLRA. The most notable and well-known was the Employee Free Choice Act ("EFCA") which was introduced in congress five separate times between 2003 and 2016 and sought to enact card-check recognition as an alternative to the NLRB representation election. The most recent legislation to seek to change the NLRB election process—is the Protecting the Right to Organize Act ("PRO Act"), which was introduced in 2019 and again in 2020. In neither case did Congress adopt this legislation. These

persistent unsuccessful efforts in Congress to require card-check recognition, as described more fully below, are additional compelling evidence that the Board cannot reasonably find that the *current* NLRA already requires employers to recognize unions, without an election, based on a card showing of majority support.

(a) Labor Reform Act (1977–78). The proposed Labor Law Reform Act, which Congress considered in 1977 and 1978, called for an expedited election procedure after the filing of an election petition. It stated that when "an employee, group of employees, or representatives thereof file a petition stating that a majority of employees in an appropriate bargaining unit have designated a representative which the employer refuses to recognize and there is no representative currently certified or recognized with respect to any employees in the bargaining unit," this would trigger a procedure for "expedited elections."[90]

(b) Employee Free Choice Act (2016). The EFCA which was reintroduced in 2016, and would likewise have required union certification without an election, if an individual or union received signed authorization cards from a majority of unit employees.[91]

(c) Workplace Democracy Act (2015) and Clean Energy Worker Just Transition Act (2015). Two legislative proposals in 2015 likewise sought to amend the NLRA to require card-check recognition: the Workplace Democracy Act ("WDA") would have required the NLRB to certify an individual or a union, without an election, "if a majority of the employees has signed valid authorizations and no other individual or labor organization [was] currently certified or recognized."[92] A related bill was the Clean Energy Worker Just Transition Act ("Clean Energy Act"), which also would have required NLRB certification without an election if a majority of unit employees signed authorization cards.[93]

(d) Employee Free Choice Act (2016). The Employee Free Choice Act was reintroduced in 2016, and would likewise have required union certification without an election, if an individual or union received signed authorization cards from a majority of unit employees.[94]

(e) Protecting the Right to Organize Act (2019–2021). Introduced in 2019 and again in 2021, the PRO Act abandoned the prior legislative efforts to require card-check union recognition in all situations where a prior certified or recognized union did not exist[95] However, the PRO Act would have eliminated the "standing" of employers even to participate "as a party or to intervene" in any representation case.[96] Also, whenever a majority of employees voted *against* union representation and where the Board set aside the election because "the employer committed a violation of [the] Act or otherwise interfered with a fair election," the PRO Act provided for Board certification and issuance of a bargaining order, *without* conducting any election in which the union prevailed, if the union received signed authorization cards from a majority of unit employees.[97]

(f) United States-Mexico-Canada Agreement (2020–present). The United States-Mexico-Canada Agreement ("USMCA"), which governs trade between the U.S., Canada and Mexico, was signed into law on January 29, 2020, with overwhelming bipartisan support in the House (by a vote of 385-41 on December 19, 2019) and the Senate (by a vote of 89-10 on January 16, 2020).[98] As part of the USMCA, the United States—together with Canada and Mexico—committed to protect "freedom of association and the effective recognition of the right to collective bargaining."[99] In this regard, based on perceived deficiencies that existed in Mexico, the USMCA explicitly requires Mexico to "*[p]rovide in its labor laws* that union representation challenges are carried out by the Labor Courts *through a secret ballot vote.*"[100] The USMCA likewise requires Mexico to adopt legislation requiring that initial and revised labor contracts have "*majority support*" among employees, which must be proven "through exercise of a *personal, free, and secret vote* of workers covered by the agreement," with additional "*effective verification*" by an "*independent* entity" that "a *majority* of workers…demonstrated support… through a *personal, free, and secret vote*."[101] In the United States, Congress clearly intended that these required labor reforms in Mexico would produce "a level playing field,"[102] thereby giving Mexican employees the same level of protection afforded to American workers under U.S. labor law.[103]

It defies credulity that the NLRB—which is charged with protecting the rights of U.S. employees—would instead find that U.S. unions must receive card-check recognition *without* a secret-ballot election and with *no* "effective verification." This would give U.S. employees inferior rights compared to what the United States is requiring for Mexican employees who, under the USMCA, are guaranteed the right to participate in a "secret ballot" election and a "personal, free, and secret vote" whenever a union claims to have representative status or seeks to register new or revised labor contracts.[104]

D. Mandatory Card-Check Recognition Would Undermine Employee Free Choice. Under the NLRA, "[t]he bargaining interests of a union are protectable only insofar as those interests *coincide with the interests of the employees*," and the "purpose of the Board is to protect the bargaining rights of employees…", not the bargaining rights of (a) union."[105] As noted above, Congress amended the NLRA more than 50 years ago to make it mandatory for the Board to "direct an election by secret ballot" before certifying any union.[106] The Board and the courts have acknowledged that union authorization cards, though not "*totally* invalid,"[107] are "a *notoriously unreliable* method of determining majority status of a union."[108] The Supreme Court has also indicated—twice—that Board-conducted elections are the "*preferred*… method of ascertaining whether a union has majority support," which has "*acknowledged superiority*" and authorization cards are "*admittedly inferior* to the election process."[109]

Nobody can seriously question the extremely high standard of integrity associated with secret-ballot elections conducted by the NLRB for more than eight decades. These elections have produced remarkably few problems, with a rigorous process for evaluating election objections in post-election Board and court proceedings.[110] By comparison, decades of Board and court cases—including the Supreme Court *Gissel* and *Linden Lumber* decisions—leave no doubt that authorization cards are susceptible to abuse and manipulation,[111] with very limited review regarding questions regarding their integrity and potential misrepresentations made during the solicitation process.[112] As a matter of public policy, since the NLRA makes union representative turn on the exercise of employee free choice, it makes no sense to abandon a "preferred" method that is more reliable, in favor of an "inferior" method that is less reliable. Indeed, Congress placed such importance on resolving union representation issues based on a "secret ballot" election, a "personal, free, and secret vote" and "effective verification" that the USMCA, adopted by the House with a 385-41 vote and by the Senate with an 89-10 vote, mandates these guarantees for Mexican employees. It cannot possibly be true that Congress intended that American employees, under U.S. law, would have lesser procedural protections regarding their "full freedom of association" and the right to have representatives "of their own choosing."[113]

The NLRA gives the Board only two primary responsibilities, one of which involves processing election petitions and conducting secret-ballot elections, and the statute commands that the Board "in each case assure to employees the *fullest freedom* in exercising the rights guaranteed by [the] Act."[114] There is no reasonable basis for concluding that the interests of employees can be advanced by *dispensing* with Board-conducted elections and in favor or requiring employers to grant card-check union recognition. Such a requirement would treat authorization cards as "a freely interchangeable substitute for elections," which the Supreme Court in *Gissel* did not approve,[115] and would undermine employee rights guaranteed by the NLRA.

There is no legitimate basis for concluding that the interests of employees can be advanced by dispensing with Board-conducted elections, and substituting a new card-check union recognition requirement.

Conclusion

The National Labor Relations Act does not require employers to grant "card-check" union recognition. The Supreme Court has upheld the right of employers to deny requests for card-check recognition and to insist that a union demonstrate it has majority support in a secret-ballot election conducted by the NLRB. For 85 years, the Board, the courts of appeals, and the Supreme Court have uniformly held that secret-ballot elections are the "preferred . . . method of ascertaining whether a union has majority support," and have held that authorization cards are "admittedly inferior to the election process."[116] The Board retreated from any requirement that employers articulate particular reasons for denying union requests for card-check recognition, which the Supreme approved in Gissel, and such a requirement would raise serious First Amendment concerns. Finally, Congress has repeatedly failed to adopt legislation that would have amended the NLRA to result in card-check union recognition, and the USMCA—adopted by overwhelming bipartisan majorities in the House and Senate—underscores the importance of "secret ballot" elections and "effective verification" when determining whether unions have "majority support" among employees. These considerations reinforce a conclusion that a card-check union recognition requirement does not exist—and has been affirmatively rejected—under current law. There is no reasonable basis for the NLRB and the courts to find otherwise.

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End notes

1. Philip A. Miscimarra formerly served as Chairman of the National Labor Relations Board, Harry I. Johnson, III formerly served as a Board Member on the NLRB, Crystal S. Carey formerly served as an NLRB Staff Attorney, and Francisco Guzmán formerly served as an NLRB Field Attorney. The authors are currently attorneys in the labor and employment practice of Morgan, Lewis & Bockius, LLP.

2. 85 NLRB 1263 (1949), *enforced,* 185 F.2d 732 (D.C. Cir. 1950), *cert. denied,* 341 U.S. 914 (1951).

3. National Labor Relations Act (Wagner Act), 49 Stat. 449, § 9(c) (1935).

4 Labor Management Relations Act ("LMRA"), 61 Stat. 136, Title I, Sec. 101, §9(c) (1947) (emphasis added).

5. NLRA Section 7, 29 U.S.C. §157. The 1935 version of the NLRA is also called the "Wagner Act," and the 1947 amendments were part of the LMRA cited in note 4 above (also called the "Taft-Hartley Act"). The 1959 amendments were part of the Labor-Management Reporting and Disclosure Act (also called the "Landrum-Griffin Act"), 73 Stat. 519, Title VII, Sec. 701-707 (1959).

6. Section 3(d) of the Act states that the General Counsel "shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints" in unfair labor practice cases, and "in respect to the prosecution of such complaints before the Board. . . ." 29 U.S.C. §153(d).

7. NLRA Section 10, 29 U.S.C. §160.

8. *Joy Silk Mills, Inc*, 85 NLRB at 1264 (emphasis in original).

9. *Id.*

10. *Id.*

11. *Gissel*, 395 U.S. at 602-603; *Linden Lumber*, 419 U.S. at 307

12. 29 U.S.C. §157 (emphasis added).

13. Section 9(a) of the Act states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, that the bargaining representative has been given opportunity to be present at such adjustment." 29 U.S.C. §159(a) (emphasis added).

14. Section 9(b) of the Act states: "The Board shall decide in *each case* whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b) (emphasis added).

15. 29 U.S.C. § 159(c).

16. The ability of an employer to extend voluntary recognition to a union, provided that the union provides "convincing evidence" of majority support among employees in an appropriate unit, stems from Section 9(a)'s indication that a union may be "designated or selected" by a majority of employees. *Gissel*, 395 U.S. at 596 (footnote and citation omitted).

17. NLRB Memorandum GC 21-04, "Mandatory Submissions to Advice," at 7 (Aug. 12, 2021) ("GC Memo") (https://apps.nlrb.gov/link/document.aspx/09031d4583506e0c). The GC Memo instructed Regional staffs to submit 67 types of cases to the Agency's Division of Advice (within the Office of the General Counsel) for "centralized consideration," including a category of cases in which the General Counsel "would like to carefully examine," which suggests the General Counsel will argue that the Board should find violations based on new theories advocated by the General Counsel. *Id.* at 1. Within this category, the GC Memo states:

Cases in which an employer refuses to recognize and bargain with a union where the union presents evidence of a card majority, but where the employer is unable to establish a good faith doubt as to majority status; specifically, where the employer refusing to recognize has either engaged in unfair labor practices or where the employer is unable to explain its reason for doubting majority status in rejecting the union's demand. *See Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949). Id. at 7.

18. *Cemex Construction Materials Pacific, LLC and International Brotherhood of Teamsters* (Cases 28-CA-230115, 28-CA-235666, 31-CA-237882, 31-CA-237894, 31-CA-238094, 31-CA-238239, 31-CA-238240, 28-CA-249413, and 28-RC-232059). Brief in Support of General Counsel's Exceptions to the Administrative Law Judge's Decision (April 11, 2022).

19. *Gissel,* 395 U.S. at 602-603 ("The Board itself has recognized...that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support," elections have "acknowledged superiority" over authorization cards); *Linden Lumber*, 419 U.S. at 307 ("the policy of encouraging secret elections under the Act is favored").

20. *Gissel*, 395 U.S. at 603 (describing cards as "admittedly inferior to the election process"); *Linden Lumber*, 419 U.S. at 306 (stating that an employer confronted with signed authorization cards "concededly may have valid objections to recognizing a union on that basis" and "may have rational, good-faith grounds for distrusting authorization cards in a given situation"). Regarding the potential problems associated with authorization cards, the Supreme Court has stated: "We would be closing our eyes to obvious difficulties...if we did not recognize that there have been abuses, primarily arising out of misrepresentations by union organizers as to whether the effect of signing a card was to designate the union to represent the employee for collective bargaining purposes or merely to authorize it to seek an election to determine that issue." *Gissel*, 395 U.S. at 604 (emphasis added). *See also Cumberland Shoe Corp.*, 144 NLRB 1268 (1963).

21. The NLRA protects employees from restraint or coercion by employers and unions regarding the exercise of employee rights protected by the Act. See NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (making it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7"); NLRA § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (making it unlawful for a union "to restrain or coerce...employees in the exercise of the rights guaranteed in section 7"). See also NLRA § 9(b), 29 U.S.C. § 159(b) (stating that the Board's bargaining unit determinations "in each case" must "assure to employees the fullest freedom in exercising the rights guaranteed by this Act").

22. *Gissel*, 395 U.S. at 600, 613-615; *Linden Lumber*, 419 U.S. at 303-304.

23. 395 U.S. 575 (1969).

24. In *Gissel*, three of the four cases addressed by the Supreme Court had been decided separately by the Court of Appeals for the Fourth Circuit, and the Supreme Court *Gissel* opinion also resolved a fourth case that had been decided by the Court of Appeals for the First Circuit. *Id.* at 579-580.

25. *Id.* at 582-83 (emphasis added). *See also id.* at 595 ("the employers' refusal to bargain in each of these cases was accompanied by independent unfair labor practices which tend to preclude the holding of a fair election").

26. *Id.* at 610. Thus, the Court in *Gissel* stated: "Because the employers' refusal to bargain in each of these cases was accompanied by independent unfair labor practices which tend to preclude the holding of a fair election, we need not decide whether a bargaining order is ever appropriate in cases where there is no interference with the election processes." *Id.* at 595.

27. *Id.* at 592-93 (emphasis added).

28. *Id.* at 593 (emphasis added; citations omitted).

29. 158 NLRB 1077 (1966).

30. Gissel, 395 U.S. at 593 (emphasis added) (*quoting Aaron Brothers*, 158 NLRB at 1078)). The General Counsel bears the burden of proving all

alleged violations of the Act, since NLRB Section 10(c) requires that all Board findings in unfair labor practice cases be supported by the "preponderance" of the evidence, and Sections 10(e) and 10(f) provide that the Board's factual findings will be upheld only "if supported by substantial evidence on the record considered as a whole." 29 U.S.C. §§ 160(c), (e), (f).

31. *Gissel*, 395 U.S. at 593 (emphasis added) (*quoting Aaron Brothers*, 158 NLRB at 1078).

32. 395 U.S. at 594 (emphasis added).

33. *Id.* at 602 (emphasis added; footnote omitted).

34. *Id.*

35. *Id.* at 601 (emphasis added).

36. *Id.* at 603 (emphasis added).

37. *Id.* at 602 (emphasis added).

38. *Id.* at 604 (emphasis added).

39. *Id.* at 603 (emphasis added).

40. *Id.* at 601 n.18 (emphasis added).

41. *Id.* (emphasis added).

42. 419 U.S. 301 (1974).

43. *Gissel*, 395 U.S. at 600.

44. *Linden Lumber*, 419 U.S. at 302 ("There is no charge that Linden engaged in an unfair labor practice apart from its refusal to bargain"). The Board decision in *Linden Lumber* upheld a finding that the employer engaged in antiunion discrimination in violation of Section 8(a)(3) of the Act based on the failure to reinstate two employees following the end of a recognition strike, but the Board concluded that the violations did not warrant a bargaining order because they did not prevent a "fair and truly representative election" from being conducted. *Linden Lumber*, 190 NLRB 718, 719 (1971), *reversed sub nom.*

45. *Linden Lumber* 190 NLRB at 719.

46. *Id.* at 721.

47. *Truck Drivers Union Local 413 v. NLRB*, 487 F.2d 1099, 1111-13 (D.C. Cir. 1973), *reversed*, 419 U.S. 301 (1974).

48. 419 U.S. at 310.

49. *Id.* at 304, 307 (emphasis added).

50. *Id.* at 304

51. *Id.* at 313 (emphasis added; citations omitted).

52. *See* text accompanying notes 26-31 above.

53. *Joy Silk*, 85 NLRB at 1264 (emphasis in original).

54. *Aaron Brothers*, 158 NLRB at 1081 (Member Jenkins, concurring). *See also id.* ("I would not find unlawful a refusal to recognize a union on the basis of a proffered card showing when the employer insists on an election and does not commit unfair labor practices.") (Member Zagoria, concurring).

55. *Gissel,* 395 U.S. at 603.

56. NLRA § 7, 29 U.S.C. § 157.

57. *Gissel*, 395 U.S. at 599.

58. *Id.* at 600, 602. *See also Linden Lumber*, 419 U.S. at 307.

59. NLRA § 9(c), 29 U.S.C. § 159(c) (stating that, in union representation cases where a question concerning representation exists, the Board "shall direct an election by secret ballot and shall certify the results thereof").

60. *Gissel*, 395 U.S. at 585-86 (citations omitted; emphasis added).

61. 386 F.2d 562 (4th Cir. 1967).

62. *Id.* at 566.

63. *Id.* at 565-66 (emphasis added; footnotes omitted). As indicated in previously, the Supreme Court in *Gissel* stated that authorization cards, though "*admittedly inferior* to the election process," were not so "*inherently unreliable*" to preclude them from being relied upon by the Board when issuing a bargaining order based on a finding that the employer's unlawful conduct meant a fair election could likely never be conducted. *Gissel*, 395 U.S. at 601, 603. However, one can expect that, absent such conduct, the deficiencies previously recognized by the Fourth Circuit would prompt the court to find that every employer had a good faith reason for withholding card-check union recognition and requiring that the union prevail in a Board-conducted election. In fact, this is precisely what the Supreme Court held was lawful in *Linden Lumber.*

64. 261 F.2d 638 (1st Cir. 1958).

65. *Id.* at 640-41.

66. 347 F.2d 74, 78 (2d Cir. 1965).

67. *Id.* at 78 (citation omitted).

68. 387 F.2d 20 (3d Cir. 1967).

69. *Id.* at 23 (*quoting Sunbeam Corp.*, 99 NLRB 546, 550-51 (1952).

70. *Gissel*, 395 U.S. at 585-86 (describing the Fourth's Circuit position in prior cases, as well as its disposition of the *Gissel* decision that was appealed to the Supreme Court). *See also NLRB v. S.S. Logan Packing Co.*, 386 F.2d 562 (4th Cir. 1967), quoted in the text accompanying notes 60-62 above.

71. 394 F.2d 717 (5th Cir. 1968).

72. *Id.* at 732.

73. 346 F.2d 936 (5th Cir. 1965)

74. *Id.* at 942 (*citing Superex Drugs, Inc.,* 150 NLRB 97, (1965).

75. 395 F.2d 28 (6th Cir. 1968).

76. *Id.* at 34 (*quoting NLRB v. Flomatic Corp.*, 347 F.2d 74, 78 (2d Cir. 1965). *See also Lane Drug Co. v. NLRB*, 391 F.2d 812, 820 (6th Cir. 1968) (referring to the unreliability of authorization cards, and holding it is not necessarily true "that failure of the employer to accede to the union's offer for a check of authorization cards by a neutral third party, is proof of the employer's bad faith").

77. 723 F.2d 1360, 1371 (7th Cir. 1983).

78. *Id.* at 1371 (citations omitted).

79. 390 F.3d 824 (8th Cir. 1968).

80. *Id.* at 828 n.4 (citation omitted).

81. 399 F.2d 930 (9th Cir. 1968).

82. *Id.* at 935-936.

83. *See, e.g., Harris v. Quinn*, 573 U.S. 616, 647 (2014) ("[t]he government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves") (citation omitted); *National Ass'n of Manufacturers v. NLRB*, 717 F.3d 947, 957-58 (D.C. Cir. 2013) (indicating that "the First Amendment protects 'the decision of both what to say and what not to say,'" and a "compelled speech violation" occurs when "the complaining speaker's own message was affected by the speech it was forced to accommodate").

84. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575, 577 (1988); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979); *Int'l Union of Operating Engineers, Local 150* (Lippert Components), 361 NLRB No. 8 (July 21, 2021); *Carpenters Local 1506* (Eliason & Knuth of Arizona), 355 NLRB 797 (2010).

85. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963).

86. *Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 571 (1982) (citations omitted).

87. National Labor Relations Act (Wagner Act), 49 Stat. 449, § 9(c) (1935) (emphasis added).

88. Labor Management Relations Act ("LMRA"), 61 Stat. 136, Title I, Sec. 101, §9(c) (1947) (emphasis added). The requirement that the Board conduct secret-ballot elections in all cases involving union certification does not prevent employers from extending voluntary recognition, based on a showing of majority status, without an election. *Gissel*, 395 U.S. at 595-600. However, this adds to the virtual unanimity expressed by Congress, the Board and the courts that a Board-conducted election is the "preferred" means by which employee sentiments about union representation can be determined, and that demands for card-check recognition are "admittedly inferior to the election process." *Id*. at 602-603.

89. *See United States v. Capobianco*, 836 F.2d 808, 811 (3d Cir. 1988) (the "exclusion" of a particular obligation "gives rise to an inference that the omission was intentional").

90. Labor Law Reform Act, H.R. 8410, 95th Cong. (1977) (https://www.congress.gov/bill/95th-congress/house-bill/8410); Labor Law Reform Act, S. 2467, 95th Cong. (1978)(https://www.congress.gov/bill/95th-congress/senate-bill/2467).

91. Employee Free Choice Act, H.R. 3619, 108th Cong. (2003) (https://www.congress.gov/bill/108th-congress/house-bill/3619); Employee Free Choice Act, S. 1925, 108th Cong. (2003) (https://www.congress.gov/bill/108th-congress/senate-bill/1925); Employee Free Choice Act, H.R. 1696. 109th Cong. (2005) (https://www.congress.gov/bill/109th-congress/house-bill/1696); Employee Free Choice Act, S. 842, 109th Cong. (2005) (https://www.congress.gov/bill/109th-congress/senate-bill/842); Employee Free Choice Act of 2007, H.R. 800, 110th Cong. (2007) (https://www.congress.gov/bill/110th-congress/house-bill/800); Employee Free Choice Act of 2007, S. 1041, 110th Cong. (2007) (https://www.congress.gov/bill/110th-congress/senate-bill/1041); Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009) (https://www.congress.gov/bill/111th-congress/house-bill/1409); Employee Free Choice

Act of 2009, S. 560, 111th Cong. (2009) (https://www.congress.gov/bill/111th-congress/senate-bill/560). EFCA would not merely have resulted in employer card-check recognition, it provided for NLRB certification of unions that had a card-check majority, as described above, effectively rescinding the secret-ballot election requirement in union certification cases that Congress added to the NLRA in 1947 as part of the Taft-Hartley Act amendments. *See text* accompanying notes 86-87 above.

92. Workplace Democracy Act, H.R. 3690, 114th Cong. (2015) (https://www.congress.gov/bill/114th-congress/house-bill/3690); Workplace Democracy Act, S. 2142, 114th Cong. (2015) (https://www.congress.gov/bill/114th-congress/senate-bill/2142).

93. Clean Energy Worker Just Transition Act, S. 2398, 114th Cong. (2015) (https://www.congress.gov/bill/114th-congress/senate-bill/2398).

94. Employee Free Choice Act of 2016, H.R. 5000, 114th Cong. (2016) (https://www.congress.gov/bill/114th-congress/house-bill/5000).

95. Protecting the Right to Organize Act of 2019, H.R. 2474, 116th Cong. (2019) (https://www.congress.gov/bill/116th-congress/house-bill/2474); Protecting the Right to Organize Act of 2019, S. 1306, 116th Cong. (2019) (https://www.congress.gov/bill/116th-congress/senate-bill/1306); Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. (2021) (https://www.congress.gov/bill/117th-congress/house-bill/842); Protecting the Right to Organize Act of 2021. S. 420, 117th Cong. (2021) (https://www.congress.gov/bill/117th-congress/senate-bill/420).

96. *See, e.g,*, Protecting the Right to Organize Act of 2019, H.R. 2474, 116th Cong. § 4(d) (2019) (as introduced) (https://www.congress.gov/bill/116th-congress/house-bill/2474), which would have amended NLRA Section 9(c)(1) to read in part: "No employer shall have standing as a party or to intervene in any representation proceeding under this section."

97. *See, e.g,*, Protecting the Right to Organize Act of 2019, H.R. 2474, 116th Cong. § 4(d) (2019) (as introduced) (https://www.congress.gov/bill/116th-congress/house-bill/2474), which would have created a new NLRA Section 9(c)(5)(B) that would have provided:

> In any case in which a majority of the valid votes cast in a unit appropriate for purposes of collective bargaining have not been cast in favor of representation by the labor organization and the Board determines that the election should be set aside because the employer has committed a violation of this Act or otherwise interfered with a fair election, and the employer has not demonstrated that the violation or other interference is unlikely to have affected the outcome of the election, the Board shall, without ordering a new election, certify the labor organization . . . and issue an order requiring the employer to bargain with the labor organization in accordance with section 8(d) if, at any time during the period beginning one year preceding the date of the commencement of the election and ending on the date upon which the Board makes the determination of a violation or other interference, a majority of the employees in the bargaining unit have signed authorizations designating the labor organization as their collective bargaining representative. *Id.* (emphasis added).

98. USMCA Implementation Act, Pub. L. No. 116-113, 134 Stat. 15 (2020).

99. USMCA Chapter 23, Art. 23.3(1)(a).

100. *Id.*, Chapter 23, Annex 23-A, § 2(d) (emphasis added).

101. *Id.*, §§ 2(e)(ii)(C), 2(f)(ii) (emphasis added).

102. U.S. Trade Representative Robert E. Lighthizer testified that the USMCA "requires each country to respect internationally-recognized labor rights," resulting in Mexico's commitment to ensure "secret ballot votes on labor union representation and collective bargaining agreements," thereby promoting a "level playing field" between U.S. and Mexican employees). Hearing on the 2019 Trade Policy Agenda: Negotiations with China, Japan, the EU, and UK [and] New NAFTA/USMCA . . . and Other Matters, Hearing Before the House Ways and Means Committee, 116th Cong. 4 (2019) (written testimony of U.S. Trade Rep. Robert Lighthizer) (emphasis added). *See also id*., hearing transcript at 25 (USMCA's labor reforms "create a level playing field" between the U.S. and Mexico) (statement of Rep. Mike Thompson); Hearing on Mexico's Labor Reform: Opportunities and Challenges for an Improved NAFTA, Hearing Before the House Ways and Means Subcommittee on Trade, 116th Cong. 5 (2019) (USMCA would help "level the playing field" between U.S. and Mexican employees) (statement of Rep. Vern Buchanan); Trade and Labor: Creating and Enforcing Rules to Benefit American Workers, Hearing Before the House Ways and Means Subcommittee on Trade, 116th Cong. 53-54 (2019) ("We want to look for agreements that would . . . create a more level playing field") (statement of Rep. Stephanie Murphy); *id.* at 5 ("Trade agreements, like USMCA, raise standards in other countries, levels the playing field so that our companies and workers can compete and win globally") (statement of Rep. Vern Buchanan); *id.* at 11 (indicating that past trade agreements did not "ensure a level playing field with fair treatment of workers") (statement of Shane Larson, Dir. of Legis., Politics and Int'l Affairs, CWA); *id.* at 24 ("we should consistently and aggressively enforce our own trade laws and use international mechanisms to make sure that other countries' policies do not lead to an unlevel playing field") (statement of Thea Mei Lee, President, Economic Policy Institute); *id.* at 50 ("the American worker can compete with anybody on a level playing field") (statement of Rep. Tom Rice).

103. USMCA Chapter 23, §§ 2(d), 2(e)(ii)(C), 2(f)(ii).

104. *NLRB v. Ben Duthler, Inc.*, 395 F.2d at 34 (emphasis added; citations omitted).

105. *See text* accompanying notes 86-87 above.

106. *Gissel*, 395 U.S. at 602 (emphasis added).

107. *NLRB v. Quality Markets, Inc.*, 387 F.2d 20, 23 (3d Cir. 1967) (quoting Sunbeam Corp., 99 NLRB 546, 550-51 (1952)). *See also NLRB v. Ben Duthler, Inc.*, 395 F.2d 28, 34 (6th Cir. 1968); *NLRB v. S.S. Logan Packing Co.*, 386 F.2d 562, 565-66 (4th Cir. 1967); *NLRB v. Flomatic Corp.*, 347 F.2d 74, 78 (2d Cir. 1965).

108. *Gissel*, 395 U.S. at 602-603 (emphasis added). See also *Linden Lumber*, 419 U.S. at 304, 307 (same).

109. *See, e.g., Magnum Transportation*, 360 NLRB 1093 (2014) (upholding an election where the union won by one vote, where a voter mistakenly placed an "X" on the blank side of a folded ballot, which was placed into the ballot box, after which the voter requested the opportunity to vote a second time; the Board determined that it was inappropriate to open and count the voter's second ballot, which was cast subject to challenge, and the Board held that a rerun election was not warranted notwithstanding the alleged ambiguity associated with the Board agent's instruction telling the voter to "just go in the back and put an X on the paper").

110. *See, e.g., Gissel*, 395 U.S. at 603-604 (recognizing "some instances of irregularities" regarding union authorization cards, and stating "[w]e would be closing our eyes to obvious difficulties ... if we did not recognize that there have been abuses, primarily arising out of misrepresentations by union organizers...,"); *Linden Lumber*, 419 U.S. at 313 (noting that employers "may have rational, good-faith grounds for distrusting authorization cards in a given situation"). *See also* text accompanying notes 59-81 above.

111. *See Gissel*, 395 U.S. at 601-610 (describing Board and court rulings regarding different types of problems regarding authorization card solicitation).

112. *See text* accompanying notes 98-102 above.

113. NLRA §§ 1, 7, 29 U.S.C. § 151, 157.

114. NLRA § 9(b), 29 U.S.C. § 159(b) (describing Board bargaining unit determinations). The Board's second primary responsibility—apart from conducting elections and resolving questions concerning representation—is to decide unfair labor practice cases. *See* NLRA § 10, 29 U.S.C. § 160.

114. *Gissel*, 395 U.S. at 601 n.18.

115. *Gissel*, 395 U.S. at 602-603; *Linden Lumber,* 419 U.S. at 304, 307.

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