COALITION FOR A
DEMOCRATIC WORKPLACE

How Neutrality and Card Check Agreements Harm the American Worker

For over 75 years, employers have had a right of free speech under the National Labor Relations Act (NLRA or "the Act").[1] This statutory right of free speech, however, is under attack. Unions have long sought to limit the right of employers to speak freely during an organizing campaign. The current Administration[2] and the General Counsel of the National Labor Relations Board (NLRB or "the Board") that it appointed[3] have likewise made clear their desire to curtail employer speech through federal legislation and/or Board actions, and even some state legislators, including in Connecticut, California, and Washington, want to restrict employers from simply speaking to employees about unionization in employer-sponsored meetings.[4]

At the same time, corporate stakeholders are encouraging employers, often at unions' behest, to keep silent in union organizing campaigns by agreeing to so-called "neutrality" and "card check" agreements. Oftentimes, these shareholders and investors are under the mistaken belief, manufactured by unions and the media, that neutrality/card check agreements are good for employees. This paper demonstrates, to the contrary, that *neutrality agreements harm American workers* by denying them important information they need to determine whether they wish to join or not join a union.

This paper explains how neutrality agreements prevent employees from exercising their Section 7 right to make a meaningful choice about representation by allowing unions to conceal necessary information from employees. Further, it examines how card check agreements do not reflect employees' true wishes by replacing a neutral, NLRB-supervised secret ballot election with organizing campaigns too often based on intimidation and deception. We conclude that employers who care about their employees' best interests should not agree to neutrality or card check agreements.

A. Neutrality Prevents Employees from Making an Informed Choice about Union Representation

1. What Is a Neutrality Agreement?

A neutrality agreement is a contract between an employer and a union wherein the employer agrees to remain neutral while the union attempts to organize the employer's workers. Typically, neutrality agreements require employers to remain silent during union organizing efforts and even prohibit employers from providing facts to workers to correct false or misleading statements made

[1] NLRA, 29 U.S.C. §158(c).
[2] The White House, Press Release, Statement by President Joe Biden on the House Taking Up the PRO Act (Mar. 9, 2021).
[3] NLRB, Office of Public Affairs, NLRB General Counsel Jennifer Abruzzo Issues Memo on Captive Audience and Other Mandatory Meetings (Apr. 7, 2022).
[4] California SB-399, *California Worker Freedom from Employer Intimidation Act*, Today's Law As Amended - SB-399 Employer communications: intimidation.; CT SB 163, *An Act Protecting Employee Freedom of Speech and Conscience*, 2022SB-00163-R00-SB.PDF (ct.gov); Washington SB 5417, Bill Information.

by the union. Essentially, an employer relinquishes its free speech rights to lawfully make its case as to why employees should not vote to be represented by the union. Often, these agreements not only require that the employer refrain from campaigning against the union but also require the employer to provide the union with personal information about the subject employees, such as phone numbers and home addresses, with no employee consent.

Usually, neutrality agreements also include an agreement to recognize the union as the exclusive bargaining representative of the employees by a "card check" rather than by a secret ballot election. This means that rather than voting for or against union representation in a tightly monitored secret ballot election, a union can win representation if a majority of employees simply sign authorization cards—often presented to them with high-pressure tactics by union organizers. (Some such tactics are described below.) Put simply, neutrality and card check agreements are contrary to the cornerstones of democracy: the right of citizens to make fully informed representational choices by hearing all candidates' positions and to vote in an election supervised by an impartial third party without coercion or fear of retaliation by any party.

2. *Genesis of Neutrality Agreements: Declining Union Membership and the Corporate Campaign.*

Contrary to media headlines about a supposed resurgence of union organizing and approval of unions, most American workers do not want a third party between them and their employer. Union membership has been declining for decades, down again from 2021 to 2022.[5] In its January 19, 2023, news release, the Bureau of Labor Statistics reported, "The 2022 unionization rate (10.1%) is the lowest on record."[6] Gallup's latest annual Work and Education survey revealed that a clear majority of non-union workers (58%) say they are "not interested at all" in joining a union, while just over 1 in 10 (11%) say they are "extremely interested" in joining.[7]

Moreover, the small pool of employees who belong to a union report lower satisfaction and morale than non-unionized employees. In the 2022 Gallup poll, non-union members reported being more engaged, *i.e.*, involved and enthusiastic, about their work and workplace than union members (33% and 27% respectively). On the other hand, about one in four union members (24%) reported being actively *dis*engaged, *i.e.*, unhappy and resentful that their work needs are not being met.[8] This is consistent with an earlier Gallup survey, which in 2015 demonstrated that union members are significantly less likely than non-union members to say they are "completely satisfied" with six of thirteen job aspects, including workplace safety, recognition for accomplishments (a key driver of employee engagement), flexibility of hours, job security, their boss/supervisor, and workload.[9]

[5] Bureau of Labor Statistics News Release, Union Members – 2022 (Jan. 19, 2023).
[6] *Id.*
[7] Justin McCarthy, "U.S. Approval of Labor Unions at Highest Point Since 1965," Gallup (Aug. 30, 2022). Those surveyed who said they are interested in joining a union likely do not have the kinds of information discussed in this paper that they need to properly evaluate unionization.
[8] *Id.*
[9] Andrew Dugan, "Union Members Less Content with Safety, Recognition at Work," Gallup (Sept. 11, 2015).

As fewer and fewer employees opt for union representation when given the choice, unions increasingly resort to corporate campaigns to bolster their business. "Corporate campaign" refers to the union practice of exerting pressure on an employer's shareholders, business-to-business relationships, consumers, and political representatives to urge the employer to deprive employees of a fully informed, secret ballot election by agreeing to neutrality and card check.

As an AFL-CIO strategy document explained, "a coordinated corporate campaign applies pressure . . . by seeking vulnerabilities in all the company's political and economic relationships—with other unions, shareholders, customers, creditors and government agencies—to achieve union goals."[10] The late AFL-CIO President Richard Trumka once stated, "Corporate campaigns swarm the target employer from every angle, great and small, with an eye toward inflicting upon the employer the death of a thousand cuts rather than a single blow."[11]

Some major unions have instructional manuals on the corporate campaign that advocate for relentless exploitation of company weaknesses, real or contrived.[12] For example, former Service Employee International Union (SEIU) President John Sweeney wrote:

> Outside pressure can involve jeopardizing relationships between the employer and lenders, investors, stockholders, customers, patients, tenants, politicians or others on whom the employer depends for funds.
>
> Legal and regulatory pressure can threaten the employer with costly action by government agencies or the courts.
>
> Community action and the use of the news media can damage an employer's public image and ties with community leaders and organizations.[13]

Real-world examples of such campaigns abound. Consider Microsoft's effort to acquire Activision Blizzard. The Communications Workers of America (CWA) leveraged government power to force Microsoft Activision into agreeing to forego its employees' right to a secret ballot election in favor of card check or online voting, unregulated and unsafeguarded methods of expressing free choice that leave workers vulnerable to coercion and retaliation.[14] CWA threatened the deal's closure by sending a letter to the Federal Trade Commission (FTC) that raised anti-trust concerns about the

[10] Industrial Union Department, AFL-CIO, Developing New Tactics: Winning with Coordinated Corporate Campaigns (1985).
[11] *Id*.
[12] Robert Harbrant, former president of AFL-CIO's Food and Allied Service Trades Department, was quoted: "We think you can rewrite the rules of the game by creating circumstances and exploiting them." Manheim, Jarol, *The Death of a Thousand Cuts, Corporate Campaigns and the Attack on the Corporation*, Lawrence Erlbaum Associates (2001), p. 168, citing Bob Kuttner, "Can Labor Lead?" *New Republic*, at p. 23 (Mar. 12, 1984).
[13] *See* Jarol Manheim, *The Death of a Thousand Cuts, Corporate Campaigns and the Attack on the Corporation*, Lawrence Erlbaum Associates (2001), p. 168, quoting *Contract Campaign Manual* (Washington: Service Employees International Union, n.d.).
[14] *See* Noam Scheiber and Karen Weise, "Microsoft Pledges Neutrality in Union Campaigns at Activision," *The New York Times* (June 13, 2022).

acquisition, including that "when viewed as a vertical or horizontal merger, [the transaction would] threaten data privacy and security, undermine consumer protection online, impinge on the consumer right to repair and exacerbate worker disempowerment and wage suppression."[15] Shortly after, several union-aligned senators sent a letter to the FTC that parroted the CWA's points.[16] When Microsoft agreed to a neutrality agreement, CWA conveniently, dramatically, and without explanation or investigation abandoned its position and withdrew its complaints regarding the alleged deficiencies of the acquisition.[17]

Another high-profile example is the SEIU's corporate campaign against Sutter Health, a network of hospital and medical practices in Northern California. In his 2001 book *The Death of a Thousand Cuts, Corporate Campaigns and the Attack on the Corporation*, Jarol Manheim, Professor Emeritus of Media and Public Affairs at The George Washington University, wrote that SEIU waged "the most comprehensive exploitation of the regulatory environment of any [corporate campaign] that has occurred in any campaign to date" against Sutter.[18] SEIU instigated investigations of Sutter's practices in a "remarkable variety of regulatory and political venues," including but not limited to the Internal Revenue Service, NLRB, Department of Health and Human Services, and numerous California agencies, all while painting a picture of poor patient care to the public. These efforts were an attempt to financially drain and embarrass Sutter into agreeing to neutrality and card check.[19] While the union's attempt was not successful at organizing the employees, Sutter was forced to publicly justify and defend its actions.

Neutrality and card check agreements must be understood in their context—organized labor's effort to discredit and silence employers so as to deflect from the deficiencies that have driven down union membership for decades. Such efforts are obviously to the detriment of employers, but, far more importantly, they are devastating to these companies' employees.

3. Neutrality Agreements Violate Employees' Right to Self-Determination

Unions argue that neutrality agreements are beneficial to employees, because they determine whether a majority of employees desire union representation more expeditiously than a secret ballot election. This argument falsely presumes that the interests of employees and unions are one and the same.

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[15] Letter to the Federal Trade Commission from Public Citizen, Center for Digital Democracy, Communications Workers of America, The Repair Association, Public Knowledge, American Economic Liberties Project, The Revolving Door Project, National Employment Law Project, Open Markets Institute, Towards Justice, People's Parity Project, Institute for Local Self-Reliance, Main Street Alliance, Fight for the Future, Demand Progress Education Fund (Mar. 1, 2022), available at https://www.citizen.org/article/microsofts-activision-blizzard/.
[16] Letter from Senators Warren, Whitehouse, Booker, and Sanders to the Federal Trade Commission (Mar. 31, 2022), available at https://www.warren.senate.gov/imo/media/doc/2022.03.31%20Letter%20to%20FTC%20re%20Activision%20Microsoft%20Deal.pdf.
[17] *See* CWA News Release, "CWA Supports Microsoft's Proposed Acquisition of Activision-Blizzard," (Jun. 30, 2022).
[18] Manheim, *supra* note 13, at 78-79.
[19] *Id.*, at 79-80.

The belief that what is always good for unions is good for employees ignores the guiding principle of the NLRA: that employees are free to choose or reject union representation. Section 7 of the Act guarantees employees "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, equally importantly, "*to refrain from any or all such activities.*" In other words, employees have just as much right to reject or oppose unionization as they do to support it.[20]

Section 7 rights belong exclusively to employees, not unions, nonemployee union organizers, or employers. Yet neutrality agreements are contracts between an employer and a union that employees never bargained for or chose.[21] Indeed, employees are rarely even made aware of neutrality agreements, let alone consulted in their negotiation or asked to give consent to their employers entering into one.

4. Employer Free Speech Is a Safeguard to Employees' Section 7 Rights

We take as axiomatic that voters make better election decisions when they hear both sides of an issue.[22] In this way, employees' Section 7 right to make an informed decision about union representation is intrinsically linked to the employer's right of free speech under Section 8(c) of the NLRA.

Section 8(c) of the NLRA provides: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit." The original NLRA, the Wagner Act of 1935, lacked this provision. The early NLRB, charged with enforcing the Wagner Act, required employers to maintain strict neutrality during campaigns or else be liable for unfair labor practice (ULP) charges if they expressed their opinions to employees about unionization.[23]

In 1941, however, the U.S. Supreme Court rejected the NLRB's view of employer rights. In *NLRB v. Virginia Power Co.*,[24] the Court held that employers had, at a minimum, the right to express noncoercive views on unionization. Congress went a step further to eliminate any ambiguity that employers must be able to express their views on unionization when, in 1947, it passed the Taft-

[20] *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992); *see also Bloom v. NLRB*, 153 F.3d 844, 849-50 (8th Cir. 1998) ("Enlisting in a union is a wholly voluntary commitment; it is an option that may be freely undertaken or freely rejected"), *vacated and remanded on other grounds sub nom*, *OPEIU Local 12 v. Bloom*, 525 U.S. 1133 (1999).
[21] *Lechmere*, 502 U.S. at 532 ("By its plain terms, thus, the NLRA confers rights only on employees, not on unions or their nonemployee organizers.")
[22] *See* Alexander MacDonald, "The DC Circuit Reminds the NLRB – Again – That Employers Have a Right to Speak About Unionization," *Federalist Society* (Jun. 14, 2021).
[23] *See, e.g.*, *Schult Trailers*, 28 NLRB 975 (1941); *Ford Motor Co.*, 23 NLRB 342 (1940); *Southern Colo. Power Co.*, 13 NLRB 699 (1939), *enf'd* 111 F.2d 539 (10th Cir. 1940).
[24] 314 U.S. 469 (1941)

Hartley Act—the current NLRA as we know it—in large part to quell union abuses that were burdening the economy.[25] One of its key provisions was Section 8(c), which was intended to ensure that employers lawfully may speak freely about unions as long as such speech is not threatening or coercive.[26] Even President John F. Kennedy recognized the importance of this change. In 1947, while working on the Taft-Hartley Act amendments during his first year in Congress, Kennedy agreed it was necessary to enact the changes, because "employers must be guaranteed the same rights of freedom of expression" granted to unions in the Wagner Act.[27]

Since then, the Supreme Court has held repeatedly that Section 8(c) codifies First Amendment speech principles into the labor-relations context to preserve the free flow of thought.[28] For example, in *U.S. Chamber of Commerce v. Brown*, the Court stressed:

> But [Section 8(c)'s] enactment also manifested a "congressional intent to encourage free debate on issues dividing labor and management." . . . It is indicative of how important Congress deemed such "free debate" that Congress amended the NLRA rather than leaving to the courts the task of correcting the NLRB's decisions on a case-by-case basis. We have characterized this policy judgment, which suffuses the NLRA as a whole, as "favoring uninhibited, robust, and wide-open debate in labor disputes," stressing that "freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB."[29]

Put more simply, Section 8(c) enshrines free debate, which benefits all parties, most notably employees who have the important decision to make about whether to unionize or to retain their own individual voices in their workplace.

Neutrality, however, fundamentally requires an employer to forfeit its Section 8(c) free speech rights. Although a "neutrality agreement" suggests that an employer must remain neutral during an organizing campaign—speaking neither favorably nor unfavorably of the union, in reality it imposes a gag solely on speech unfavorable to the union. For example, the United Auto Workers' (UAW) model neutrality agreement provides in relevant part that an employer may not "communicate in a negative, derogatory or demeaning nature about the other party (including the other party's motives, integrity, character or performance), or about labor unions generally."[30]

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[25] NLRA, § 1, Findings and Policies.
[26] S. Rep. No. 105 on S. 1126, 1 Legislative History of the Labor Management Relations Act 1947, 429–30 (1948) ("The committee believes these [Board] decisions to be too restrictive and . . . provides that, if under all the circumstances, there is neither an express or implied threat of reprisal, force, or other offer of benefit, the Board shall not predicate any finding of unfair labor practice upon the statement.") Note that the "under all the circumstances" language was eliminated in the final version of the legislation that became law.
[27] H.R. Rep. 80-245, 80th Cong., 1st Sess. at 113-114 (1947), *reprinted in* 1 Legis. Hist. 404-405 (1947) (Supplemental Minority Report by Hon. John F. Kennedy) (emphasis added).
[28] *See e.g.*, *Gissel*, 395 U.S. at 617 (1975) ("[A]n employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board.")
[29] *U.S. Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008) (internal citations omitted).
[30] UAW model neutrality agreement, available at https://www.nrtw.org/d/uawna.pdf.

Although ostensibly obligated to remain "neutral," under the agreement the employer is presumably permitted to sing the UAW's praises, if it so chose.

Why does it matter from the employees' perspective if the employer gives up free speech and says nothing of unions? The answer lies in the fact that during an organizing campaign, unions often suppress a host of information that many employees would want to consider before choosing them as their exclusive bargaining representative.

For instance, unions have extensive "rulebooks" that they do not distribute to prospective members. Union constitutions and bylaws impose dozens of rules on employees, such as paying dues, going on strike when the union demands, and keeping quiet about things they do not like about the union. The International Brotherhood of Teamsters' (IBT) constitution, for example, is over 180 pages long—not including local bylaws.[31] If an employee disobeys these rules, they can be put on trial and penalized. Indeed, the Workers United constitution has 9½ pages devoted solely to charges against union members.[32] Unions can and do fine members for violating the rules.[33] Although these rulebooks govern union members' conduct and impacts their wallets, unions are under no obligation to show them to employees when they ask employees to sign cards or vote for the union. Indeed, in many instances, it is likely that employees are wholly unaware of these rules and restrictions when they exercise their choice in an organizing election.

Additionally, unions spend a tremendous amount of employees' hard-earned dues on non-representational activities, such as political contributions and exorbitant officer salaries. For example, employees would be surprised to learn that in 2022, the Teamsters spent over nine million dollars ($9,079,914) on political activities and lobbying. Its president made approximately $350,000, and several officers made more than $100,000.[34] It is hard to dispute that employees should know where their money goes and the financial health of the union when faced with the choice of representation, but unions do not distribute their financials to potential members.

Further, many major unions have records of corruption and scandal they would just as soon not have aired in an election campaign:

- In April 2023, IBT President Sean M. O'Brien placed Teamsters Local 731 in an emergency trusteeship as a result of a "deeply troubling pattern of repeat violations and failure to act in the interest of the members" by the Local's Principal Officer and Local Executive Board. Violations cited included, among others, tens of thousands of dollars of

[31] IBT Constitution, available at https://teamster.org/wp-content/uploads/2022/03/2021IBTCONSTITUTIONBooklet.pdf.
[32] Workers United Constitution (as revised Mar. 5-7, 2013), available at https://d3n8a8pro7vhmx.cloudfront.net/workersunitedunion/pages/47/attachments/original/1431580873/Constitution-March-6-2013.final_.unmarked.pdf?1431580873.
[33] *See e.g.,* Marshall Zelinger, "Employees who crossed King Soopers picket lines now face consequences from union," 9News.com (Apr. 19, 2022).
[34] Teamsters National Headquarter LM-2 (Mar. 30, 2023), available at https://olmsapps.dol.gov/olpdr/?_ga=2.227764949.974708757.1681253495-1137739208.1675739795.

credit card misuse, over $300,000 in unauthorized bonuses, and over $900,000 in unauthorized donations and contributions.[35]

- Recently, the UAW held its first direct election of International Executive Board members instead of through its historical delegate system. The election, overseen by a neutral court-appointed monitor, stems from an agreement between the U.S. Department of Justice and the UAW in December 2020 after a years-long investigation into rampant corruption. The investigation resulted in numerous criminal convictions and jail sentences for top UAW officials in connection with misuse of union funds (*i.e.*, members' dues).[36]

- Dozens of SEIU employees recount being "plagued by sexual misconduct scandals" that fell on the deaf ears of SEIU leaders.[37] SEIU President Mary Kay Henry is accused of promoting a known serial predator, the former Organizing Director of SEIU Local 721 Southern California Public Service Workers Union, and retaliating against whistleblowers.[38]

- SEIU reportedly flooded Chicago hospital emergency rooms with sick and injured people, intentionally creating a dangerous condition to exploit for organizing, and used minor trick-or-treaters to distribute propaganda.[39]

- Several SEIU officials have been convicted of crimes, including but not limited to embezzlement, tax evasion, and falsifying government reports.[40]

Unions likewise commonly mislead employees about how collective bargaining works. Surprising to many, short of threatening employees with bodily harm or forging documents, unions enjoy wide latitude in their messaging to employees, including misstating fact and law.[41] Unions routinely promise employees that they will get a "seat at the table" and the company will grant them huge raises and benefits, without explaining that employees are not party to any contract reached between the company and union (if reached at all) and the union cannot really guarantee

[35] Letter from Sean M. O'Brien, General President, to Officers and Members of Teamsters Local 731, Burr Ridge, Illinois (Apr. 4, 2023), available at https://teamsters731.org/wp-content/uploads/2023/04/Final-Notice-of-Trusteeship.pdf.
[36] *UAW Monitor*, available at https://www.uawmonitor.com/; *Automotive News*, available at https://www.autonews.com/static/section/report05.html; Breana Noble, "UAW monitor publishes rules for first direct election," *The Detroit News* (May 11, 2022).
[37] *See* Me Too SEIU at https://www.metooseiu.com/#home; Affidavits in *Mindy Sturge v. SEIU-United Healthcare Workers West*, Sup.Ct. of California, Cty. of Alameda, RG 18905355, available at https://www.paydayreport.com/wp-content/uploads/2019/12/Affadavits.pdf.
[38] Mike Elk, "SEIU Prez Knew of Sexual Misconduct and Personally Promoted Staffer Anyhow," *Payday Report* (Dec. 11, 2019).
[39] "Terrible Tactics: In order to unionize hospitals or win labor concessions, SEIU has allegedly put patients' and supporters' lives at risk and exploited children," SEIU Exposed.
[40] "Crime and Corruption: Numerous SEIU local officers have been convicted of or pled guilty to crimes conducted in office, including stealing their mostly lower-wage employees' dues money," SEIU Exposed.
[41] *Midland National Life Insurance Co.*, 263 NLRB 127, 130 (1982).

anything. Unions withhold that seniority is generally prioritized over merit, the risks of strikes and the union's strike record, that employees in non-right-to-work states can be fired for not paying dues, and the difficulty of decertifying the union, among other important collective bargaining issues.

Also troubling is the fact that workers have no way of knowing whether a coworker advocating for union representation is being paid by the union to do so. This practice – known as salting – is not only lawful, but neither the union nor the "salt" are under any obligation to disclose this underhanded practice to DOL or anyone else. Through independent research, one group recently uncovered that Workers United spent $2.5 million on salts at Starbucks locations across the country, dismantling the perception that the Starbucks organizing drive was organically grown by the workers.[42] The Starbucks workers had no idea that the person pushing for unionization was paid by the union and thus had ulterior motives and lacked any long-term interest in working for the company.

Additionally, unions can make misleading statements and wildly unjustified and inappropriate promises to employees without any repercussions. Unfortunately, the NLRB has been protecting such anti-employee behavior for decades.[43] Unions can promise benefits for unionizing that they simply cannot deliver regardless of whether they win or lose the election. They frequently promise free health care, autonomy in the workplace, access to loans, special discounts on services or products, and other benefits or services that they have no authority to provide. One recent example is a case against an Illinois-based employer who is alleging that the union's improper activity included "promises by union representatives to team members that in exchange for voting yes, the union would provide them a pathway to citizenship, including by providing them with green cards."[44]

Thus, employers play a necessary role in organizing campaigns by providing a counterbalance to unions' misleading comments and promises and by providing vital information that employees are unlikely to get elsewhere. Unions seek to censor employer speech via neutrality agreements so they can provide employees with a one-sided and frequently misleading story. Thus, if the employer agrees to a neutrality agreement, the employees' "choice" will not be based upon a full and accurate portrayal of the facts.

B. Card Check Agreements Compound the Negative Effects of Neutrality on Employees

1. What Are Card Check Agreements?

[42] "Analysis: Workers United paid nearly $2.5 million to organizers, "salts" and activists at Starbucks," *Labor Union News* (Apr. 25, 2023).
[43] *See, e.g.*, *The Smith Company*,192 NLRB 1098 (1971).
[44] "A Company's Objections To Union Promises Made During Election Campaign May Be An Uphill Battle," *Labor Union News* (Apr. 20, 2023).

Neutrality agreements often include card check agreements, where an employer agrees to voluntarily recognize the union without an election, based on a showing that a majority of employees have signed union authorization cards. Unions encourage employees to sign authorization cards – hard copy or electronic – that say the employee gives the union the authority to be their exclusive bargaining representative.[45] "Exclusive" means the employee no longer speaks on their own behalf about important terms and conditions of employment, such as wages, benefits, and other working conditions. An authorization card is a contract between the employee and union, whether the employee knows it or not.

Card check agreements deprive employees of the benefits and safeguards of a secret ballot election conducted by the NLRB. Professor Manheim summarized cogently:

> Card check, when successfully employed, legitimizes recognition of the union without the need for an election. In that way, it eliminates much of the cost and risk of an organizing campaign. More than that, it takes such a campaign out of the public view. Elections must be conducted according to certain rules, the violation of which can constitute a ULP. In a card check procedure, these rules do not generally apply. The union's representatives can visit employees in their homes or elsewhere and can obtain signatures under a variety of circumstances that might not be permitted in an NLRB-conducted procedure. Thus, the union can avoid delays and faces fewer barriers in contacting workers, although management often claims that such procedures lead to intimidation of workers, especially recent immigrants.[46]

Secret ballot voting is the American gold standard for good reason. It preserves voter privacy and election integrity. Cards, on the other hand, are not votes cast in the privacy of a voting booth. Union organizers need only approach employees (at any time, in any place, and as many times as necessary) to present them with a card; their willingness to submit is obviously and immediately known to the organizer. "Therefore, unions and co-workers will know which employees have agreed to sign union cards and which have not. This may subject employees to misinformation, peer pressure, humiliation and possible coercion at the hands of unions and coworkers."[47]

On top of that, as Manheim indicated, unions use card check to both hide the campaign from the employer and expedite it, with the goal that employees never get the full picture from employers about the negatives of the union and unionization. In this way, card check compounds the detrimental one-sidedness of neutrality.

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[45] *E.g.*, SEIU Local 721 digital authorization card, https://www.seiu721.org/unionauthorization.php; Workers United Rochester Regional Joint Board union e-card, https://workersunitedupstate.org/union-e-card/; Teamsters Local Union No. 856 authorization card, https://teamsters856.org/wp-content/uploads/2015/02/856CARD.pdf.
[46] Manheim, *supra* note 13.
[47] U.S. Chamber of Commerce, *The Employee Free Choice Act: Piercing the Rhetoric*, Labor, Immigration & Employee Benefits Division (2009).

An employee's decision to relinquish dealing directly with an employer and, instead, rely upon a third-party union to negotiate their terms and conditions of employment is significant. "This decision should be made based on a full understanding of the facts, as well as in an atmosphere free of fear of retaliation, coercion, harassment, pressure or ridicule. A secret ballot, confidential election provides this."[48]

2. *The Courts, the NLRB, Federal and State Legislatures, and Unions Alike All Recognize that Secret Ballot Elections Are Superior to Card Check*

The weight of legal authority demonstrates that card check is an inferior process to secret ballot voting. Foremost, the history of the NLRA makes clear that secret ballot elections are the preferred method of measuring a union's support (or lack thereof) from potential bargaining unit members. The 1935 Wagner Act originally provided that the NLRB could certify a union based on a secret ballot of employees "or any other suitable method," but the 1947 Taft-Hartley Act eliminated that language.[49] The present language states that the NLRB "shall direct an election by secret ballot."[50]

The Supreme Court and United States Courts of Appeal have likewise confirmed the primacy of secret ballot elections. In *NLRB v. Gissel Packing Co., Inc.*, the Supreme Court addressed whether and when employers were required to recognize a union based on the presentation of signed authorization cards. The Court stated that cards were "admittedly inferior to the election process,"[51] and "[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."[52] The Court, therefore, determined that cards were only to be used where the employer's unfair labor practices were so severe that "a fair election probably could not have been held, or where an election [was] set aside."[53]

In *Linden Lumber v. NLRB*, the Supreme Court reiterated that an employer does not violate the Act by refusing to accept cards and insisting on a secret ballot election to determine the true wishes of employees. The Court stated, "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…"[54]

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[48] *Id.*
[49] NLRA (Wagner Act), 49 Stat. 449, § 9(c) (1935).
[50] Labor Management Relations Act (LMRA), 61 Stat. 136, Title I, Sec. 101, §9(c) (1947) (emphasis added).
[51] *Gissel*, 395 U.S. 575, 603 (1969)
[52] *Id.* at 306.
[53] *Id.* at 601 n. 18.
[54] *Linden Lumber*, 419 U.S. 301, 304 (1974); *accord*, *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1371 (7th Cir. 1983) ("Workers sometimes sign union authorization cards not because they intend to vote for the union in the election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back, since signing commits the worker to nothing (except that if enough workers sign, the employer may decide to recognize the union without an election")); *NLRB v. S.S. Logan Packing Co.*, 386 F.2d 562 (4th Cir. 1967) ("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 NLRB has likewise stressed that independently supervised elections are a better expression of employee free choice.[55] Such cases span 40 years.[56]

Legislative attempts at codifying card check have repeatedly failed.[57] When considering the inaptly named Employee Free Choice Act (EFCA), Former Senator George McGovern (D-SD), who dubbed himself a "longtime friend of labor," came out against the bill, because "workers could lose the freedom to express their will in private, the right to make a decision without anyone peering over their shoulder, free from fear of reprisal."[58]

In fact, the federal government and some states are working to guarantee secret ballot elections. The current Tennessee legislature, for example, passed a law that would ensure, among other things, that employees of businesses seeking certain state funds get a secret ballot election.[59] Under the United States-Mexico-Canada Agreement (USMCA),[60] which governs trade between the three nations and had the goal of more equitably balancing the labor laws of Mexico and the U.S., Mexico is required to "[p]rovide in its labor laws that union representation challenges are carried out . . . through a secret ballot vote."[61] The agreement also required Mexico to adopt legislation requiring that labor contracts have "majority support" among employees, with an independent agency verifying that "a majority of workers . . . demonstrated support . . . through a personal, free, and secret vote."[62] The U.S. government understood the value of secret ballot elections when drafting and approving the USMCA and clearly established that employees in Mexico would benefit from the critical protections of a secret ballot. It is, therefore, inconceivable that the NLRB would extinguish these same guarantees for U.S. employees.

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[55] *Id.*, 419 U.S. at 301.

[56] *Dana Corp.*, 351 NLRB 434, 438-440 (2007) (discussing the superiority of the election process in terms of the secrecy of employee decisions, the accuracy of information provided to employees, and reliability, stating, "union card-solicitation campaigns have been accompanied by misinformation or a lack of information about employees' representational options" and "Board election presents a clear picture of employee voter preference at a single moment"); *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 105 (2001) ("Board-conducted elections are the preferred way to resolve questions regarding employees' support for the unions."); *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1240 (1966) ("[W]e regard it as the Board's function to conduct elections in which employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint, or coercion … but also from other elements that prevent or impede a free and reasoned choice.)

[57] S.560 – Employee Free Choice Act of 2009; H.R.5000 - Employee Free Choice Act of 2016. Notably, the failed EFCA would have required the NLRB to develop guidelines and procedures for card check. Private card check agreements generally have no standards for determining the validity of cards.

[58] George McGovern, "My Party Should Respect Secret Union Ballots," *The Wall Street Journal* (Aug. 8, 2008).

[59] Tennessee S.B. 0650, available at https://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=SB0650&GA=113. A survey of Tennessee residents conducted between December 9-15, 2021, shows support for the bill's goals. *See* https://laborpains.org/wp-content/uploads/2022/01/UAW-polling-data-.pdf.

[60] *See* USMCA Implementation Act, Pub. L. No. 116-113, 134 Stat. 15 (2020).

[61] USMCA Chapter 23, Annex 23-A, § 2(d) (emphasis added).

[62] *Id.* §§ 2(e)(ii)(C).

Perhaps most tellingly, unions have acknowledged for decades that cards are often not a true expression of employees' wishes. The AFL-CIO's 1961 "Guidebook for Union Organizers" stated: "NLRB pledge cards are at best a signifying intention at a given moment. Sometimes they are signed to 'get the union off my back' … Whatever the reason, there is no guarantee of anything in a signed NLRB pledge card except that it will count toward an NLRB election."[63] In February 1989, the AFL-CIO published a survey of campaign outcomes that made clear that cards do not equal votes; "It is not until the union obtains signatures from 75% or more of the unit that the union has more than a 50% likelihood of winning the election."[64] Further, the Center for Union Facts has cited the AFL-CIO's 1998 legal brief to the NLRB that criticized cards for *decertification* of a union because they were "not comparable to the privacy and independence of the voting booth," whereas the "election system provides the surest means of avoiding decisions which are 'the result of group pressures and not individual decisions.'"[65]

As referenced above, UAW President Shawn Fain was recently sworn into office after the union's first-ever direct election of International Officers by secret ballot. The election was conducted under the supervision of an independent court-appointed Monitor in settlement of a DOJ probe into the auto union's systemic corruption.[66] The 2022 UAW constitution now reflects secret ballot voting for International Officers.[67] It is, to say the least, hypocritical for a union to afford its membership the benefits of a confidential election, free from retaliation or coercion, while attempting to deny prospective members the same. Prospective members deserve the same rights as those who are already in the union.

3. Union Intimidation of Employees to Sign Cards Is Well-Documented

The mere possibility of coercion should be enough to afford employees a private vote, but intimidation and deception of employees to sign cards by unions and union supporters is more than theoretical.[68] Former Senator McGovern noted in his attack on EFCA the "many documented cases where workers have been pressured, harassed, tricked and intimidated into signing cards."[69] In one instance, a union supporter allegedly stated to an employee that she had better sign a card, because if she did not, the union would come and get her children and slash her car tires.[70] In other cases, union representatives or supporters photographed employees taking union literature[71] and

[63] *See* Union Facts.com, "Cards Are Not Votes," available at https://www.unionfacts.com/article/the-problem/cards-are-not-votes/.
[64] *Id.*
[65] *Id.*
[66] UAW Monitor, available at https://www.uawmonitor.com/; UAW, "UAW President Shawn Fain Sworn In," (Mar. 26, 2023).
[67] UAW Constitution, Article 10, available at https://uaw.org/uaw-constitution-2/.
[68] As noted in CDW's July 2022 Report, *Online Voting in Union Representation Elections: The Latest Attempt to Eliminate Workers' Right to Secret Ballots*, this is equally true of online card collection and electronic voting.
[69] George McGovern, "My Party Should Respect Secret Union Ballots," *The Wall Street Journal* (Aug. 8, 2008).
[70] *HCF, Inc. d/b/a Shawnee Manor*, 321 NLRB 1320 (1996).
[71] *Randell Warehouse of Arizona*, 347 NLRB 591 (2006) and *Enterprise Leasing Co.—Southeast, LLC*, 357 NLRB 1799, 1800 (2011).

presented a petition for union support in English to Spanish-speaking employees without translation.[72]

On February 8, 2007, the House Committee on Education and Labor's Subcommittee on Health, Employment, Labor and Pensions held a hearing regarding EFCA. Employees and former union organizers presented compelling testimony of union card check abuses. Some of this testimony was as follows:

- "Employees are told at off-site meetings that signing a card only certifies that they attended the meeting. Employees are also offered a free t-shirt if they sign a card. What they are not told is that these cards are a legally binding document, which states that the employee is pro union—thus placing the union one step closer to their goal of complete control of the employees' workplace life without the employee even realizing it…"[73]

- "In April 2005, the UAW obtained the personal information of each employee. It wasn't enough that employees were being harassed at work, but now they are receiving phone calls at home. The UAW also had Union employees from other facilities actually visit these employees at their homes. The union's organizers refuse to take 'no' for an answer. If you told one group of organizers that you were not interested, the next time they would send someone else. Some employees have had 5 or more harassing visits from these union organizers. The only way, it seems, to stop the badgering and pressure is to sign the card."[74]

- "Visits to the homes of employees who didn't support the union were used to frustrate them and put them in fear of what might happen to them, their family, or homes if they didn't change their minds about the union. In most cases, constant pressure at work and home was enough to make workers break and at least stop talking against the union—neutralizing them, so to speak."[75]

- "One of the first meetings with the union after the launch of the 'card check' campaign was a Q & A session with a local organizer and SEIU organizing director at a large reception hall at one of our Portland campuses. At that meeting, union authorization cards were placed purposely in front of each chair. Some of us, myself included, spoke to our colleagues before the meeting about those cards, and questioned their meaning and purpose. At the meeting, employees asked the union agents questions about the

[72] *Flaum Appetizing Corp.*, JD (NY)-08-09 (Feb. 18, 2009).
[73] Statement of Mike Ivey, Materials Handler, Freightliner Custom Chassis Co., Hearing of U.S. House of Representatives Education and Labor Committee Subcommittee on Health, Employment, Labor and Pensions (Feb. 8, 2007), at 4, available at https://www.govinfo.gov/content/pkg/CHRG-110hhrg32906/pdf/CHRG-110hhrg32906.pdf.
[74] *Id.* at 4-5.
[75] *Id.* at 6 (Statement of Ricardo Torres, Former Union Organizer for the United Steelworkers).

purpose of the cards. The union agents responded by telling us that signing the card only meant that the employee was expressing an interest in receiving more information about the union, or to have an election to decide whether or not to bring the union in… On October 17, 2005, my department was brought to a meeting with our senior management and told that as of that date, we were officially represented by SEIU. There was never an election and no further information was available to us."[76]

- "As an organizer working under a 'card check' system versus an election system, I knew that 'card check' gave me the ability to quickly agitate a set of workers into signing cards. I did not have to prove the union's case, answer more informed questions from workers or be held accountable for the service record of my union. When the union is allowed to implement the 'card check' strategy, the decision about whether or not an individual employee would choose to join a union is reduced to a crisis decision. This situation is created by the organizer and places the worker into a high pressure sales situation. Furthermore, my experience is that in jurisdictions in which 'card check' was actually legislated, organizers tended to be even more willing to harass, lie and use fear tactics to intimidate workers into signing cards. I have personally heard from workers that they signed the union card simply to get the organizer to leave their home and not harass them further. At no point during a 'card check' campaign, is the opportunity created or fostered for employees to seriously consider their working lives and to think about possible solutions to any problems…. There were threats made to anti-union people. As an organizer, there were many times where I was directed to create what is called a rat campaign, in which you identified a pro-union supporter who hasn't signed a union card, label them as company rats, and harass them on the shop floor. In one such environment in Indianapolis, a woman actually had a heart attack on the shop floor because the stress was so great."[77]

The above illustrates some of unions' common ploys to coerce and deceive employees into signing cards, including concealment of an existing neutrality/card check agreement with the employer, lying about what cards mean, workplace harassment, intrusive and threatening home visits, and refusal to return cards that employees wish to revoke. Add to this that neutrality prevents employees from ever hearing critical information about the union or unionization generally—information that unions deliberately conceal, and it is easy to see how employees cannot make a meaningful choice about representation when employers agree to neutrality and card check.

[76] *Id*. at 5 (Statement of Karen M. Mayhew, Employee of Kaiser Permanente). Mayhew testified that she filed unfair labor practice charges against SEIU and Kaiser Permanente. The parties entered into a settlement that required the company to revoke the voluntary recognition and the union to obtain representational status through a Board-supervised secret ballot election (p. 6). A similar settlement was obtained on charges of Ryan Canney, an employee of Somers Building Maintenance-Siltronic, who alleged SEIU Local 49 deceived him and his coworkers into signing "information flyers" the union later used to obtain voluntary recognition, among other coercive tactics. *See* "SEIU Union Must Abandon "Card Check" Union Organizing Drives in Pacific Northwest After Finding of Rampant Abuse of Employees' R," National Right to Work Legal Defense Foundation (Apr. 24, 2007).
[77] *Id.*, at 32, 39, statement of Jennifer Jason, former UNITE HERE organizer.

C. Conclusion

Employers should not agree to neutrality and card check agreements, because they are bad for workers. The fundamental policy behind the NLRA is that employees have the right to choose whether they wish to have a union or not, without fear of retaliation or coercion. A bedrock principle of democracy is that the choice of one's representatives should be made through a secret ballot election following open debate between the parties.

Decades of legal precedent and actual experiences show that neutrality deprives employees of critical information, because unions are under no obligation to provide relevant information at all. Neutrality and card check are unions' devices to publicly pressure employees to sign away their rights after hearing only one side of the story. Employers should not facilitate this scheme.

The NLRA should be amended to require unions to provide to prospective members, at a minimum, their constitution and bylaws, financial reports, strike histories, record of criminal activity and unfair labor practices, and a statement regarding the meaning of cards before any card is deemed valid. Before that happens, any employer that agrees to neutrality and card check is preventing employees from making an informed choice about whether unionization is in their best interests.