BEFORE THE

NATIONAL LABOR RELATIONS BOARD

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IN RE: NOTICE OF PROPOSED)

RULEMAKING, REPRESENTATION) VOLUME II

CASE PROCEDURES)

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Public proceedings before the National Labor Relations Board, MARK GASTON PEARCE, Chairman, held at 1099 Fourteenth Street, N.W., Washington, D.C., the Margaret A. Browning Hearing Room, commencing at 9:36 a.m., Friday, April 11, 2014, before Keith A. Wilkerson, a notary public of and for the District of Columbia.

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A P P E A R A N C E S:
National Labor Relations Board Members:
MARK GASTON PEARCE, Chairman
PHILIP A. MISCIMARRA, Board Member
KENT Y. HIROZAWA, Board Member
HARRY I. JOHNSON, III, Board Member
NANCY SCHIFFER, Board Member

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P R O C E E D I N G S

MR. PEARCE: Good morning, everyone. This is the second day of the meeting of the National Labor Relations Board. I'm still Mark Gaston Pearce, the chairman. To my right are board members Kent Hirozawa and Phil Miscimarra, and to my left are board members Harry Johnson and Nancy Schiffer.

As we stated yesterday, the purpose of this meeting is to hear from and question individual presenters. This is not a group presentation by any means. We're grouping folks for administrative convenience. Although presenters are encouraged to reply to the extensive prior written commentary submitted to this rulemaking, this meeting is not a forum for group discussion among the presenters, so if there is a question that we ask we're going to be trying to focus it on the individual rather than the group, and speakers should address the Board and not other speakers.

Housekeeping is that you keep your badges, the same story. This is a very exclusive nightclub. If you lose your badges you might not be able to get in. If you go out for lunch make sure you have your badges with you to come back in, and

then at the end of the day make sure you trade your badges in for your driver's license so that you'll be able to get on the plane. You should note that there have been adjustments to the schedule, so anybody who is working from the old schedule, you might be advised to pick up some of the new schedules that are available outside.

The first seating, this is the first grouping, this is a topic area that involves five seatings, so we're going to have a lot of testimony in that regard. I strongly encourage those people following to make adjustments to their presentations once points have been made that are very similar or possibly exactly like the point that you're going to make so that we can reduce repetition. We hate to remind people of that if it gets too repetitive, but we will. We're going to have lunch at 12:30, closer to 1:00, and we're going to have a short break at approximately 11:00 or 11:30.

The topic area is:

Election date. Please describe the standard to be applied for scheduling an election. The proposed rules state that the regional director should select an election date which "is as soon as practicable." If you disagree with the standard,

please describe the standard you would apply. Specify whether you think the rules should include a minimum or maximum time between the filing of the petition and the election, and, if so, how long this time should be. Also address whether the proposed rules adequately protect free speech interests; if you believe they do not, please and state specifically how the proposal can be adapted to adequately address the matter.

For the first seating we have Joseph Torres, Brian Petruska, Elizabeth Milito, Edgardo Villanueva and Glenn Rothner. Welcome everybody. Thank you. Mr. Torres, you can proceed.

MR. TORRES: Thank you, Chairman Pearce. Again, my name is Joseph Torres. I'm a partner in the law firm of Winston & Strawn, based in their Chicago office.

Chairman Pearce and members of the Board, thank you again for the opportunity to address you regarding the proposed election rule changes. As you noted, we were asked to address two specific issues concerning the timing of election and the effect of that on the free speech interest guaranteed by the National Labor Relations Act.

I would submit that the "as soon as

practicable" standard in and of itself doesn't do much to inform a practitioner as to what they should expect. What matters is ultimately what that standard evolves into in terms of an actual time frame for conducting elections, and I submit that the more appropriate measure of that time period should be the existing median times that the vast majority of NLRB elections are resolved. It represents a benchmark that has been developed through collective experience, and to that extent I believe it provides a reasonable degree of certainty for interested parties.

You can see what has happened in the past, you can apply it to your situation, and develop some reasonable expectations for your clients as to how this process will play out. Many of these clients, as I'm sure you've heard over the last day, have little or no experience with the National Labor Relations Act, and so bringing certainty to the process, in my opinion, promotes the best policy for this Board to pursue.

To the extent that the proposed "as soon as practicable" standard is intended to refer to the 10 to 21 day time period that is contemplated by the notice of proposed rules, I believe it proceeds from

a faulty assumption that the current median times, which are well documented, require some wholesale revision. I believe that the sort of extreme or isolated examples of elections that have exceeded the median times by substantial amounts relative to the overall number of elections that this Board processes every year, its own statistics make clear that the vast majority of election cases are resolved in an efficient and expeditious process, and any alleged need to shoehorn all election cases into an unnaturally short time period lacks any generally acceptable empirical support.

In my experience advising clients that are small, that are large, the current median times, as I said, provide some reasonable reference point for individuals as to the timing and expected developments of an election campaign. I believe that establishing guidelines to inform an "as soon as practicable" standard requires you to look at the timing of elections in various sizes and industries, geographic locations and circumstances, and that, based upon that experience, it is a sound basis for policy development. In contrast, establishing significantly shorter generally applicable time periods based on an atypical minority election I

would submit is not.

I would note that the Board can more precisely address any specific issues that might warrant deviation from those median times by looking at data that could identify the factors that may be causing delay in some cases, seeking input from relevant constituencies as to how such factors could be addressed to reduce delay in cases where that occurs, and identifying a consensus based solution which I would suggest the median time period represents. They balance employee Section 7 rights, the need for reasonably prompt resolution of election issues, and the rights of employees and labor organizations to meaningfully advocate their views.

And I think that takes us to the next point. For employers and employees in and labor organizations to have a meaningful ability to express their views concerning unionization and organizing campaigns, I think it's important that the time periods that are set for an "as soon as practicable" standard allow not only for communication itself but education as to what we're actually talking about.

I believe, again, that statutory such as

those embodied in Section 8(c) must also include some reasonable opportunity for expression in order for the statutory right to have any meaningful benefit. And to the extent that the current median time frames allow for reasonable processing of the vast majority of elections, I would submit that employers and employees should be able to engage during those time periods in some reasonable amount of education and communication regarding the election.

It is a balance to be struck. Recognizing that we're not dealing with absolutes in terms of what is the only time period for holding an election, I think that the circumstances in which various elections present themselves should allow for variation and that the median time frames show that that generally happens in a fairly efficient and effective process. And when there are circumstances that the Board in its experience identifies require some adjustment, a solution would benefit from a more precise assessment of the factors that may be causing delays or issues. Thank you very much.

MS. SCHIFFER: I wanted to ask about one of the statements you made about having guidelines

to inform the standards. You mentioned geography, industry and some other factors. I wondered if you were suggesting that there would be different guidelines for different areas of the country and for different industries.

MR. TORRES: No. I'm merely pointing out that there is no atypical election, that they come in a vast majority of circumstances, and that the collective experience of all of those large employers, small employers, geographic areas, that the unique circumstances of whatever their proposed unit is all accumulate to provide a body of experience, that that is embodied in the median time periods that have been reported, in my view, and that we should not be slicing it into sort of compartmentalized time periods.

MS. SCHIFFER: I appreciate that. I was confused about that. Are you suggesting that in this rulemaking we provide the time periods?

MR. TORRES: Yes. I believe that to the extent that you have existing time periods your work is done. There is no need to further -- the time periods that show the collective experience, in my opinion, is the standard by which you should be implementing an "as soon as practicable" time

period. I don't think anyone agrees that that is not optimal, all things being equal, that we get to an election as soon as practicable, but the question or the devil in the details is how much in fact will that time period be, and I would suggest that you already have some standard that you can use to inform that standard for practitioners and employees.

MR. PEARCE: But wouldn't you imagine that there would be some challenges to creating static time periods even if it varies from industry to industry just because of the fluid nature of the circumstances that present themselves?

MR. TORRES: I think if you defined a rigid time period as the embodiment of "as soon as practicable," I would completely agree with that, Chairman Pearce. But what I'm suggesting is that a median is just that: it is a guideline, it is a frame of reference, it is a time or period that the regional offices can take into account when they're trying determine what works best in a particular circumstance.

Recognizing that there's a vast number of variables that come into play in any election proceeding, it seems to me that by giving them some

benchmarks to be using as guides to try and work through some agreement with the parties, that that is a workable solution, rather than, as you suggest, trying to statically say that in every instance you shall conduct the election no later than X date. Again, I think there's just too many variables for you to try and establish minimums and maximums for these sorts of circumstances.

MR. JOHNSON: Just to jump in, then, would you be fine with us in defining "practicable" by throwing out a few things to look at, for the regional directors to look at? I'm not quite sure whether you're approving that approach or disapproving that approach.

MR. TORRES: Well, I think that to the extent that there are factors that lead to -- in looking at the median time periods that already exist, if it's three to four weeks that we're saying is sort of the normal time period, it seems to me that, subject to whatever unique circumstances might apply in a particular case, setting that as sort of the timeline or the benchmark that they should be shooting for is not an unreasonable standard for them to employ.

MR. JOHNSON: Okay. So your premise is

basically that what's going on now in terms of experience is in the field is the baseline we should use.

MR. TORRES: Yes.

MS. SCHIFFER: And the median you're using is for non-litigated --

MR. TORRES: Again, I think there's a lot of moving pieces here. If we're talking about elections that ultimately have some contested issues, I think that the median time periods are slightly longer. Whether there is a middle ground there or whether there are going to be other changes to the rules that would require there to be some adjustment I think depends on other things the Board's considering adopting here.

MR. PEARCE: Thank you, Mr. Torres. Mr. Petruska.

MR. PETRUSKA: Thank you, Chairman Pearce, Member Hirozawa, Member Miscimarra, Member Schiffer, Member Johnson. I spoke with you yesterday. I'm counsel to the LIUNA Mid-Atlantic regional organizing coalition.

I'm speaking today in support of the current standard that directs elections to be held as soon as practicable. It's important for the

standard for scheduling elections to be flexible because there is a lot of fluidity in bargaining units. They vary in size, geography and complexity in just about every way imaginable. However, straightforward elections of relatively smaller units in single locations should be able to be conducted expeditiously, and if you have a large unit with multiple locations, as can happen sometimes in construction, it may take longer to prepare. Mail balloting is going to have its own schedule. It's going to be different. What is important is the principle that should drive the scheduling. In general, expeditious elections should be preferred to those with prolonged delay.

I think it is important to maintain the Board's neutrality in the process. Delay can create a sense of futility among workers who are organizing. It can negatively influence employee views on working collectively and on the collective bargaining process. I think it is important to maintain the Board's neutrality in the process, and so the schedule should really be based on neutral factors such as how long does it practically take to run the election and not on artificial timetables.

There has been great concern in the

business community in the comments that the proposed rulemaking would result in elections that are aggressively fast. I read at least two commentators, and I believe this comes from former Member Flynn's estimate, of elections possibly within ten days. And those who cite the ten day election also allege that the abbreviated schedule threatens the employer's ability to participate in debate and education with employees over the election.

I would suggest that these concerns are overblown. To begin, elections in ten days from the filing of a petition, as I see it, could only occur in a stipulated situation, a stipulation or consent, and in that instance all parties are going to have to agree on the date to begin with so no one's rights are being trampled.

In contested cases, by contrast, there are several practical considerations that make an election within ten days extremely unlikely. First, when a election is directed, the direction of election cannot issue until after the record's been produced, and it takes a couple of days just to produce the record because the regional director has to read it in order to direct the election. That

will necessarily, I think, make the ten day election in a contested case impossible.

Even if the pre-election decision is deferred until after the direction of election issues, the director nevertheless has to put in time to write the decision before the election and tally ballots, and so that has to be taken into consideration. The ballots have to be printed. These days, in my area it's often in multiple languages. Each additional step requires more time, and the regional staff must be available to hold the elections on the days and times directed. This requires scheduling far enough in advance so that staff can be available.

Lastly, there's the Excelsior list. Even if it's issued in two days, most unions are going to want to have that before they proceed, and they're want to going to have time to assess it, because that's going to be one of their first opportunities to assess what they know about the unit with what's on the list.

Fifth, there is the Board's traditional convention of holding elections on paydays. These aren't necessary in every unit, but in units with substantial part-time employees there is efficacy to

holding it on that day so that employees would be present, and that will also drive scheduling considerations.

Consequently, even under swift proceedings in contested cases, I would anticipate a minimum of two weeks after the hearing to conduct an election. I think elections in contested cases will range between 21 and 35 days from the petition, but 21 days probably acting as the earliest. In stipulated consent cases, which are the vast majority, I think you can have a shorter timeline, and I think that's appropriate, but since those are stipulated cases everyone's agreed to that voluntarily.

So let me say that I do not think the schedule can be fairly called an ambush election. I do not think a three to four week election restricts free speech rights. Employers maintain their rights under Peerless Plywood to conduct mandatory meetings, under Shopping Kart to disseminate propaganda regardless of its accuracy or inaccuracy, and under 10(c) to express any opinion so long as it contains no threat and promises no benefits.

In all, I think the employer's right to these modes of expression are not abridged by the

rule and that the concerns for restrictions on free speech are substantially overblown. Thank you.

MR. PEARCE: Would you advocate setting a particular number of days minimum and maximum number of days to set an election date?

MR. PETRUSKA: I wouldn't advocate for that because I think it's unnecessary. I will say that currently we have a Supreme Court who is more solicitous to corporate free speech rights than any court in history, and I do think that's a consideration at least with respect to this being an issue that is driving a lot of the comments.

I do think that it's important to make clear that the practicable standard is not one that restricts or that precludes participation in the process. So I don't think there needs to be a minimum, but I do think it needs to be made clear that some of the "parade of horribles" that have been in the comments are not a likely outcome of the standard.

MR. MISCIMARRA: Mr. Petruska, your comments are very helpful because there are a significant number of steps -- and I'm summarizing -- that kind of dictate when elections become practicable because there are a lot of

mechanics associated with it.

Do you interpret the word "practicable" to mean the mere mechanics associated with getting an election done and kind of the statutory minimums that affect timing, and do you think the Board should take into account how much time the employees actually would benefit from having and making a decision on whether or not to be union represented?

MR. PETRUSKA: I would say the first set of criteria is what the Board should focus on. I'm not aware of any way that the Board would be able to determine how much time would be helpful to employees. I'm not sure that that's necessarily something that a person could say as a general matter in setting rulemaking for all bargaining units across the country, so I do think it's appropriate to focus in on the practical steps.

MR. MISCIMARRA: But aren't we the only entity that's in a position to actually evaluate how much time employees need?

MR. PETRUSKA: Well, the regional directors are going to be making many of these decisions. In contested cases they're going to be the ones making this decision, and they're in a position to make it on a case by case basis. I

would expect in cases where, depending on the circumstances -- and I'm looking mostly at, you know, the practical considerations -- they're going to need more time. I think they're the ones to make that determination.

I suppose if there is a small unit, but it's a contested case and the regional director thinks, "I could knock this out in, you know, four days," he might say, you know, "I'll push it back a week to have more time" maybe just to give them a buffer, that is I think a consideration that the regional director should make on a case by case basis, and I think the practical guidance gives him the appropriate guidance that he should be using.

MR. JOHNSON: A quick follow-up to Phil's question. If the Supreme Court in Chamber of Commerce versus Brown has recognized that employees have an implicit right, an underlying right, to receive information opposing unionization, and if the Supreme Court, also ensconced in that decision, is referring to some earlier decisions that essentially the NLRA is favoring uninhibited, robust and wide-open debate in labor disputes, shouldn't we take into account of those policies when we set whatever standard we're going to set here?

MR. PETRUSKA: I guess I would say yes, but I think the standard does, because I think the standard is allowing an ample period. And I just don't see, you know, with the timeline that I think the standard is going to produce, I don't see any way that those considerations that a free and robust discussion wouldn't be possible in let's say, a two week period. In my experience, that is a lot of time for employers to have communications with their employees about a union election, and so I think that the current standard does take those facts into consideration. I don't think there needs to be add-on, you know, timetables to accommodate those principles.

MR. JOHNSON: Okay. You think that's enough. And I do want to compliment you on your 2014 written comment, because you rely on a lot of sort of empirical analysis to get where you're doing. Wouldn't it be helpful, though, if we had some empirical analysis of employer free speech opportunities as they're actually exercised during a campaign before we start regulating the amount of time employers have to engage in free speech?

MR. PETRUSKA: Well, you know, we got this far, and as I understand it the schedule has

mostly been driven by the procedural mechanics, and so I think that's still the course to maintain. Rulemaking can be done and it can be redone, but I think that we do have, not empirical, but we do have a lot of experience, and I'm giving you my experience as it stands, but I do think the time periods are sufficient.

In the commenting I really haven't seen a lot in the way from business communities to describe the meaningful differences between three weeks versus two weeks or four weeks versus two weeks. But what is the message, what is the mode of communication that has been precluded by that additional time, whether it's just something that they want for captive audience meeting and want it spaced weekly as opposed to three? It seems to me that there hasn't been or that I haven't seen a suggestion that we need to use a different way of scheduling this other than looking at the mechanics.

MR. JOHNSON: Right. But if we don't have the data, would it make sense for us to start regulating free speech if we don't have the data? I mean, which way should the presumption go?

MR. PETRUSKA: I'm going to disagree that we're regulating the speech. I think what we are

doing is we are setting a schedule based upon procedural mechanics, and I don't think there is a substantial regulation of speech in doing that.

MR. JOHNSON: Okay. Just one more question. Let's say I totally agree with you that we need to set the standard according to the practicalities of how elections actually are set and what makes sense. Why wouldn't it make sense at least to bracket that off so that all parties would agree that they're dealing with something other than what's going on in the regional office that week?

MR. PETRUSKA: Well, without knowing what you mean precisely by --

MR. JOHNSON: Just the minimum/maximum, minimum bracket and maximum bracket.

MR. PETRUSKA: Well, again, the worry with minimum brackets is that you do have most of these cases occurring by stipulation, and I think in stipulated cases those elections should be free to proceed as quickly as the parties determine, and all of this does factor into how decisions are made.

MR. JOHNSON: Let's say the minimum doesn't apply to stipulated election agreements. Would you support a minimum/maximum bracket if there is no agreement to be had?

MR. PETRUSKA: Well, I guess what I would say is that I don't see a minimum as being necessary.

MR. PEARCE: Which is what you said to me in my questions. We have to move on. Ms. Milito.

MS. MILITO: Chairman Pearce and Board members. I spoke yesterday, so I will just keep my remarks today brief this morning.

While changes to the Board's current rules on election procedures would affect businesses of all sizes, NFIB, the National Federation of Independent Business, for whom I'm appearing this morning, is primarily concerned about impact on the country's smallest employers.

When it comes to labor issues, NFIB's constituency is very unique as compared to most businesses represented by other trade and business associations. Very few NFIB members have a dedicated human resources professional. Even fewer if any NFIB members have a dedicated labor relations expert or in-house counsel, and typically all employment and labor matters are the direct responsibility of the small business owner.

The proposed time frame under which elections will be held in potentially 10 to 21 days

from the filing of a petition will be particularly problematic for small business owners who have few administrative employees and few, if any, in-house labor experts or in-house counsel to comply with the expedited procedures. The proposed rule does not properly balance the rights of employees, employers and labor units in the pre-election period, and the shortened time frames deprive employers of their due process rights under the Act.

The collective goal of an election is to have an informed constituency, and to do so you need to have both candidates show up and express their views, and 10 to 21 days is just not enough time for a small employer to find someone to prepare a message and deliver a message to the employees. Communication with employees is a protected right of employers, and we are very concerned that the proposed rule would prevent employers from effectively communicating with employees about the unionization process.

As crafted, the proposed rule deprives employees of making an informed choice, strips small businesses of due process, and compromises employee rights. In contrast, NFIB believes the current union election process, which takes a median of 38

days, generally provides enough time for unions to make their case, and, importantly, for employers to make theirs, and for employees to have the information they need to make a fully informed choice. Thank you.

MR. PEARCE: Where do you get 10 to 21 days from?

MS. MILITO: The proposed, potentially. I mean, we just heard Mr. Petruska say potentially it could be ten days.

MR. PEARCE: Okay. So if it's ten days by virtue of stipulations of the parties, is there an injustice going on?

MS. MILITO: I believe potentially there still could be, yes, you know, or you have a small business owner who has agreed to a stipulation because he feels cornered in a box. He found counsel, it took him several days to find counsel and he's not sure what to do, so he signs something because he's not sure what else -- you know, he's acting kind of under pressure, if you will.

MR. PEARCE: So currently parties can stipulate.

MS. MILITO: Yes. And in most elections they are stipulated. I understand that. Yes,

absolutely. I would agree with that.

MR. PEARCE: And currently parties can waive the time period for the Excelsior list and can waive other things and have an election in less than the 38 day period.

MS. MILITO: Right.

MR. PEARCE: In 21 days, possibly. That can happen now.

MS. MILITO: Yes.

MR. PEARCE: Do you think that that is depriving an employer of an opportunity to educate its employees?

MS. MILITO: In some situations I do think the employer is deprived of their right because, again, I think they're acting under pressure. And I think ultimately, again, as I said before, the goal is to have an informed constituency. So we want to make sure the employees are informed and hear both sides, too. So I think in some situations you're shortchanging the employees, you're boxing the employer in a corner, everything's condensed, accelerated if you will, so the employees ultimately don't hear both sides.

MR. PEARCE: Now, of course we don't know what employers feel boxed into a corner to enter

into a stipulation because of pressures or what have you or which employers find it expedient to just do that because they think they can communicate effectively with their employees. We don't really have data that distinguishes between them.

Is it your suggestion that the proposed rule compensate for the possibility anyway that employers may be entering into these stipulations under duress?

MS. MILITO: Right now the median of, you know, 30 to 47 days I think is working well. I think that was Mr. Torres's testimony, and I agree wholeheartedly with that. I think flexibility is needed. And I'm not saying that all small employers who enter into a stipulated agreement -- that's not what I'm saying -- are doing so under duress.

I just think, you know, accelerating it is only going to hurt small employers. They don't know what to say, so they don't say anything. They know that there is a lot that they can't say, and so I think what I hear from my members is, "It's better just not to say anything until I find a lawyer who tells me what I can say or what I can or cannot do."

MR. PEARCE: But in light of that, would you suggest that parties be prohibited from entering

into stipulations if it results in an election that is shorter than 30 to 31 days?

MS. MILITO: Not at all. No, not at all. That's not my testimony. No, not at all, no. Again, I'm not saying that stipulated agreements with small employers are all done under duress. Not at all. I'm just saying that, you know, the Board needs to be careful in, I think, accelerating and taking it into consideration kind of the disadvantages that small employers have, you know, when they don't have in-house expertise.

MR. MISCIMARRA: Ms. Milito, part of the focus of the Act is not just on having elections, but it's to produce stable bargaining relationships that benefit all sides if a majority of employees support union representation. Just because your organization is associated with small businesses, what's the level of familiarity that most small businesses have if they're presently non-union with the rules that govern how bargaining takes place if a union prevails in an election, and how much time do you think is needed for people to become familiar with those rules?

MS. MILITO: I think their familiarity with labor issues and with employment issues in

general is small. I mean, they don't know much. They opened a restaurant or they opened a small manufacturing plant not because they knew anything about union or employment matters. So there is a steep, steep learning curve. And again, that's why they're dependent on finding outside help.

But I do think it depends. I mean, I certainly have some members that are better educated on this just because of the industry they're in, so I think there is some variation, but by and large most don't know much about employment or labor matters in general.

MR. MISCIMARRA: Thank you.

MR. PEARCE: Thank you very much. Mr. Villanueva.

MR. VILLANUEVA: Thank you. Good morning, Mr. Chairman, and distinguished members of the Board. I am Edgardo Villanueva, president of EMSI Consulting, a management consulting labor relations firm based in Chicago. In your terminology, I am a persuader. Of course, unions come up with other, more creative names for my profession.

Given the limited time I have, let me establish up front that I feel that reducing the

time frame from the filing of a petition to election day is simply unfair to the employees, the voters who are faced with making a very important decision of significant long term impact to their working lives and pocketbooks.

I'm sure you've heard that in the circles that I represent, that is, management, this potential change is referred to as ambush elections. Based on my 32 years of hands-on face-to-face contact with thousands of eventual voters in NLRB elections, I feel that the term "ambush" would apply to the voters more so than to the employers.

Of particular concern to me, and the focus of my presentation here before you, is the multitude of situations I have faced where the employees in the voting group are predominantly Spanish speaking immigrants from various countries in Latin America who have never had exposure to the nuances of the National Labor Relations Act that you oversee and whose only point of reference about unionization are the labor laws of their own country or the appealing promises of a trade union organizer whose job it is, ironically, to persuade them to vote for the union, and who may either be guilty of a sin of commission by not stating the truth, or,

even worse, a sin of omission by failing to inform the workers of the whole story.

Mr. Chairman, after meeting with countless employee groups in many diverse industries across the country and even in Puerto Rico where the Act applies, I have personally experienced and seen the total lack of understanding or a profound misunderstanding about the National Labor Relations Act that these employees have as they prepare to go to the voting booth in an election conducted by your agency. I could relate many anecdotal situations of employees reciting a totally inaccurate understanding about the collective bargaining process in this country or about the devastating potential of permanent replacement in economic strikes or even having knowledge of what a union security clause is, et cetera.

Given this reality, Mr. Chairman and members of the Board, I urge you to not take away the right of these workers to have ample time to get the facts and hear both sides of the issue, just as you are doing here today in this hearing, and simply be fair to them, the voters, by allowing them enough time to become informed on all aspects of their decision in the relatively short time frame they

have while juggling work and family obligations. I'm not asking for more.

I'm simply asking you to let them keep the standard plus or minus 42 days that the NLRB has historically established is a workable and fair time frame for these employee voters to become educated on what is a complex and important law. Taking away this educational period would not be favoring unions nor giving management a disadvantage or the other way around, but it simply would be unfair to take away the rights of employee voters to make a truly informed choice.

You've heard elegant legal arguments from what was referred to yesterday as the creme de la creme of legal minds for and against streamlining the election process, and in some ways I think there is a need for some of that. You've heard from union organizers and now a management consultant; however, not from a single worker, the average voter who is no expert in U.S. legal law, especially those that immigrated to this country. I wish you had. Therefore, on this one key factor, that is, the time frame employees need to educate themselves, I strongly suggest that you be fair with them and give them the realistic time they need to understand a

very complex subject.
Mr. Chairman and member of the Board, I sincerely thank you for the opportunity to speak before you today, and I hope that you will take my observations into account as you make your eventual decisions. Thank you.
MR. PEARCE: Thank you.
MR. JOHNSON: I think we did hear from some workers yesterday.
MR. VILLANUEVA: My apologies.
MS. SCHIFFER: You may not have been here.
MR. VILLANUEVA: I may not have. I apologize.
MR. JOHNSON: Let me just get more directly to your point. It sounds like your point is that employees don't have enough information about the law. Am I correct?
MR. VILLANUEVA: Yes. But specifically, my experience, as I mentioned in my presentation, is that employees who have immigrated to this country, their understanding about the law is mainly, if any, based on what they know of, let's say, labor laws in Mexico or Guatemala.
MR. JOHNSON: So let's say that we

improve our bilingual outreach efforts. Let's assume that we can do something internally to help educate people more quickly. Does that take away your concern and then allow us to have an election timetable that doesn't rely on that as a source of delay?
MR. VILLANUEVA: Well, the Board, of course, already provides much of its material in many languages. In fact, in the course of th meetings, the captive audience meetings that we referred to earlier, we present that, the National Labor Relations Act in Spanish, based on the literature the Board provides.
So I think the Board gives enough information. My point is that it just takes that much time. As I said, I think that the standard that is currently in place is enough, frankly. I'm not saying that we need ten weeks or six or whatever, but four to five weeks or thereabouts. And was mentioned also by Mr. Petruska, a lot of times these elections are going to be scheduled on a particular payday so that we encourage participation, so it's a question of giving enough time.
And also remember, Mr. Johnson, these

businesses -- and Ms. Milito also made the point -- they're busy, they're working, so like in a span of ten days we wouldn't meet with them ten days. We might meet with the employees once a week, let's say. So three or four sessions with them to explain what is a complex law I think is fair to them, and so I'm simply asking you not the change it or reduce it, if I've answered your question.
MS. SCHIFFER: You used the term "persuader," and actually that's not a National Labor Relations Act term. But when you called yourself a persuader, as I understand it, and I'm not sure it was entirely clear, you work for companies?
MR. VILLANUEVA: I do, yes.
MS. SCHIFFER: So you're persuading on behalf of the company?
MR. VILLANUEVA: That's right, yes.
MS. SCHIFFER: And to follow up on what Member Johnson asked, in the proposal a notice to employees that normally now goes out when a petition is filed would be required to be posted in the workplace. In your experience, do employers now post that notice?
MR. VILLANUEVA: Many do. Although if I

recall, and I don't have it in front of me, the indication typically is that the notice -- are you referring to the notice of election, that it should be posted 72 hours before the election?
MS. SCHIFFER: No. The notice to employees that goes out when the petition is filed.
MR. VILLANUEVA: Some do and some don't, because it's my understanding --
MS. SCHIFFER: Some do and some don't. And don't you think it would be useful to employees to have that information as soon as the petition is filed and that that would help with some of the concerns that you have outlined?
MR. VILLANUEVA: That would be fine. The notice that you're referring to that comes with the initial package, if you will, including the petition and so forth, it outlines the law or some aspects of it. But the further explanation of what that means and the implications to them, should they decide to unionize et cetera, is what we try to educate people about during the course of these meetings.
Businesses have to run their business, and we typically, as I said, have an opportunity to meet with employees perhaps once a week for 45 minutes to an hour, and three or four of those 45

minute sessions is just barely enough to be able to actually educate them on, let's say, the collective bargaining process or other aspects of what unionization entails for them.

MR. PEARCE: Well, you're a contractor for the employer, aren't you?

MR. VILLANUEVA: Yes, sir.

MR. PEARCE: So the employer can kind of dictate how much time you have with the employees. And you certainly are able to go right into the workplace and speak directly with the employees during their work time or during what has been referred to as captive audience meetings.

MR. VILLANUEVA: That's the common terminology, yes.

MR. PEARCE: And some of these employers, I understand, might have an intranet where they communicate electronically with the employees.

MR. VILLANUEVA: It certainly is becoming more and more popular, yes.

MR. PEARCE: And then they can deliver messages on that intranet as well.

MR. VILLANUEVA: Mr. Chairman, they certainly can. It's not my general experience, again, being on the ground, that that is the

favorable way of communicating with them. Face-to-face talking and answering their questions, that's what I'm asked to do on behalf of the employer. Also, Mr. Chairman, although the internet and computers and social media is becoming more and more popular, I meet with a lot of people who don't have computer skills, who may not have a computer at home, so it's not the standard way of communicating. The internet is not the standard. Face-to-face --

MR. PEARCE: But the point that I'm making is that face-to-face is an option that you have, and you have as much of an opportunity to communicate with the employees as the employer will permit. Wouldn't you say that?

MR. VILLANUEVA: Right, the employer. But when you say the employer, Mr. Chairman, just to clarify, it is as their business will permit. They have a business to run, whatever type of business it is. As I said, a standard situation is that we get a chance to meet with employees in small group settings or whatever and to present information and answer their questions probably, as I said, 45 minutes to an hour per week, if you will, so if we have a three week or four week period before the election you might have four opportunities to

educate them about a complex issue.

MR. PEARCE: But that time period is dictated by the employer's determination as to how much time it wants to give you.

MR. VILLANUEVA: The answer is yes. The employer determines when it is convenient or possible to keep the business running while allowing these individuals to get the information that we want to make sure that they understand.

MR. PEARCE: Thank you. Mr. Rothner.

MR. ROTHNER: Thank you. I began my career as a union side labor lawyer not under the National Labor Relations Act but under the California Agricultural Labor Relations Act. I was on the staff of the United Farm Workers Union between 1975 and 1978.

My comments this morning concern the question of whether this Board should remove obstacles to the expeditious conduct of representation elections. And I'd like to describe my experience under the Agricultural Labor Relations Act, a statute that includes a maximum period of seven days between filing of the petition and the conduct of the election.

I'll start by clarifying that I'm not

advocating a maximum seven day period under the National Labor Relations Act. I simply want to describe an example of a speedy approach that worked well in the hope that the Board will adopt rules that will remove impediments to the expeditious conduct of elections and adopt standards and guidelines that direct regional directors to hasten the process.

Under the Agricultural Labor Relations Act, the seven day provision was necessary in order to ensure that the election take place during a peak employment season while the migratory workforce remained in the vicinity. And to test that question, that is, peak season, the ALRB's regulations required that the employer supply relevant payroll records from past growing seasons within 48 hours from the filing of the petition.

While there were no statutorily required pre-election hearings or pre-election hearings of any kind, there were issues; the peak season question being one of them. There were unit exclusion issues, agricultural employee issues, whether certain employees who worked in, say, packing sheds and doing field to shed trucking were covered under the National Labor Relations Act

rather than the Agricultural Labor Relations Act, and geographic community of interest questions having to do with whether non-contiguous growing regions of the same employer should be included in the same bargaining unit.

In our experience, putting issues such as supervisory inclusions and exclusions and other individual inclusion and exclusion issues off until after the election promoted not only speed but the conservation of resources all around for the agencies and the parties. The outcome of course sometimes renders these unit inclusion and exclusion issues moot if the union loses the election. And in many cases, if the unit wins the election the parties find a way, often quite easily, to resolve those issues without the need to invoke the Board's processes.

As for the impact of speed on the opportunity to wage persuasion campaigns, the experience under the Agricultural Labor Relations Act was that there was no shortage of consultants and lawyers to advise employers, and that was true even for the smallest of farms commencing with the first citing, not with the filing of petition but with the first citing of any union activity in the

field of the particular employer.

In fact, there are many firms that grew exponentially in California, law firms and consulting firms, with the adoption of the Agricultural Labor Relations Act. The campaigns were robust all around, including not only activity at the sites but visits to labor camps, use of radio spots and many types of paraphernalia on all sides. This was before the day when one could use intranet or internet or even effectively use video in a campaign, but certainly we have all those advantages today for people who want to get their message out.

At bottom, I just don't understand the complaint that there might be insufficient time to campaign. After all, the employer has the workers within its domain every day, including payday, with an enormous advantage in disseminating its message orally, in writing, in a variety of visual and electronic media, in groups and one-on-one.

By the way, under the Agricultural Labor Relations Act, in the '70s the vast majority of employees being organized were immigrants, and the vast majority of those employees were monolingual in languages other than English, and some in fact were illiterate. A significant portion were illiterate

in any language. I never heard a complaint from an employee that they needed more than seven days to figure out what unionization was about or how to vote in an election.

In fact, I would argue, anecdotally again, that too long a period between the filing of the petition and the election leads to campaign fatigue on the part of the employees. I have experienced that under the National Labor Relations Act, particularly in cases where there is a protracted period where people get fed up with both sides receiving far too much information, in my experience voter participation tends to fall. We had extraordinarily high levels of participation in those very speedy ALRA elections, much higher levels than in many NLRB elections that I've been involved with since.

And the proof regarding participation and opportunities for persuasion is in the pudding. In its first three months of operation, the ALRB, and this was back in 1975, conducted 329 elections. There were two unions involved in many of those elections, certainly not all of them, the United Farm Workers Union and the Teamsters, and victories went to each as well as to the non-union choice.

As for the ability of employers to wage campaigns during my three year tenure with the Farm Workers Union, much to my unhappiness, there were two elections involving the largest table grape and tree fruit employer in the industry, Giumarra Vineyards Corporation, and both times the campaigns were hard fought and the winner was no union. So they certainly had an opportunity in a very large election conducted in a very short amount of time to get their message out.

In sum, the experience under the Agricultural Labor Relations Act demonstrates that it's possible speed up the process as I've seen the past, and it works. I'd also like to add that I don't think that this is a very complicated undertaking that you're engaged in, with all due respect, and I'd like to make the point that --

MR. PEARCE: You're out of time, so if you can wrap it up.

MR. ROTHNER: It will be really quick.

MR. PEARCE: Okay.

MR. ROTHNER: In 1966 one of the earliest strikes was going on in the table grape industry, and the United States Senate decided to hold subcommittee hearings on whether to amend the

National Labor Relations Act to include agricultural employees as a means to provide a vote to the workers on strike. Only one employer came forward to testify at those subcommittee meetings held in Delano, California. His name was Martin Zaninovich.

His point was that "There's no strike, it's a myth, our workers don't want a union." Senator Robert Kennedy asked Mr. Zaninovich if he would honor an election if his employees chose to be unionized, and Mr. Zaninovich said that he would if an acceptable set of rules could be established. Senator Kennedy responded as follows: "We have the ability to get to the moon, so I think we can establish machinery so people can vote." I think you can do this, I think it's not that difficult, and I wish you will.

MR. PEARCE: Thank you. We are well beyond our schedule, so I'd ask my colleagues to refrain from questioning Mr. Rothner. Thank you for your presentation. Thank you all very much.

Our next seating is Ole Hermanson, J. Aloysius Hogan -- and Mr. Perl, you're with us again, good to see you -- Donna Miller, Darrin Murray, and Steve Maritas. Why don't we start?

MR. HERMANSON: My name is Ole Kushner

Hermanson. I'm an organizer for AFT Connecticut, an affiliate of the American Federation of Teachers, and I'm here with my colleague, Donna Miller, who is a home health aide from VNA of southeastern Connecticut.

I've been organizing for ten years. During this time I've worked on more than a dozen campaigns. I've worked with workers in food service, hotels, museums, private sector education, and most recently with all classifications in acute care hospitals. I've been the lead organizer on six campaigns during which we petitioned with the NLRB. I've become very familiar with the Board's election process.

In every one of these elections the time between filing to the date of election was the most hostile and tense and the time when the workers were subjected to the most scrutiny and surveillance. In each campaign the employer knew about the organizing efforts long before we filed for election, and in each campaign the employer ran a coordinated anti-union campaign on work time in the workplace before the petition was filed.

In each campaign the employer retained anti-union consultants and produced reams of

anti-union literature before the workers filed the petition. In each campaign the employer was aware workers were signing union cards and released literature specifically aimed at discouraging workers from signing. In each campaign the workers informed management when they achieved majority status and asked the employer to recognize their union without a lengthy process. In each campaign the employer sought to delay the election as much as possible, always pushing for a date beyond the recommended 42 days from filing. In each campaign the employer withheld information about the eligible voters until the last possible minute. In each campaign the employer ramped up their anti-union campaign after the petition was filed, and in each campaign the employer violated the law in the time between filing and election.

When we organized the nurses at Rockville Hospital in 2009, before the union even petitioned for an election management put anti-union letters in employees' paychecks, posted on bulletin boards, and handed out literature to workers in the workplace.

The employer sought to delay the hearing twice. On the day of the hearing, in an effort to reach a stipulated agreement, the employer allowed

the Board agent and me to view the list of eligible workers on his laptop. It was in Excel. It was neatly formatted with names, addresses, departments, average hours worked and hire dates. Yet the Excelsior list was given to the union at the last possible moment in a fax copy, five point font, no grid lines, no column headings, and skewed to the side on the paper.

They actually worked to cause delay and confusion rather than provide the information promptly. The employer used the delay to try to convince the nurses they should not join the union. Between filing and the election, management produced 30 unique anti-union documents totaling over 60 pages of material for a unit of 100 nurses. They held meetings on every floor and in every department and on every shift.

In 2013 an overwhelming majority of the home health aides at the VNA of southeaster Connecticut signed union cards and a public petition. Out of 26 aides, 20 signed a public petition and 16 appeared in photos. These aides made their desire to collectively bargain very clear. They filed for an election on September 16th, and, despite a stipulated agreement, the

employer insisted on October 24th.

During the federal government shutdown the election was put into limbo, but management did not stop campaigning. They sent out leaflets, held mandatory anti-union meetings on work time, and even sent handwritten letters to each aide. When the government reopened on October 17th the election could have gone forward as scheduled, but the employer demanded another delay for no reason at all.

The Board was available, the employees were ready, but the employer was able to push the election all the way back to November 8th. Despite 54 days of anti-union harassment from their employer, all but one aide voted to join the union. In each of these elections the employer was entirely in the driver's seat, determining the day of the election and able to delay the will of the employees for months. It seems the employer has endless opportunities to forestall the rights of the workers. I'll pass it over to Donna.

MS. MILLER: I have worked for the company for ten years. Last summer I decided it was time for a change. I saw how much better the nurses were treated, and I realized it was because they had

a union, they had a voice. This made me realize that we needed a union and we needed a voice.

I spoke with my co-workers, and we were all on the same page. We called the union. A majority of us decided we wanted to join. We signed union cards and petitions. We asked management to recognize our union and begin the bargaining process. It was a clear majority. Management refused. We wore buttons declaring our solidarity in staff meetings, but the answer was still no.

In the parking lot, in full view of management, we all took pictures and signed a petition. The answer was still no. The president of the company wrote handwritten cards and mailed them to our homes, encouraging us to vote no. Management delayed the election as long as they could. Many of us became anxious that our jobs were in jeopardy during this delay.

Why is management allowed to hold us back? It is supposed to be our right to bargain collectively. They delayed the vote for the sake of delaying. We felt our rights were being violated because our company continued to stall the vote. I want to know why my company or any company has the right to delay our votes not once but many times.

It is very hard for workers to stand up to their bosses and ask for a voice. We need our government to be there for our workers to facilitate the process of forming a union. It did not need to be this difficult. Thank you forgiving me the opportunity to present our story.

MR. PEARCE: Thank you, Ms. Miller.

MR. MISCIMARRA: I want to thank both of you for your comments. The one question that I have is, you know, that we have many cases. In your case it sounds like the employees were unanimous in their support for representation except for one. We have many cases where the entire election turns on a margin of one vote, which would suggest that the employees had different sentiments about union representation. This is an issue where there are many strong feelings on all sides, and that's evident in many of the comments everybody has given to us.

What do you think is the right amount of time in terms of those instances where people are really trying to figure out what is the right thing for them? What do you think is the right amount of time?

MR. HERMANSON: I think that in her

election it was near unanimous. In the example I explained at Rockville General Hospital, it did turn on one vote. I think the employer's position is to always delay. I think that if there is an opportunity to delay the election the employer will delay the election. I think that there is ample opportunity for people to get information on both sides, that the employer has endless opportunities to communicate with their workers during working hours, but if they have an opportunity to delay they will.

When I worked with the Backus nurses just a few years ago the employer was represented by Tom Gibbons from Jackson Lewis, who is a former Board attorney. When we stipulated the election he would not provide the classifications that would be represented, and when asked why he wouldn't provide the classifications he said because he doesn't have to provide them to the Board agent. That's what he said: "I don't have to provide them." When we asked him why the date should be on the date that he selected, which was as far out as possible, he said, "Because I can, and that's when I want it to happen." They were very frank, and I appreciate their candor in some ways. But honestly, the

employer has endless opportunities to communicate with their workforce, and if you create an opportunity for them to delay, they'll delay.

MR. MISCIMARRA: We have to anticipate that both sides will try to make reasonable decisions that will support their particular view. With your experience, what do you think is the right amount of time?

MR. HERMANSON: I think that -- it's not conceivable to me that there would be the ability for the Board to conduct elections the day that workers decided that they wanted to join a union and bargain collectively, as is their right. But if it was possible, then that's appropriate, because it's really the workers' decision. The employer has communicated with employees since the day of hire. Most of the people in this room have probably seen the 20 minute Target advertisement that they show every single worker upon hiring on why they don't think a union is necessary. The employer has communicated with the workers on what they think.

MR. MISCIMARRA: So you would embrace the "as soon as practicable" standard.

MR. HERMANSON: Yes.

MS. SCHIFFER: Ms. Miller, I want to

thank you for coming to testify today and for your courage to do that. I think it is very important for the Board to hear from the workers who are the ones who vote in the election. I wanted to ask you if you thought that the delays served a purpose in helping you and your co-workers become more informed about the law and the issues involved in the election.

MS. MILLER: No. We knew about it. I mean, we had questions. We asked, you know, the president or even Ole. We knew what we wanted. We knew all about it. There are a lot of minority aides, they all called me with questions, and if I didn't know the answers I would call Ole, or even ask the CEO, and she would answer them.

MS. SCHIFFER: So you had the information you needed.

MS. MILLER: We did, yes.

MR. PEARCE: Thank you very much. Mr. Hogan.

MR. HOGAN: Board members, thank you for the opportunity. I'm an attorney and a senior fellow at the Competitive Enterprise Institute, a free market think tank here in D.C. just down the street on L.

I agree with the proposed rule's stated goal to increase understanding of and participation in the unionization process. Regretfully, though, I have to agree with the conclusion of the 18 U.S. Senators who recently commented to you in writing that the proposed rule will impact the ability of employees to make a well informed choice because the obvious effect of the rule is to limit the ability of an employer to communicate with its employees regarding an upcoming election.

I go further than they do, though, because in this day and age of neutrality agreements, and separate from neutrality agreements, in Hohfeldian terms, legal terms, rights and duties, there is no duty for the employer to educate. We're treating it here as though the employers have a duty practically speaking to educate the workers, but they don't, and especially in the era of neutrality agreements I think of it as a course.

I have children, and I think of the workers as learning about labor unions. It's a very arcane and very intricate area of the law, and you all are experts, but it's taken you years to become experts. Many of the people in this room are attorneys, and for people to learn, for students to

learn a course essentially on labor unions and the effect and impacts and the rights and duties that would then accrue, you really need to take into account how long it would take somebody to learn that stuff. It's a long time. You have to think about what a student would want. Curtailing workers' time to study for their huge life changing test of whether to unionize would diminish the understanding of and participation in the unionization process.

Under the proposal workers could have only about a quarter of the time to study the unionization material, given the current average 38 days. Any school student in America would tell you that cutting study time by 75 percent, which could be the case in an agreement between the employer, would adversely impact their grade in a big way, their understanding of the material, and so, too, cutting workers' educational opportunity by 75 percent would be terrible for their learning.

I do agree also with the 18 senators' quote of Senator John F. Kennedy when he said that it was essential to allow at least a 30 day interval between the request for an election and the hold of an election in order to, quote, safeguard against

rushing employees into an election where they are unfamiliar with the issues. That's really insightful, because he focuses on the learning of the employees, and that really needs to be the standard, how long it takes them to understand the material.

We heard previously from a persuader that it could work out that there is essentially one class of 45 minutes to an hour once a week. And people are working full time, many of them have families, and maybe they do some homework, but essentially three classes of about 45 or 50 minutes is not going to be enough for them to be educated about the fullness of the implications of unionizing. So really, 30 days would be an absolute minimum to some of the questions of whether there should be a minimum. I do agree with Senator John F. Kennedy.

One of the effects is, too, that when you jump these types of pressures onto employers, they are not going to be able to do other things. This is an all-consuming kind of a thing. And to the extent that the employers do take on the duty of educating, they are pulled away from other things like hiring other people, and that's not what our

economy needs with a rush of this kind of a thing. A longer period of time would help with that.

Another analogy. The LMRDA for union officers elections in the guide for election officials regarding the conduct of local union officer elections, they have a handy election planner in figure one, and if you do the math on it it works out to well over a 30 day election schedule in that different election scenario for union officers which could be used as an analogy.

And the last point I'll make, given the time, is that I would recommend that you avoid raw partisanship and do at least have the agreement of one minority board member so that we do not run into a purely partisan thing and then the pressure to undo it at a later time.

MR. PEARCE: Whose responsibility do you believe it is to educate employees about their unionization?

MR. HOGAN: Well, really, I don't think there is a duty. The employer can't be given the duty and can't right now be held liable if they do not do the educating if they're in a neutrality agreement. So they don't have the duty. The union doesn't have the duty to educate them certainly on

the fullness of the implications that might not accrue to their benefit. There's no duty for them. That omission that was talked about earlier, the sin of omission, they're not held liable in that circumstance.

Right now there is none. And it may be in this neutrality agreement era that if there is no big sort of claiming time in opposition, which is a phenomenon that occurs on Capitol Hill, if there is nobody claiming time in opposition, maybe you need to give in that circumstance a longer period of time. It would be a factor that I would propose that you look at for extending the educational opportunities for the workers.

MR. PEARCE: And the educational opportunities would be provided by whom?

MR. HOGAN: Well, the Volkswagen case is one. There have been outside groups not employed as persuaders who have been interested in the outcome and who have provided materials in the form of billboards or the internet. But again, that's not --

MR. PEARCE: But that's not what you're suggesting, that we extend the time so that people can put up billboards. Is that what you're saying?

MR. HOGAN: No. You're exactly right. Right now there's no duty to educate the workers. So to the extent in a neutrality agreement era --

MR. PEARCE: But you still maintain that the time should be extended for education.

MR. HOGAN: Right, because they have to show some initiative then and take some initiative to develop your own curriculum, to go to the library if the case may be, to go to the internet, to talk to people. They have to go out and do research rather than being spoon fed the material.

MR. PEARCE: Well, what do you think the Board's role is? Do you think we should provide the education?

MR. HOGAN: Well, I'm not going to recommend more government intervention and rules and regulations, but you've got to be mindful of the workers. That should be your key consideration.

MR. JOHNSON: I have just one quick follow-up. There's been a lot of folks talking about their various anecdotal experiences one way or another. If we assume that employees have a right to receive information on the one side or the other, has there been any empirical study on the amount of time it takes a group of people to understand a

given body of information?
MR. HOGAN: I think that a lot of people in here have taken labor law courses, and to even study for your first test takes more time than the amount of time that people are talking about here for educating the workers. I haven't seen the empirical studies that you're suggesting perhaps should be done.
MS. SCHIFFER: You're not suggesting that workers take labor law courses before they vote, are you?
MR. HOGAN: Well, essentially that's --
MS. SCHIFFER: You are.
MR. HOGAN: They're giving -- in condensed layman's terms the union's giving their view, and in many cases, although not all cases, the business is giving their view, which many times, as we've heard before in the NFIB circumstance, the small businesses are not really equipped to provide that education. But that's essentially what they're trying to do. Both sides are trying to provide some education, if indeed there are two sides.
MR. PEARCE: Thank you, Mr. Hogan. Mr. Perl.
MR. PERL: Thank you, Chairman Pearce and

members of the Board. I appear here today once again on behalf of the Tennessee Chamber of Commerce and Industry, which, as I said previously, represents both large employers and small business owners throughout the state.
I begin, Mr. Chairman, with your statement quoted in the notice of proposed rulemaking that the purpose of this rulemaking process is to improve the process for all parties in all cases, and I would submit that the proposal here falls far short of that.
Here the Board majority's proposed election rule overhaul dramatically curtails the time allowed between the filing of a petition and the actual election, just as it did in 2011. In doing so, it conflicts with the statutory policy in favor of free debate guaranteed under the First Amendment and Section 8(c). The Second Circuit so aptly stated in Healthcare Association of New York State against Pataki, 417 F3d 87 in 2006 that Section 8(c) not only protects constitutional free speech rights, but it also serves a vital function within labor law by allowing employers to present an alternative view and information that a union would not present, thus aiding the workers by allowing

them to make informed decisions.
As far back as 1962, this Board in Sewell Manufacturing Company explained that it seeks to remove all obstacles which said prevent or impede reasoned and informed choice by employees. Here the Board does just the opposite. It doesn't just remove obstacles; it imposes them by steamrolling elections in the name of streamlining the process.
The period of time between the filing of the petition and the holding of the election is critical. It's in this critical period that management has the opportunity to communicate its position on unionization to employees, many of whom would have already signed union authorization cards that secure the election.
A quick accelerated election can leave an information void, heightening the risk that employees may vote without having the benefit of the employer's alternative viewpoints. Moreover, after employees receive information from their employers they need sufficient time to develop understanding, ask questions if necessary, and consider each alternative before they're asked to vote.
The drastic rule changes proposed here minimize rather than maximize the likelihood that

all voters will be exposed to the arguments against as well as for union representation. The Board's reformulation, instead, reduces the election process, as stated by Members Miscimarra and Johnson to vote now and understand later.
In seeking to balance the apparent diametrically opposed views of the Board majority and employers, we should look to the election results of recent times to see whether unions are being disadvantaged under the current framework for representation elections. NLRB elections demonstrate that unions win more than 60 percent of all RC elections. This is strong evidence that the present system works fairly for all parties. As a prior speaker said, the proof is in the pudding.
That the Board dismisses this evidence as irrelevant, as it did when it issued its final rule in 2011, tends to create the perception that the Board is committed to creating as short an election cycle as administratively possible, even at the expense of shortchanging procedural safeguards and statutory protections. Assuming arguendo that the Board adopts its quickie election model in violation of its own self-professed standard to improve the process for all parties in all cases, we propose

that the Board at least adopt a notice requirement requiring unions to formally notify any and all employers at the outset of any organizing activity directed against them.

The Board is acting under the assumption that employers generally become aware of union organizational activity prior to the filing of a petition. This generalization is not true in very many cases, and the Board is therefore underestimating the detrimental impact of a quickie election process on both employers and employees.

Indeed, the Board acknowledged when it published its final rules in December 2011 that at least in some cases employers may in fact be unaware of an organizing campaign. A notice requirement would institutionalize the process and be consistent with the Chairman's declaration that the rule changes are intended to improve the process not just for some parties but all parties in all cases. At a minimum, the notice requirement is an essential safeguard for fundamental fairness and more clearly achieves the statutory process, the statutory policy of guaranteeing employers free speech and employees free choice.

In conclusion, resolving representation

questions fairly trumps resolving elections more speedily.

MR. PEARCE: So if an employer has a policy, and I understand many employers do, a policy in their handbooks that says, "We believe in a union-free work environment," would by your proposal there be an obligation on the part of the employer to notify the unions that that's what their policy is?

MR. PERL: No. I don't believe there is a representation process engaged at that point, Mr. Chairman. Some employers have such a statement in the handbook. I would suspect that the vast majority of small business owners which are included in the Tennessee Chamber's membership do not have such policies, and many of them don't even have handbooks.

MR. PEARCE: But if such a policy does exist, wouldn't you consider that to be campaigning?

MR. PERL: No, not necessarily. I think that's a statement of the company's position. That's not a part of a representation campaign.

MR. PEARCE: Well, I guess we can get into semantics about that, but you would not think that that is campaigning even if it was contained in

an employee handbook?

MR. PERL: That's correct.

MR. MISCIMARRA: Mr. Perl, thanks for being with us today in addition to your comments yesterday. Do you have any problem with the efforts, and I don't want to speak with the other Board members, but I think that there is support across the board -- no pun intended -- for trying to address the issues associated with those cases where elections are delayed beyond 56 days or more than two months, and in some cases much longer than that.

Do you have any problem with our focus in part on trying to identify and eliminate, to the extent that we reasonably can, the causes for delays in those cases?

MR. PERL: No, I don't. In fact, I think the Board contributes to the delays in many cases. For example, in your dealing with it in the NPRM the Board's present policy is on a request for review, and the Board will not schedule an election within the next 25 days to give the Board ample time to consider and rule on the request for review. That 25 day period could be shortened if the Board steps up and deals with it in a much more timely fashion. That's one of the kinds of incremental improvements

that could take place outside of this notice of this prosed rulemaking process. I think the Board can do some things internally to help itself.

But when you look at the questions and the responses before about, "Well, how many days should there be between petition and election, should there be a minimum, should there be a maximum," I think in a sense we need to look at what needs to take place to ensure a fair and free election here.

In yesterday's panels we looked at a number of the key components, including the pre-election hearing, to deal with vital issues like supervisory status. You cannot shortchange the election process by having a bright line 20 percent rule that no issues can be heard during the representation process hearing, the pre-election hearing, unless they constitute more than 20 percent of the unit, even vital supervisory issues.

If you eliminate that, yes, you can get to the election much quicker, but then you have a much more extended prolonged election representation process because now you're going to deal with issues such as the case I mentioned yesterday, the ITT Lighting case, that went over four years because the

vital issue of supervisory status was not dealt with by the regional director of the Board pre-election.

MR. MISCIMARRA: Thank you.

MR. JOHNSON: Just really quick. I just want to get some more information about sort of your pre-notice model to the extent that you've thought it through. How much pre-notice would there be before the petition, and then what would the deadline be before the election in the case that there was pre-notice?

MR. PERL: Well, Member Johnson, the notice requirement proposal that I submit respectfully to this Board is the quid pro quo if you proceed with your quickie election approach here. There has to be some opportunity, some ample opportunity for the employees to hear from both sides, and I would submit that that notice requirement should be triggered before the union seeks to have any solicitation of --

MR. JOHNSON: Right. I understand that. I was just trying to get your concept of how long that's going to be.

MR. PERL: And if the union gets the card signed, and it's going to depend on the size of the unit, but I think there has to be a notice

requirement as the quid pro quo for the quickie election model and that that should be triggered before any authorization cards get signed to put the employer on notice that this organizing campaign is going to commence.

Now, even the notice requirement is not a perfect solution, because for small business owners, which comprise a majority of the employers in this country here, they still have to go out and get ample representation through the form of attorneys or some advisors, and that's going to take some time.

MR. JOHNSON: I'm sorry, because we're running out of time. I don't want to be rude or anything like that. But let's just assume it takes the union like three or four months to get the cards together because they have an ample amount of time to assemble cards. Is your proposal basically that before the very first card is signed, say, four months out before the petition comes in that the union would give the employer notice if we had a more accelerated election process on the back end?

MR. PERL: That is correct.

MR. PEARCE: Thank you, Mr. Perl. Mr Murray.

MR. MURRAY: Chairman Pearce and Board members, thank you for the opportunity to speak. I'm Dr. Darrin Murray. I'm an adjunct or part-time professor at Loyola Marymount University in Los Angeles. I'm here on behalf of SEIU to provide the perspective of an employee who has recently experienced an organizing campaign at our university.

In December of 2013 the union filed a petition on behalf of part-time faculty like myself. There were approximately 450 people in our unit. There was not a stipulation as to exactly what the bargaining unit would be and some confusion about that. There was a hearing on December 27th where the university proposed including what are called fieldwork supervisors into our bargaining unit, a number of people that may have been upwards of 200 folks.

Up to that point I had never heard of these employees. I had never met one of them. I didn't know who or what they were. Later on I learned that they supervised student teachers. As part of their credentialing process they're professionals working primarily in secondary school settings. They are not actually located on our

campus. Many of them are in San Francisco as part of the Teach for America program. They do not actually teach classes. They do not appear in the schedule of classes. I didn't know who they were. They're paid a per student rate for the folks that they supervise.

In this hearing my colleague, Eric Greenberg, attended that hearing. The provost and the dean of the school of education argued that they don't have to, according to Eric Greenberg, that they don't have to hold office hours just like our adjunct faculty don't have to hold office hours, which surprised me because that was completely inaccurate.

Anyhow, the Board decided that we did share a community of interest. I don't think that was a well informed decision, but it was the decision that was made. The contested group of fieldwork supervisors was more than 20 percent of our bargaining unit, so we would have needed a hearing either under the current rules or under the proposed rules before the election.

Under the proposed rules Loyola Marymount University would have been required to give the union a list of these names of fieldwork supervisors

before the hearing. That would have made it much easier for us to find those workers since they didn't even appear in the schedule of classes. But when we went to the hearing we didn't know who they were or where they were, and that made it hard for us to inform the attorneys and the Board about whether they really were part of our community of interest, and it made it awfully hard for us to find them to get them to sign cards or tell them our side of the story and talk about our working conditions.

In terms of educating people on working conditions, as a professional educator it may take years in order to understand some of your lawyering stuff, but in terms of understanding my working conditions it's pretty straightforward. I've had my career to do that. And in terms of looking around and seeing what other unionized faculty have, it's pretty straightforward, it's pretty easy to do that, and the arguments are pretty clear.

I'm also an employee of the California State University. They've been represented by the California Faculty Association for quite a few years now. I've seen the direct benefits that unionization has provided to my colleagues on that campus. The working conditions between the

California State University and Loyola Marymount University are, frankly, stark.

I wanted to speak to my employees. I wanted to talk to them about those differences in working conditions. The way the selection was run limited my ability to share those experiences because we didn't even know who was in our bargaining unit. The university had complete and unabated access to that group of employees. It's not fair that we weren't afforded the same opportunity. We should have the same access to free speech as our employer does, and the current rules didn't allow for that. Thank you.

MR. MISCIMARRA: Dr. Murray, if I may, and I'll preface this by saying I don't think we deal with any issues that involve absolutes, so this has many moving parts. But the one thing I gather from your comments is that it would have been helpful to have information earlier regarding the identities of people in those job classifications.

Is it correct that another thing that you believe is that those field service employees had their own right to be educated by you and by the other union supporters in connection with information that they didn't even know was important

to their interests? And that kind of operates both ways.

MR. MURRAY: Sure.

MR. MISCIMARRA: And one way that we can deal with that deals with notification. We've had some other interesting proposals about that. Would you agree that the total time frame available -- and there are competing interests all around, but one part of the kind of hollow tube that has moving parts is that the available time frame does affect many of these issues -- would you agree or disagree with the overall goal of trying to make sure there is enough time for the important stuff to get done but not too much time to permit too much mischief to get done? I don't know if we can apply that standard, but --

MR. MURRAY: I'll leave the moving parts to people that are in a far higher pay grade than myself. All I know is that had we had that list of names it wouldn't have taken long to be able to get ahold of them. I know this afternoon we're talking more about the voter lists and what's on those voter lists, and I'll be back to talk about that a little more. I don't necessarily need a long time to go to folks and say, "Look, here are working my conditions

at Loyola Marymount, here are my working conditions at California State University Northridge, here are the significant differences, if you'd like I can give you that speech in about ten minutes." So it doesn't require a protracted period to do that. I just need to have the access.

MR. JOHNSON: But isn't communication an iterative process in the sense that you actually have to communicate to an audience and they may flip back and forth? There may be a lot of interesting things to talk about during a campaign.

MR. MURRAY: Sure, absolutely, and I enjoy those conversations, but that doesn't necessarily mean that they have to be protracted to be iterative or generative or constitutive.

MR. JOHNSON: Or all three.

MR. PEARCE: Your point basically is that had you had the information time would not have been the factor.

MR. MURRAY: Not the major factor, and certainly not a 30 day period or three 45 minute sessions or whatever else. We're capable of getting information out, reading stuff, being fairly efficient about that, making our points. I don't think we would have needed an exceptionally long

period of time in order to do that.
MR. MISCIMARRA: Dr. Murray, just out of my personal curiosity, what's your area of academic expertise?
MR. MURRAY: Communication studies.
(Laughter.)
MR. JOHNSON: Wait a second. I just want to make sure that it's clear. So you're an expert in communicating.
MR. MURRAY: I purport to be occasionally.
MS. SCHIFFER: And as an expert in communication studies you're saying that that length of time is not required.
MR. MURRAY: I don't think it's particularly necessary for a protracted period, yes.
MR. JOHNSON: Well, since you're here as an expert in communication studies, have there been any such studies on the amount of time it takes for people to absorb a let's just say not simplistic set of facts that might be going on in any sort of election campaign?
MR. MURRAY: I don't think there's going to be a study that provides a "one size fits all" answer to that particular question. I think it

would be terribly contextually based on the audience and information and all sorts of factors. I'm not aware of any studies, although you've given me the idea for one that might advance my career a bit and get me out of the adjunct pool and into something that is tenured.
MR. JOHNSON: If you're back in another three years on this please have that study completed. But to be more serious here just for a moment because this is interesting to me, if we don't have any data don't you think free speech is an important enough value that we shouldn't jump in and then impose a bright line that's going to cut that down?
MR. MURRAY: I'm not saying we don't have any data. I'm saying I'm not necessarily familiar with what data is available. Maybe we can get a researcher on that one to see what's in that body of literature. You know, I wouldn't imagine that a reasonable time frame and the time frames that I'm hearing about, I don't think the unions are proposing that we have an instantaneous election before we've had the chance to even talk to folks. But I'm not looking at 30 and 60 and 90 days as being a time frame that is really necessary to

understand the issues.
MR. JOHNSON: That's your personal opinion. Right?
MR. MISCIMARRA: We reserve the right to recall you and continue this hearing to the extent necessary. Thank you very much.
MR. PEARCE: Thank you Dr. Murray. We're in recess for ten minutes.
(Recess.)
MR. PEARCE: Welcome. Our next seating is Ronald Meisburg -- I won't call you by the name that your mom used to call you -- Gabrielle Semel, Peter Kirsanow, Tom Meiklejohn and Kara Maciel. Thank you all. Ron, why don't you proceed?
MR. MEISBURG: Mr. Chairman and members of the Board, I am still Ronald Meisburg, and I'm still here on behalf of the United States Chamber of Commerce. The topic for this panel involves the standard to be applied in scheduling an election. The Board has asked each witness to address specific questions, which we will do, but first I want to set some context for my remarks.
The Board states that its proposal is necessary so that employees' votes may be recorded accurately, efficiently and speedily and to remove

unnecessary barriers to the fair and expeditious resolution of questions concerning representation. But we do not believe the Board has articulated why the current system is not expeditiously resolving questions concerning representation.
As the Chamber and many others have pointed out and as Members Miscimarra and Johnson have noted in their dissent, the NPRM advocates a cure that is not rationally related to the disease. The statistics on the efficiency of the Board's excellent representation case handling under existing procedures are well known. 92 percent roughly of all elections are held pursuant to an agreement. For all cases the median time between the filing of a petition and the election is 38 days. 94 percent of all elections occur within 56 days. If you focus on the cases involving pre-election hearings, as Members Miscimarra and Johnson emphasized in their dissent, in 2013 the median time between the petition and election in those cases was 59 days.
Looking at the statistics, it's difficult to understand how these differences justify the Board's proposed broad rewrite of election rules. The Chamber agrees with Members Miscimarra and

Johnson that the data demonstrate that delay is an issue confined principally to a discrete minority of less than 10 percent of all representation cases. The graph that was published with their dissent at 79 Fed. Reg. 7346 dramatically illustrates that the cases in this small discrete group, the less than 10 percent of all election cases, creates a tail of cases in which elections were conducted from somewhere between 57 to over 3,000 days. Now, clearly that tail is where the Board should focus its attention, and, as dissenting members suggest, closely exam the particular reasons that have contributed to those relatively few elections that have involved unacceptable delay.

Now, with the Board's own statistics showing a lack of a need for these broad proposed changes, we now turn to the specific issues posed by the Board. First, we want to address whether the proposed rules adequately protect free speech interests. It's been indicated that the proposed rules may reduce the time for the scheduling of an election to roughly less than half the median time of 38 days for the holding of elections under the current system.

This threatens to seriously undermine the

rights of employers and employees recognized under the First Amendment and 8(c) by the Supreme Court to engage in a free and open discussion on the issue of union representation and collective bargaining.

As I noted yesterday, unions have months or even years to organize the workforce before the employer may ever be aware of it. They file election petitions at the time of their choosing, and many if not most employers are ill prepared to immediately respond to the arguments and promises made by the union in the proceeding months. Because of these concerns and others, the Chamber proposes no change be made in the current system employed by the Board in representation cases. We believe that the current system adequately protects the free speech concerns of all.

You ask us what standard should be applied for scheduling an election. We do not believe there should be any change from current practice. 92 percent of elections held under an agreement between the parties are conducted in an expeditious manner. The agreements presumably reflect bargaining tradeoffs agreed to by the parties in the regional offices. What better way to resolve the competing interests and desires of the

parties than by an agreement arrived at voluntarily?

The same is true with respect to the 8 percent of cases in which a hearing is held. Although not the product of an agreement, the elections involved there were the product of an orderly and generally expeditious hearing process, as the Board's own statistics demonstrate. There is no need to change the current system with respect to these cases, at least for those that are near or within that 59 median day time frame.

To the extent that any election extends into the tail of cases that go beyond the median, that less than 10 percent of all cases, the Board should study those cases. If it does so, it can in that process solicit the views of its constituencies regarding whether as soon as practicable or some other standard of formulation is appropriate for scheduling an election in those cases.

Finally, we were asked to specify whether the rule should include a minimum or maximum time between the filing of the petition and the election and how long that time should be. Because we do not believe there should be any change in the current system, we also do not believe there should be any change in the time frames that are the product of

the current system. Instead, if the Board studies the outlier cases in detail, it can in that process solicit the views of its constituencies regarding whether there should be minimum and maximum times applicable to those cases, and, if so, what those times should be. Thank you.

MR. PEARCE: What about that 25 days for a request for review? What do you think about that?

MR. MEISBURG: We did not take a position on that in our formal comments, other than to say that we don't think that the review should be eliminated. If there is a time that the regional directors are going to be given routinely to account for that review, obviously that is up to the Board, but I'm not prepared today to agree that that would be the proper thing to do.

If we were at the beginning of this process, as we had suggested might be more appropriate, where I could sit down with my client and others and you to discuss how that might be handled, I think that would have been a good thing. But at this point, I think on behalf of my client we're not prepared to sort of stipulate to any sort of changes or differences that the Board hasn't proposed other than to say we believe that the

current system works appropriately, that in fact the review should be maintained as it currently is, and that the Board should focus its energies and a considerable amount of energies in studying the outlier cases, and focus on those in order to obtain the reasons for the delay in those cases and what the appropriate changes might be to stop the delay in those cases.

MR. PEARCE: Now, speaking as a former general counsel, wasn't it your position that the Board should embrace processes that would expedite or provide opportunity for free choice in a more expeditious manner?

MR. MEISBURG: Well, first of all, with all due respect, I'm not speaking on behalf of myself or in any personal capacity or former capacity. I'm speaking on behalf of my client, the Chamber of Commerce.

What I recall as general counsel as being the most efficient thing, and this runs a little contrary to some of the testimony we've had, our system of regions, it's kind of a federal system, and while we work very hard to maintain consistency across the regions in what constituted an unfair labor practice, what was illegal, I believe we

tolerate a lot more in the cases of when are we going to schedule an election and how are we going to deal with the parties. And the reason we do that is because, and there is nothing legal or illegal about it, it's much more based on in over 90 percent of the cases what the parties themselves can come to agree to.

But when that's not the case, it gives the regional director some freedom to deal with it, and I think we've acknowledged today there can be tremendous differences in each case. And there are even differences among the regions simply because of local customs, because of -- I remember Region 1 celebrates Patriots' Day. They don't do it everywhere else. In New Orleans they take off Fat Tuesday, I think. So you have these kinds of regional differences, and you have differences in the employers in these regions.

So I really think the current system can be accommodated very well to doing what you want to do, which is to eliminate delay, but eliminate delay where it is bad, not where it's really not delay.

MR. PEARCE: I'm thinking that a Fat Tuesday proposal in the NPRM is an omission.

MR. JOHNSON: I second the motion.

(Laughter.)

MR. MISCIMARRA: Mr. Meisburg, you're a former general counsel and a former Board member, and former Member Kirsanow is with us as well. Is there anything that would prevent and would you oppose anything that we could do as a Board if we get a request for review? One option which I assume we won't go back to is just to have the Board directly address all representation election issues, which was the case before the early '60s.

But is there anything that would prevent us in connection with the requests for review to adopt a different way to address those cases? You can take almost any kind of alternative dispute resolution process that has been suggested for different kinds of tribunals, and there are many varieties that could result in quicker decisions by the Board. Is there anything that would prevent us from doing that if we get a request for review in deciding that more promptly?

MR. MEISBURG: First, let me say that what impelled the legislative enactment in the LMRDA that allowed the Board to delegate some of this to the regional directors at the time was a huge backlog. I'm not so sure that today that would be

seen as necessary. I do think the Board's involvement in the election process is key. I really don't think we can farm this out to the regional directors completely, even though I think for purposes of arranging the election that the regional director should have a fair amount of discretion that they currently exercise.

As to the second part of the question on the issue of what other resolution processes might be available or could the Board introduce a resolution, I have not and will not speak on behalf of my client as to that issue.

But let me just say on behalf of myself personally that I don't see, since the Board has introduced settlement judges and other processes to settle unfair labor practice cases, that it doesn't seem like it would be beyond the Board's authority to run a test program of some sort like that, and that's without commenting on the efficacy of the program itself. It seems like the Board has taken that power in other types of cases, so I don't know that I could see a legal impediment to it.

I stress that this is not something that I've had a chance to discuss with my client or any of its members, so I can't take a disposition on

their behalf, but that's what I think.
MR. JOHNSON: Really quickly. You're one of only five people in U.S. history who have actually served as a Board member and general counsel, and I think that makes your contribution here invaluable. Our ultimate mission is to separate out unnecessary delay from necessary delay so we can basically render justice, and I think you've covered at least making sure the Board should be directly involved in the representation procedures as part of what you would see as some necessary delay.
From your perspective, what are the necessary delays in the process? Why are they necessary? I know you don't have a lot of time, so just broad brush it.
MR. MEISBURG: Well, certainly there is delay necessary to provide due process and free speech rights. That's very important to the Chamber. We've made that a part of our written comments as well as part of my oral presentation today.
I think the delay that accommodates legitimate interest to the parties in a given setting, and we can't possibly know what the facts

are, is subject to the regional director's ability to guide the parties and in some cases direct the parties to an election. You know, regional directors, their compensation, I don't know how it is under the current budget, but they were rated every year, and they were rated in accordance with certain standards and goals that the Board sets for conducting so many elections in so many days and handling other things.
Regional directors have every incentive personally in terms of compensation to try and meet those goals in as many cases as it is possible to meet those goals, in as many cases as is not necessary to delay meeting those goals. So they're going to make that judgment in the first instance, and we believe that right now they're doing a good job.
We don't know much about the delay in the tail I talked about. Maybe the delay in the case where the election was held on the 57th day was a necessary delay. Maybe the delay that was involved in the election that was held on the 3,000th day involved some necessary delay and some unnecessary delay. The fact is that we don't know, because we haven't put the lens of study on that outlier group

of cases.
So I certainly think there is necessary delay, the due process and free speech concerns, and I know we heard earlier about the educational concerns which is a factor of that. There may be other necessary delays that will show up in given cases that we just can't know about, but we certainly see where the group of cases is that kind of would fit the research pattern for where the unnecessary delay may be lurking, and I think that's where I think the Board should focus its efforts.
MR. PEARCE: Thank you. Ms. Semel.
MS. SEMEL: Well, I also am the same person that I was yesterday. I'm Gabrielle Semel. The proposed rules state that the regional director should select an election date as soon as practicable, and I support that standard.
Yesterday I testified about three representation cases in Connecticut, Long Island, New York and upstate New York involving T-Mobile USA in which the representation process was dragged out unnecessarily, in my opinion, by the employer. And today, as I promised yesterday, I want to talk about what happened during that delay.
While the parties and the employer and

the employees awaited decisions in those cases and then waited for the actual election, all three petitions were supported -- I should have said this earlier -- all three petitions were supported by an overwhelming majority of the employees when the petitions were filed. In all three cases, while everyone was waiting for the results, the employees received regular communications from T-Mobile as to why the union was bad and not in their interest before the petitions were filed. That was before the petitions were filed. Once the petitions were filed and especially after the decision and direction of election, these messages increased, becoming a drumbeat that was somewhat overwhelming to many of the workers.
In Albany, the drumbeat was sufficiently severe that CWA-TU ended up pulling the petition because we understood we had lost majority support. In Connecticut, where the process from petition to election was the quickest, the workers did elect unionization, but by one vote as opposed to an overwhelming majority.
From the time of the decision until the vote the workers were spoken to daily about the ills of unionization either on conference calls, in

one-on-one meetings or in group meetings. According to one worker, and I quote, "Managers and supervisors make daily statements that we will be fired or lose some of our current job benefits if we choose union representation," close quote.

On Long Island support for the union was the strongest. However, that was also the place where the process took the longest. I think I testified yesterday it was close to seven months. During that time senior level managers were in the employer's facilities every day. That had not been the practice before the filing of the petitions. One high level manager set up her office, she set up her office in the conference room and was a constant presence at the workplace. Employees were required to be on daily conference calls, some lasting as much as two hours while they were told of the evils of unions.

The situation on Long Island became so adversarial that a high level manager told the employees on a conference call that a strong union supporter could not be trusted even to do his job. That resulted in quite a backlash from that personal attack, and the manager was forced or caused to apologize to that worker publicly. But the message

had been sent: support the union openly and you risk being personally attacked by management.

The Act grants employers the right to campaign, and my testimony here does not seek to challenge that right. However, during the T-Mobile USA unionization campaigns, as with most other union campaigns I've been involved with, the employer's campaign against the union crosses the line from messaging to harassment.

As stated by another of the T-Mobile workers, quote: "Many of served in the U.S. military. One of my co-workers did three tours of duty in Iraq. We're not cowards and we don't scare easily, but the way the current election rules work has afforded T-Mobile USA too much time to delay, and they have used that delay time to terrify us about losing our jobs, our livelihood and our dignity as workers all because we wanted a fair chance to vote for the union."

Elections should be scheduled as soon as practicable, as the new rules propose, so that the employers don't cross the line and employees attempting to unionize don't end up feeling the way the T-Mobile workers felt. I know that employers argue that they need campaign time and that

scheduling elections as practicable as possible would deprive them of the ability to do so.

In my experience, that argument is false. Sadly, many employers incorporate their anti-union message in their basic employee orientation. The first day you're on the job it's the first thing you learn: "This is not a union company, we don't believe in unions." And that anti-union message is repeated, intensifying if there is even a whiff of union sympathy. This happens with large employers and it happens with small employers.

Many unions, including CWA, campaign openly. The employer knows that there is a union campaign way before the petition is ever filed. At T-Mobile CWA-TU had been openly campaigning for several years, and T-Mobile was fully aware of CWA's efforts. CWA and Ver.Di leaders had even met with T-Mobile management at various times. T-Mobile did not need the extended delays allowed by current Board procedures to make its position known to the employees. It wanted the delays to pound that message into the heads of the employees in order to convince them that unionization was simply not worth it.

Representation elections should be

scheduled as soon as practicable so that employees, who are really the most important entity in this process, can vote for a union or against it without harassment or intimidation. Thank you.

MR. MISCIMARRA: Ms. Semel, your comments to me are so helpful in more than one way, but in one way in particular. We're in a quandary, because on the one hand you talked about employees during the campaign were spoken to daily, and we're thrust in a situation -- I kind of view free speech rights, and this is not meant to undermine or speak against the interests of either employers or unions, but in terms of speaking daily during a campaign, it strikes me that among other things that's an employee right. It seems like we can't do very much. The Act contemplates speaking daily about union related issues.

But then you also made a comment that the employer made daily statements that employees would be fired or lose their job benefits if they chose the union. Now, the dissenting view with respect to the proposed rule advocates more vigorous enforcement against unlawful activities and more effective remedial measures.

One question I have is: Do you oppose

that aspect, which I think has probably the support of all five Board members, but do you support efforts to try to more effectively deal with unlawful conduct and to have more effective remedial measures during election campaigns? And if we accomplished that, hypothetically would you then agree that a reasonable time for people to speak daily about union related issues is a reasonable outcome?

MS. SEMEL: Well, of course I support increased efforts to deal with unlawful activity. There can be no doubt about that. But when I was a Board agent, and I was madly in love with what I was doing and I thought we can fight, you know, that we can protect workers, that was what I really believed in. But having done this for 30 years, the problem with remedial efforts during a campaign is that if a campaign is going on filing a charge doesn't do you much good. It doesn't get resolved, first of all, in enough time. But you also have to file a request to proceed or else you are participating in extending the election process, which is never what the union wants. So that's not helpful.

There is very little way that the union can get the agency to stop unlawful activity when

it's happening.

MR. MISCIMARRA: But the premise of my question is we're in rulemaking. Under existing law, the Board, and I don't want people to get excited, but the Board in some cases under existing law responds to charges by having a bargaining order and dispensing with the election.

So my question again is: If we devise effective remedies that are more effective and more effective ways to address the issue that we all agree is highly objectionable and inappropriate, if we do that, if we do that, would you agree that it makes sense to have a reasonable period for a campaign to take place?

MS. SEMEL: No, and I don't because I think a campaign has been taking place. In other words, the campaign starts as soon as the employer understands that organizing is taking place. In CWA's case, and I can't speak for the unions, but we do meet and we do talk amongst ourselves. And my understanding is that most unions do the same thing. The days of secret organizing are gone. I mean, unions organize in a public way, so the employer knows as soon as the campaign goes public, and that's usually way before the petition is filed,

that the campaign is taking place, that there is a campaign that's been taking place for a while.

There is something else that I wanted to talk to, and it directly addresses your question, your first question, which is that the employer has daily access to employees. The employer can talk to those employees as much as it can. The union cannot. The union doesn't have daily access. The union doesn't have access. I mean, if we're going to talk about changing the world we could talk about access for the unions and let's have unions have as much access as employers. Unions don't have that access. Employers have it, they have it every day, they have it all the time. They have all sorts of ways of communicating with their employees.

I don't believe an extended period of time is necessary for free speech rights. I think free speech rights exist before a petition is filed, and a shortened period between the time that the petition is filed and the time of the election will not in any way hamper free speech rights.

MR. PEARCE: Ms. Semel, in your experience has technology impacted upon employers' free speech opportunities?

MS. SEMEL: In order to answer the

questionnaire that the AFL sent out to union side lawyers I spoke with CWA lead organizers, and I think our answer was that employers communicate with using e-mails at least 50 percent of the time, a little bit less for texts. But yes, the employers are using technology, and they're using it more and more.

MR. PEARCE: And do you believe that in deciding what we want to do we should take those kinds of things into consideration?

MS. SEMEL: Absolutely.

MR. JOHNSON: Really quickly. This has been very, very helpful. I want to get your views on two things. One, under the practicability standard or any standard that we might devise should employer recidivist conduct in election situations be taken into account? And by that I mean unfair labor practice findings and objections, for example. Because it seems like one of your concerns is basically that, and I don't want to express a view here or there on this, but I understand that for many of the labor commenters there is a feeling that employers across the board simply engage in this conduct at the moment.

Now, whether or not I agree with that,

let's concede that there would be some employers who engage in objectionable conduct and unfair labor practices during an election environment. If there is a re-run election, for example, or if there is an election in some other nearby jurisdiction, in the same region or whatever involving the same employer, in scheduling, in the practicability standard should we address recidivism by that employer in other election situations?

MS. SEMEL: I can't really comment on that without understanding what the proposal would be, but I cannot imagine -- I'm not creative enough or imaginative enough to figure out something that the Board could do that would change the atmosphere once workers had been intimidated or given up. The statistics, although I haven't looked at them in a long time for second elections, is very bad. So that was another thing I used to think: "Well, you know, if there is enough objectionable conduct we'll just have another election."

But you really lose much more because people are demoralized by the process. It's not worth it. I think somebody talked about campaign fatigue. That's a real thing. I mean, people are energized, they want a union, and it's just not

worth it.

MR. JOHNSON: So your position is we should sort of compress the election time from the beginning on the supposition that objectionable conduct and unfair labor practices is just going to take place.

MS. SEMEL: Yes.

MR. JOHNSON: And one other thing. You mentioned that CWA's practice is typically to give de facto notice to employers that, "Hey, we're organizing now." In order to deal with this free speech issue should the Board consider having all unions, since it is apparently the prevalent position that the employers supposedly know that organizing is taking place, should we require unions some point in front of the petition if they want to have an accelerated on the back end to inform the employer that it's being organized formally?

MS. SEMEL: Somebody mentioned that on one of the earlier panels. I never even thought about that idea, so I can't really speak to it. I'd have to really think about what it meant and what the ramifications are. And at what point? Ten days before you file the petition? I would have to think about it.

MR. JOHNSON: We do do that in terms of Section 8(g), but I just wanted to see if you had any thoughts.

MR. PEARCE: Thank you. Mr. Kirsanow.

MR. KIRSANOW: Good afternoon, Chairman Pearce and members of the Board. I'm Peter Kirsanow, a partner in the labor employment practice group of Benesch Friedlander. As opposed to my previous two colleagues, I'm not the same person I was yesterday. I was Denzel Washington. I have a very aggressive barber.

(Laughter.)

MR. KIRSANOW: I'm appearing on behalf of the National Association of Manufacturers, the preeminent industrial association in the United States, and also the largest industrial trade association, representing employers large and small in all industrial sectors in all 50 states.

The tens of thousands of manufacturers have a distinct interest in the rulemaking, and we respectfully submit that the rules that compress time frames for the conduct of an election would have a significant adverse impact on the meaningful exercise of employees' Section 7 rights, 8(c) rights, and on the workplace in general.

It's arguable that more time rather than less time is necessary and at least no less than the current median, whether that be 38 days to 42 days. As noted by Members Johnson and Miscimarra, there are several federal statutes that outline specific time periods that are longer than the 38 day median for employees to consider matters no more consequential than those involving the selection of a collective bargaining representative.

By compressing the time frame in a representation election the proposed rules will essentially eviscerate the ability of employees to make an informed choice, an informed exercise of their Section 7 rights, and, at the same time, impair the 8(c) rights of employers to communicate effectively to their employees.

And as mentioned by Member Johnson during some of the exchange earlier this morning, it will chill the robust exchange of ideas as envisioned both by Congress in enacting the Act and as enunciated by the Supreme Court in several cases, not just Chamber of Commerce versus Brown, but Letter Carriers versus Austin and a whole host of circuit court decisions, especially D.C. circuit court decisions.

The cumulative effect of the proposed rules as they have an impact on Section 8(c) and on the compression of the election period, reducing the median time frame between the filing of a representation petition to the conduct of the election from 38 days, although there has been some dispute as to the number of days it would fall to, but anywhere from 10 to 20 days will deprive employers of the ability to communicate vital information to their employees regarding their rights and the effect of unionization.

Even under the current median of 38 days, it's been my experience that many employers have a difficult time effectively communicating their message. Now, that's especially true for smaller employers, as has been testified to already, but it also affects larger companies as well.

Under a not atypical organizational campaign the union may start collecting authorization cards even a year but often six to eight months before the filing of petition, and during that time they're communicating their message to the employees with very few legal constraints or practicable constraints. Not all employees are necessarily going to hear the message, and I would

challenge the proposition that most employers are aware of the campaign from the very beginning because there is very often the case that employers are completely oblivious to the fact that an organizational campaign is under way.

The employee population, or at least portions thereof, is hearing an unrebutted, sometimes one-sided story, frequently an inaccurate one. They may not hear of all the down sides of unionization. They may not hear about dues, fees and assessments. They may not hear about the union's political postures or social agenda with which employees may disagree. They may not hear about the prospects of unionized companies, some of which are faltering, some of which go out of business. The union controls the filing of the petition, which also controls the approximate time of the election.

This may be the first time that many employers first hear about an organizational campaign, and it's also the first time that many employees are aware that there is a campaign under way, and the election date's a mere five and a half weeks away under current circumstances. It takes many if not most employers, even some of the larger

ones, at least two weeks to figure out what they need or want to say regarding employee rights and unionization, and then they have three to four weeks under the current time frame to communicate that message to the employees in contrast to the 30 to 40 weeks sometimes that the unions have been conveying their message to employees.

Logistics can be even more challenging for the employers who don't have all their employees in a centralized workplace. Were the proposed rules implemented in a number of cases employers may not even have figured out what they want to say by the time the election is conducted. That would essentially deprive employers or impair employer 8(c) rights and make Section 7 rights a fiction.

The compressed time frame is enormously beneficial to unions. Indeed, for those of us who have been involved in hundreds of election campaigns over the years, it's difficult for us to conceive of a situation in which a union couldn't organize a workplace or successfully run an election especially given the impact of Specialty Healthcare.

But I would submit that the compressed time frame is profoundly harmful to the interests of employees, many of whom would be making an

uninformed choice about one of the most important aspects of their lives and also profoundly harmful to the interests of employers, who would in many cases be effectively removed from the decision to unionize the workforce and provide very little input into that decision.

For those reasons, the National Association of Manufacturers would respectfully submit that the rules, at least terms of their compression of the time frame, that the issuance of such rules be quashed. Thank you.

MS. SCHIFFER: When you talked about the employer getting its message out, you said it takes how long to get the message out?

MR. KIRSANOW: Under the current time frame, and we've heard a lot of anecdotal information, and that's why I think it might be beneficial to see if more empirical information could be adduced along these lines, but I've been doing this for 35 years despite my incredible robust and vigorous appearance, my compilation of anecdotes says that especially among the smaller employers you're looking at at least two weeks.

What is happening is -- I'll give you something that happens maybe on a biweekly basis.

You get the phone call. "Denzel, I understand that one of my factory workers has been talking about a union." I said, "You should be aware that you're probably going to get a request for recognition or a petition imminently." "No, my employees aren't really interested in unionizing." A true story. I got one of those phone calls at about 9:45 in the morning. By noon he calls me back, saying, "I got the petition."

From that period of time a lot of smaller employers who don't have a standing HR department and don't have a retention agreement with labor counsel are scouring around, maybe talking to their wills and trust attorney to try to find out who it is they need to get in touch with to help them with respect to a representation campaign. They will sit down with their attorney and try to figure out what it is in terms of unit placement what is going on, what they should be doing in terms of possibly stipulating, maybe going to a hearing. There are a number of determinations going on at that time.

Keep in mind that most companies, strangely enough, are not in the business of conducting union elections. They're in the business of making widgets. And that same person who is

making those determinations with respect to unit placement and stipulation is the same guy who's repairing tow motors, signing bills of lading, dealing with a whole host of issues. He is wearing multiple hats. So up to two weeks could go by before he determines what his position is going to be, before he even knows that he wants to send out campaign materials and maybe have some elections.

Now, that's not the case for T-Mobile or some companies that have standing HR departments. But I have the good fortune of representing ome larger companies, and they have some of the same issues as well.

MS. SCHIFFER: None of that was my question, but thank you for your comment. My question was that you said there was a certain period of time of two weeks to decide on what they were going to campaign and then a certain amount of time to get the message out. All I was really asking for was that time period to get the message out, what you said.

MR. KIRSANOW: Three to four weeks.

MS. SCHIFFER: So three to four weeks. To communicate with their employees would take three to four weeks. And so when you're talking about the

employer's message, does that equal to the information that you believe employees should have and might not have if the employer doesn't have that two to four weeks?

MR. KIRSANOW: That two to four weeks in which to communicate their message is after they've already decided that messages is going to be.

MS. SCHIFFER: We did that. But what I'm asking you is: Is the employer's message which you referred to many times the same thing as the information you believe employees need which you also referenced? I wondered if you were using those terms interchangeably.

MR. KIRSANOW: I think they are to some extent coextensive, but not completely.

MS. SCHIFFER: So the information the employees need is the information the employer wants them to have.

MR. KIRSANOW: Not necessarily. The employer may not be giving them all the information employees need. We have three parties involved here, a union, employees -- and I think we had a very eloquent witness earlier on that talked about the fact that to a large extent much of what we're discussing here seems to be not in the context of

what's best for employees, and you have the union. So employers may be giving them what they believe the employees need. Employees, some of them are gathering some of the information they believe they need, the unions are giving them the information they think they need, and hopefully all of those circles will be to some extent coextensive and the employees will get all of the information they need.

MR. MISCIMARRA: Former Member Kirsanow, getting to the -- and I don't mean to discount the importance of the interests of employees or unions. But again focusing on the interest of employees, our statute adopts a majority rule concept, and I guess the question that I have is: How much do we have to care, if we have an election which ascertains that a majority of unit employees at that point in time have support for the union, how much is it our province to care that much about whether the remaining employees participate in election discussions or actually have an understanding about the relevant issues once you get beyond the point of majority rule?

MR. KIRSANOW: I think Section 7 presumes that the Board care that all employees have at least some meaningful opportunity to participate in the

process. And in any election, whether it's a Board election or a national election, some people may choose not to participate for whatever reason.

MR. PEARCE: So as you would know, having been a former Board member, the election process from petition to actual election has over the course of years been reduced. It's been 56 down to 42 down to 38. Is it your position that as that process gets smaller the First Amendment rights of the parties are being infringed, particularly the employer? And if so, is it our responsibility as the Board to expand that process out because we're denying them their rights under the First Amendment?

MR. KIRSANOW: I do think that there is an irreducible point beyond which, if the period is compressed, First Amendment rights would be infringed upon mainly from a logistical standpoint. I think that it's difficult to effectively communicate, whether it's the union, whether it's co-workers or the employer, positions with respect to unionization or information related to the effect of unionization in a compressed time frame, depending upon the nature of the employer.

MR. PEARCE: And what would be that irreducible point?

MR. KIRSANOW: It's difficult to ascertain. I do think that right now we're at a 38 day median. I think we're in an informational vacuum. I think there is a good chance that we might get a better idea if we had more information related to the positions of labor organizations, employers, and most importantly employees as to what it would be. But the experience that many of us have had is that the current 38 day minimum in fact may not be enough time to get that information out.

MR. PEARCE: Mr. Washington, I enjoyed you in The Hurricane.

(Laughter.)

MR. JOHNSON: One quick question not related to your many movie roles. Basically, if we had to search out to another statute to find -- if we wanted to tether something to a congressional enactment or legislative history like JFK's comment on the 30 days, the ADEA on the 45 day group, for example, the 21 day for the individual, the 60 days in the Warren Act or some other yardstick, which one would be appropriate?

MR. KIRSANOW: I wouldn't take a position as to that, and I don't mean to be evasive, but I think each of those is an imperfect measure because

we're talking about different things. With respect to Warren, for example, employees are about to lose their jobs and they need to make a provision. The state employment agency needs that information as well as the union also. With respect to the OWBPA, another thing, they're about to lose their job and they have to make a determination as to whether or not they're going to accept certain benefits, so maybe 21, or in the case of a number of people 45.

Here the employees are keeping their jobs. It's something that's going to be a hopefully long term endeavor. If they are unionized, they may be unionized for the next 30 years. It's something that could have even greater consequence than the determination as to whether or not to sign a release under the OWBPA. I think at least those are benchmarks. And it should be informative that Congress has chosen longer periods for those terminal circumstances than in the ongoing circumstance of a representation election.

MR. PEARCE: Well, wouldn't you say that it's informative in the Agricultural Labor Relations Board where they have seven days to have an election?

MR. KIRSANOW: And I would submit that

that's a very discrete sector of the industry. I think what needs to be done, as what Congress did with OWBPA, that applies to all employers and all employees regardless of occupation or industry. The Board in large measure is more charged with that circumstance than it is with the narrow confines of one industry.

MR. PEARCE: Thank you. Mr. Meiklejohn.

MR. MEIKLEJOHN: I'm Tom Meiklejohn. I also am the same person I was yesterday, but I wasn't here, so I'll just briefly introduce myself by saying I've worked in labor relations or as an advocate in labor relations since 1977, however long that is, 12 years as a field employee with the National Labor Relations Board, and the rest of that 25 years or so as a representative of unions.

In that time, one of the more dramatic changes I've seen is in the practice of unions with respect to keeping their campaigns quiet and concealed from the employer. In the early days of my employment, it was almost always the case that the unions tried to keep things under a lid right up until the petition was filed, and you would have something that those unfriendly to that tactic could refer to as an ambush election. But today that's

changed, and that is the very rare exception where the union doesn't go public with their campaign.

There are three reasons for that. One is that the union, in order to build strength, has to overcome, regardless of what the employer has done or said in the past, employees come into the campaign knowing that their employer is going to oppose the campaign in almost every case and fearing the employer's reaction. And the first phase of that campaign is to build up the confidence among the employees that they can join together to speak up for themselves.

And then, in order to get that message to the larger group of employees, there has to be some committee, some group of people who are willing to go public, have their faces on campaign literature and have their names disclosed as the people who are willing to lead the campaign. Once that happens, the employer knows there is something going on.

The second reason for this is quite simply that if you end up in litigation where somebody was discriminated against because of their union activity, you want to be able to show that it was public. If it's been concealed you have a much, much harder time proving that.

And then the third reason is because it doesn't work to keep it secret. In spite of Mr. Washington's experience, my experience is that the word gets to the employer and the employer knows who the leaders are, and, if you hide that information, then you expose those employees to pressures without the protections of the Act.

With respect to the employer's Section 8(c) and constitutional rights to present their opinions, the employer is free to start expressing those opinions from the day the employees are hired. And many employers, Target, Walmart, and we know the classic examples, many employers take advantage of that. Some employers may not, but I would submit that the law gives the employers the right to express their opinions.

It doesn't give them an obligation to go out and formulate an opinion, and it doesn't require you to give the employers time to figure out what that opinion is. They have however long an employee is working at the facility to express those opinions. If they choose to do that, they have the opportunity. If they choose not to, they're not being deprived of the right to speak.

I would note, however, and maybe this is

a flip comment, but an earlier panel member talked about educating employees of their rights. The Board has developed a notice, and the court says you can't force employers to post that notice, but if the employer wants to educate employees about their rights they can voluntarily post those notices and the employees will have that information.

I have one other -- maybe people sometimes think it's a radical suggestion to look at the statute, but the language of Section 9(a) says that representatives designated or selected by a majority of employees shall be the exclusive representative.

We talked about the history of the Act a little earlier. In the first 20 or 30 years of the history of the Act the big issue was does an employer confronted with the signatures of a majority of its employees have the right to insist upon an election, and we've come to the point where that issue seems to be settled, that an employer has the right to refuse to grant recognition based upon a card majority if the employer so chooses. But we've now taken that debate from 20 or 30 years ago, taking it to another whole level, and we're arguing that not only does the employer have the right to

refuse to recognize the signatures of its employees, but it has the right to then launch a campaign to convince the employees to change their minds.

And I would submit there are many instances where the law requires that employees have a chance to think things over before they decide. But when the employee is hired and he signs a non-compete agreement, a confidential information agreement and an individual arbitration agreement, which he has no choice but to sign when he's hired, he's considered to be an adult who's bound by what he's agreed to.

I think that this statute that you're charged with enforcing calls upon you to treat -- in spite of what Mr. Hogan said, the law considers the employees not to be children but to be adults, and, if they've made the choice to sign a union card, then that choice should be given the same respect as is given to these other documents that employees are required to sign in order to get a job.

And if we're going to accept the law requires that that decision be confirmed, the point of the election is to confirm -- this is what the court said before I started the practice -- the purpose is to confirm that they want to be

represented by the union. If the purpose of the election is to confirm that choice, it should not be to give the employer an opportunity to convince them to change their minds. The law doesn't require that. I'm in favor of the language of the proposed rule.

MR. JOHNSON: We picked that up.

(Laughter.)

MR. JOHNSON: I do have some follow-up, but I want to defer to my fellow members.

MR. PEARCE: Go ahead.

MR. JOHNSON: I assume you don't want us to ignore Chamber of Commerce Versus Brown because it does establish that free-wheeling discussion of labor issues is basically what Congress wanted to protect. And without needing to go back to whether prior Supreme Court decisions recognize that or not, are we free to ignore a Supreme Court decision on this?

MR. MEIKLEJOHN: No, you're not free to ignore a Supreme Court decision, but that does not mean that you have to enforce the Act in a fashion designed to facilitate or encourage a campaign designed to get employees to change a decision that they've made. Section 8 says you can't stop -- I'm

sorry. I interrupted you.

MR. JOHNSON: I understand. You have a very good point, that the process rules might be different than the substance rules, but at some point they do intersect. If the Supreme Court is telling us that employees have an underlying right to receive information opposing unionization, I don't think we can just construct a process that says to forget about that. But I think the question about authorization cards is a very interesting one, and I appreciate all your passion that you bring to these proceedings.

MR. MEIKLEJOHN: I intended to stay more calm.

(Laughter.)

MR. JOHNSON: It was a very illuminating presentation you just made. I guess my follow-up is more, "Look, 30 percent is the showing of interest." Theoretically there could be 70 percent of people who don't support a union. There are people who can change their minds during a campaign. The law on showing of interest, the reason why it is immune from collateral attack is that it is what it says, just a showing of interest. So you're not saying we should interpret authorization documents as binding

contractual documents that then we should basically write our election process to simply ignore the fact that employees might change their minds, are you?

MR. MEIKLEJOHN: I'm not suggesting that employees don't have the right to change their minds. The Act doesn't embody the principle that employers have a right to a period of time in which to try to do that.

MR. JOHNSON: Well, that's certainly not written explicitly in the statute, but Section 8(c) is, and although it doesn't apply directly to representation proceedings, do you think Section 8(c) has any bearing on this?

MR. MEIKLEJOHN: 8(c) says that the Labor Board does not have the right to find it to be unlawful for an employer to exercise its First Amendment rights. But this may seem like a wild suggestion or analogy, but the Supreme Court obviously also says that people with lots of money are entitled to use that money for speech purposes. So it doesn't necessarily follow that if I disagree with what the Koch brothers have to say that I'm entitled to be given billions of dollars to express that opinion. So the Board can't stop the employer from speaking, but the Board doesn't have to --

MR. JOHNSON: Subsidize the employer is what you're saying.

MR. MEIKLEJOHN: Yes. I'm glad my analogy made some sense to you.

MR. JOHNSON: I see where you're going. But what is the point between cutting into Section 8(c) free speech rights and subsidization, in your view?

MR. MEIKLEJOHN: I would start with the language of the statute again, which is that it cannot find it to be an unfair labor practice.

MR. JOHNSON: I'm talking about timeline-wise.

MR. MEIKLEJOHN: I don't think that the statute requires any time. I would agree with Mr. Hermanson that the election should be held the day the petition is filed.

MR. JOHNSON: So from a process point of view it's basically zero.

MR. MEIKLEJOHN: Right.

MR. JOHNSON: And then just one last thing. Would your view change on any of this, and I know you've been involved in seeing the shift in union strategies, if the Board actually had a notice requirement and we could say that disposes of the

free speech issue, if there was a pre-petition sort of notice requirement, or do you think that's unnecessary?

MR. MEIKLEJOHN: Well, I think it's unnecessary, first of all, but I have another answer to the question. I've been thinking about it since you first raised it a couple panels ago. One of the points that I've made is that the organizing campaign starts with a period or a phase in which the union is building up, for want of a better word, the courage of the employees to band together and stand together. And unions do keep their campaigns secret at that point, because at that point employees I would say can very easily be intimidated by either legal or illegal conduct. It doesn't have to be illegal, in my view.

I think there are good reasons to preserve the right of unions to keep that first phase of the campaign secret, and I think if you tried to come up with a bright line rule you're going to tread on that.

MR. PEARCE: Thank you very much, Mr. Meiklejohn. Ms. Maciel.

MS. MACIEL: Good morning or afternoon. I'm not sure which it is. I'm Kara Maciel. I was

here yesterday. I represent the National Grocers Association, which is the independent sector of the grocery industry. NGA members are comprised of both unionized and non-unionized workplaces, many of whom enjoy positive labor relations with their union counterparts. But above all, NGA strongly supports the rights of their employees to make an informed decision on whether or not to be represented by a union, and the only way for employees to make such an informed decision is by having election processes and procedures that provide a full and fair opportunity to hear the views of both the union and the employer.

NGA submits that the NPRM reducing the timing of the election silences the employer's protected 8(c) rights and chills the Section 7 right of employees. In particular, NGA opposes the reduction of the scheduling of an election because there is no legitimate evidence supporting a need to hasten the time leading to an election and certainly nothing supported by empirical evidence from the Board.

We heard some statistics earlier from the other panels, and I will not repeat them, but there are a couple of other statistics that demonstrate

that there is no objective basis to declare that the median time of 38 days or even 60 days to prepare for and hold an election amounts to unnecessary delay. And I would note that the word "unnecessary" was frequently used in the majority's point up to 23 times. NGA submits that it's the NPRM that is unnecessary and not changes.

Since 2001, the Board's internal guidelines are to hold elections within a median of 42 days and to have 90 percent of those done within 56 days. Under your performance and accountability report, the Board has a statutory responsibility to resolve all questions concerning representation in a manner that gives full effect to the rights afforded to all parties under the Act, and you fulfill that responsibility when you resolve questions within a hundred days.

You've consistently met that goal and in the past five years have resolved at least 84 percent of all questions concerning representation within that hundred days. This past year was your best year yet. You resolved 87.4 percent of all elections within a hundred days. Accordingly, those statistic conclusively establish that the Board is just looking to solve a problem that doesn't exist,

and there's no reason to change the current timing of the election.

Why do you need to fundamentally transform a longstanding process at the heart of your statutory role when, by your own statistics and measurements, the current process exceeds your standards? As the old adage goes, "If it ain't broke don't fix it." In the face of these statistics, NGA submits that the NPRM is like a house of cards, relying on a faulty premise that accelerated elections are somehow superior to those conducted after a thorough debate.

But hasty decisions are not good decisions. Free speech is the cornerstone of the Act's statutory protections, and the proposal eviscerates an employee's opportunity to become fully informed. Instead of deliberately evaluating relevant information, employees will be rushed into voting without a full opportunity to receive facts, contemplate the consequences of their decision, and make an informed choice whether to be represented by a union.

Common sense dictates that the greater the time an individual has to inform him or herself and to reflect upon and consider all aspects of a

decision, the more likely the decision will be a true reflection of that individual's interests. The notion that faster equals better is counterintuitive, because it conflicts with the basic premise that a secret ballot should be informed by a full, free and vigorous debate and that more and not less opportunities for exchange of information and ideas is beneficial when someone is making an important decision that will impact fundamentally their life and livelihood.

Employees faced with making such an important workplace decision should be able to do so in an environment conducive to reflection and thought and not one that sacrifices deliberation for speed. Remember that employees must live with the consequences of their vote for at least twelve months depending on the result of the election, and measured by the length and consequences of that decision the current time, the median time, is very appropriate.

NGA is also very concerned about the consequences of the implications on free speech that has been well discussed by prior members of the Board, and I won't repeat they said, but we wholeheartedly support what they said. Even the

Supreme Court just last week pronounced in McCutcheon versus FEC that free speech is tempered by resources, and if the government limits resources, including the amount of time and to whom an employer can communicate to, the First Amendment is violated.

In sum, the push for accelerated elections cannot stand on its own merit, as the NPRM has failed to identify a single problem to which the proposed solution is responsive. In fact, by any measure, whether it's historical or gauged by your own current goals and internal guidelines, the existing system is working very well. Accordingly, NGA respectfully urges the Board to withdraw its proposal. Thank you for the opportunity to speak today.

MR. PEARCE: Now, you would agree that the focus of much of the NPRM deals with the process as it goes into the representation proceeding, from petition through the representation proceeding ultimately to the election. The vast majority of elections that are held are uncontested. In your view, would it be appropriate for employees to have to wait three to five months to get the opportunity to vote?

MS. MACIEL: No. I don't think that's what I'm saying or what NGA is saying. What we're saying is that the current timing demonstrates that the system is working very well as is and that there is no reason to change or reduce the time because of the serious implications that would be impacted in addition to the free speech rights of employers and the Section 7 rights of employees.

MR. PEARCE: Would you endorse that we build a campaign period into our regulations?

MS. MACIEL: I don't think you need to change the regulations as all, because, as I mentioned, they're working very well. Employers have an opportunity to communicate to employees and employees have an opportunity to communicate to fellow employees. It's like a jury. In a jury room oftentimes all the jury members make an initial vote. And sometimes it's 8 to 1 or it's not unanimous, but after a thorough opportunity to review the evidence that was set forth and communicate with their fellow jurors and have a vigorous debate, oftentimes people's votes change. That's what this process is intended to protect, and hastening the time will impede upon that right of employees and employers.

MR. PEARCE: You talked about the lack of empirical evidence supporting the proposal of the NPRM. Is there any empirical evidence that you're relying on with respect to what effect reducing the opportunity for an employer to campaign against unionization has on an employee's free choice?

MS. MACIEL: I'm not aware of any empirical evidence that has been conducted with respect to the amount of time that an employer may need to communicate with its employees after petition, and I would submit that that would be a good thing for the Board to consider before making any changes.

MR. PEARCE: Any other questions? Thank you very much. It is lunchtime. The next seating will be at 2:00 p.m., and I would request that since we have a lot to go through that we be prompt.

(Recess.)

MR. PEARCE: While we're waiting for our panel to assemble, I think this might be a good opportunity for us to recognize this being the eve of th 77th anniversary of the Supreme Court's decision upholding the constitutionality of the National Labor Relations Act.

MR. JOHNSON: So we're authorized to be

here. We'd just like you to know that.
(Laughter.)
MR. PEARCE: It was passed in the middle of the Great Depression. And as you know, it was for the purposes of eliminating substantial obstruction to the free flow of commerce by encouraging the practice and procedure of collective bargaining and protecting the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing.
And in the years that followed the Supreme Court struck down other pieces of the New Deal legislation, including our Act. And then it was viewed that conventional wisdom predicted that the NLRB's fate would be to be gone. But conventional wisdom was wrong, and on April 12, 1937 the Supreme Court decided NLRB v. Jones and Laughlin, upholding the NLRA and changing the landscape of American law. So for years thereafter the agency used to make a big deal about celebrating Constitutionality Day, and we're bringing it back. So Happy Constitutionality Day eve. Thank you all for your indulgence.
Is our next seating group available? We

have Homer Deakins, Dr. Kate Bronfenbrenner and Melinda Hensel. We are behind schedule. It's my understanding that there some real scheduling challenges that people have, and so I'm going to be fairly rigid on my time allocations, so please respect that. Thank you. Mr. Deakins.
MR. DEAKINS: Mr. Chairman and members of the Board, I appreciate the opportunity to again appear to discuss the question of the standard to be applied for scheduling elections.
One of the most notable things I saw in the proposed new rule was the total silence by the Board on a central question in fair elections, and that is the right of employees to make an informed choice whether they wish to be represented by a labor union. No one can dispute the obvious fact that unions tell employees only one side of the story about union representation. They tell them the good things. It's equally clear that most employees know little or nothing about unions.
Almost 94 percent of employees in the private sector are not members of labor unions. It falls on the employers to truthfully and in a non-coercive way to educate employees on the disadvantages of unions. This is the process which

the statute sets up to assure employees make an informed choice.
The appropriate standard for selecting an election date, I submit, should not be "as soon as practicable." The standard should be a date which safeguards against rushing employees into an election where they are unfamiliar with the issues. Senator Kennedy said that that would require a minimum of 30 days; in other words, a date assured that the employees may make an informed decision about representation.
In the words of Samuel Gompers, time is the most valuable thing on earth, time to think, time to act, time to extend our fraternal relations, and yet time is exactly what the proposed rules would deny workers in deciding whether they extend their fraternal relationships. In 2010 the average time from petition to election was only 31 days. This is a reasonable range to satisfy election standards. There has never been, and should never be, an absolute arbitrary rule on the timing of elections.
The Board's proposal for quickie elections infringes on the employer right of free speech by not permitting the employer ample time to

educate employees, or, in the words of Mr. Gompers, time to think. And the Board offers no reason why granting employers a reasonable period to communicate with employees before an election would be harmful to anyone.
There is no balancing of rights required in this instance. There is only one set of rights in the equation. In fact, providing employers with their free speech rights is completely consistent with the purpose of the Act: to protect employee rights.
There is no justification for quickie elections because of employer misconduct. The proposed rule is virtually silent on the question of the extent to which unlawful conduct is a problem, and the proposed rule suggests no change regarding the Board's treatment of unlawful election conduct, nor does the Board invite public comment about better ways to remedy these situations.
I recognize the fact that there are a number of studies which have advanced the quick election idea to avoid giving employers time to commit unfair labor practices. Those studies have been sharply criticized by management on such grounds as the fact that those studies are basically

largely reliant upon the views of union organizers with no input from management. Those issues were dealt with, I think rather thoroughly, in connection with the management comments that were made on the 2011 proposed rule, and I don't go into those any further.

But with respect to this issue of unfair labor practices, I think, rather than overhauling the Board's well established R-Case rules, which by any objective measure have worked, it's the general counsel's responsibility to stop misconduct, including seeking 10(j) injunctive release, Gissel orders and so on. This is not an excuse for depriving law abiding employers of their right to fully communicate with employees on the union issue.

The only last comment I would make is with respect to this idea of the unions giving employers notice before they file the petition. I think it was said this morning that that notice might be given at the beginning of an organizing campaign. I don't think that would make any sense. If you're going to consider such a rule, I think it should be designed on the basis of giving notice to the employer a certain number of days before the petition is filed. I don't advocate that idea, but

I think, if you're going to consider it, it needs to be designed on the basis of the time frame before the filing of the petition and not when the organizing begins. Organizing campaigns can go on for years. Thank you, Mr. Chairman.

MR. PEARCE: Thank you. Dr. Bronfenbrenner.

MS. BRONFENBRENNER: Thank you, Chairman Pearce and members of the Board. I don't know if I should say it's a pleasure to be here again, but I appreciate how well you've organized these sessions.

As you know, I was here three years ago with my preliminary findings from a study that I did with Professor Dorian Warren on the nature of employer campaigns, unfair labor practices, serious unfair labor practices, and serious unfair labor practices won and settled and their impact on election timing. Our findings from that study helped to inform the rulemaking process, and at that time we were asked to come back to the Board, expanding our data to include five years' worth of data. And here we are.

Central to those findings was developing a new and better measure of election timing based on using the date ULPs actually occur rather than the

date they're filed or the date of petition because the timing of delay is really based on from when the employer campaign starts, and a better measure is to use the date of the first unfair labor practice occurrence. Our research we're talking about today is based on using unfair labor practice documents FOIA'd from the NLRB with a 99 percent return rate of a sample of elections from 1999, a random sample of elections from 1999 to 2003, using everything from the charge to the employer response to the complaint to the Board decision.

Our findings tell us a great deal about the extent and impact of delay on election timing and the two issues that are being addressed by this panel. Employers are aware of union campaigns and begin exercising their free speech rights much earlier than has been assumed. We found that 56 percent of all unfair labor practices and 57 percent of those that have merit determination occur before the petition.

46 percent of serious ULPs and 48 percent of those that won or settled pre-merit determination or pre-hearing are before the petition, and 30 percent of serious ULPs and allegations and 30 percent of ULPs won happen 30 days before the

petition is filed.

These serious allegations, many of them involve speech. They're interrogations, they're threats, they are harassment. But also, these are the kinds of unfair labor practices that cause campaigns often to stop in their tracks and that are most intimidating to workers, discharges, alteration of wages and benefits, and we found that these unfair labor practice charges start long before the petition is filed and continue unabated throughout the campaign all the way through the petition, the election, and continue beyond.

What is most significant about these is that not only do employers know about these tactics before the petition is filed, but we aren't even counting the many campaigns where unfair labor practices occur and unions or workers don't even file the charge because, if it's a win, they don't want to bother to file a charge, or, if they know that they're losing, workers don't file the charge, or they don't file a charge because they feel all they're going to get is a posting.

In combination, what our data show is that employer campaigns are starting before the petition, and, in many cases, long before the

petition. They're continuing unabated all the way through so that each day that goes by is another day. Each day that you extend the time for when the election happens is another day where workers are threatened, harassed, discharged and coerced.

The timing of the election really matters. And employer free speech is in no way, in no way, threatened by this rule change, because employers are beginning their campaigns and have great opportunity to engage with workers and are taking that opportunity because they know about union campaigns well before the petition is filed. Thank you.

MR. PEARCE: There has been discussion about the impact this would have on small employers. Does your study address situations involving small employers?

MS. BRONFENBRENNER: One of the things that we forget is that what may seem like a small employer, the ultimate parent company is not small, and so we have to separate out small employers and who their parent company is. That's the first thing.

Many of these construction firms are ultimately often owned by much larger employers. We

researched the ownership of every single firm in our sample, and we found that many of the organizers and many of the workers did not even know who owned their firm. In construction, the employers are often part of bigger firms than they think.

Also, these firms, construction, grocers, all of these industries, they have many liability issues, and we found that they all have lawyers. Because they have lawyers for other issues, they pull those lawyers in for labor issues. But they have lawyers. When you look at the documents, they had no trouble having a lawyer -- they weren't slower in responding to charges than the large employers. They weren't less likely to commit unfair labor practices by any means. The size of the employer had nothing to do with their reaction.

Actually, what we found that was most striking is that these small employers were expending an enormous amount of money on fighting unions that seemed to outweigh what their budget should be. You would have a very small nursing home that had all Medicaid patients, and they were spending great resources in hiring a consultant to fight the union campaign, or a small construction firm that was hiring one of the most expensive

consultants in the area, and you wondered how could they afford that. Then we would realize that they were being subsidized by -- that there actually was an employer association that was probably helping them in the area.

MR. MISCIMARRA: Professor Bronfenbrenner, thanks for being with us today. With respect to potential unlawful conduct that occurs during campaigns, do you oppose the views expressed in the dissenting opinion authored by Member Johnson and myself suggesting that the Board should directly attempt to more effectively identify unlawful conduct that occurs during union representation elections and that, if it occurs, we should focus directly on trying to develop measures that more effectively remedy that conduct if it's found to have occurred?

MS. BRONFENBRENNER: Well, you try to do that. I mean, many of us try to do that with the Employee Free Choice Act, but you're not going to be able to get more effective penalties unless you involve Congress.

MR. MISCIMARRA: Well, we already have the right in some range of cases to impose bargaining orders in the face of unlawful conduct if

it's found to exist within a range of types of illegality and even dispense with an election. Is that right?

MS. BRONFENBRENNER: That's right. And I read through all the cases and I watched the employers appeal every one of those bargaining orders all the way through the courts, and that doesn't help in a campaign if it takes five years to get a bargaining order.

MR. MISCIMARRA: But my question was: Do you support or would you oppose efforts by the Board to directly address unlawful conduct if it occurs during a union representation election and to directly attempt to devise more effective measures to address that if it's found to have occurred?

MS. BRONFENBRENNER: I think the Board should do everything that's practicable, yes. That's what the proposal is. But I don't think you can do more than that. That's what the proposal is. I think the problem is that you don't control the courts and the time it takes. So yes, by all means use bargaining orders, but bargaining orders will be challenged by the people in this -- well, there are not that many people in the room anymore, but the people in this room. There needs to be a shortening

of the time between the petition and the election because there is so much time that occurs before the petition.

MR. MISCIMARRA: The one other question I had, and I've referred to more effective measures and used bargaining orders as one possible example, but the Act permits a union to file a petition based on a 30 percent showing of interest, but a union can be certified by the Board only if more than 50 percent of the employees end up expressing support for the union in an election.

Do you agree that that structure means Congress intended that there would be some reasonable period after petition filing for unions among other things, to have the opportunity to get more employee support than maybe had been expressed in the original showing of interest?

MS. BRONFENBRENNER: No union today in their right mind files with less than 60 or 70 percent on cards.

MR. MISCIMARRA: But my question relates to what Congress intended and the structure reflected in the Act.

MS. BRONFENBRENNER: Congress wrote the Act at a different time. At the time they wrote the

Act most unions were organizing through recognition.

MR. MISCIMARRA: Are we circumscribed by what Congress intended and what Congress ending up incorporating into the Act?

MS. BRONFENBRENNER: I think that the legislative history binds you, but you have your regulatory powers to do rule changes. That's what you can do. The law says that you're supposed to try to do everything to promote the right of workers to organize, the individual's right to choose between an employer and a union, and right now workers are not able to make that choice because they are afraid, they are terrified, they have to jump through hoops of fire before they're able to organize, and that was not the intent of the Act. It was not the intent of the Wagner Act or Taft-Hartley that workers literally had to go through trials of fire to choose whether they wanted a union or not.

MR. MISCIMARRA: And if we can address that issue directly, I take it you would support those efforts.

MS. BRONFENBRENNER: Yes. But I think that the way to do it is to not have them have to go through that over and over and over again. That's

shortening the time period. Employer free speech is not at risk. Employers have lots of time to communicate. There is no question that they know when union campaigns are happening, because unions cannot win today unless they are open about their campaigns.

MR. MISCIMARRA: I'll defer to my other members for any other questions.

MR. JOHNSON: I just have two data questions, really simple. You said that in conducting the study you came across instances of time of hiring consultants and time of hiring of lawyers. I assume you must have found that somewhere since you're testifying about it.

Is it anywhere in the 2011 or 2014 comments or somewhere on an online exposition of the study where that was actually measured, when employers hired consultants or when employers hired lawyers when you went through your database?

MS. BRONFENBRENNER: I collected the documents and saw the employer responses, but we researched every company. We would see who signed the documents when they filed an unfair labor practice, so we'd see whether it was a small company or a large company. We had the size of the company.

We went and looked at the size of the parent company, and so we would know when they had filed unfair labor practices we would know -- we looked up the parent company for all the thousand cases.

MR. JOHNSON: Maybe I'm not being clear. I'm just trying to find out in your study if you started collecting data points on time when the employer hired a consultant or time when the employer hired a lawyer related to the campaign, not necessarily the unfair labor practice.

MS. BRONFENBRENNER: We knew in terms of when their first unfair labor practice was committed.

MR. JOHNSON: So the unfair labor practice is basically the proxy that you're using for the employer's running of its campaign.

MS. BRONFENBRENNER: Yes.

MR. PEARCE: Thank you very much. Ms. Hensel.

MS. HENSEL: Good afternoon. Thank you again for having me back today. Again, I appreciate the opportunity. I'm going to try to be brief. I know there has been ad nauseam comments on this topic. There are a couple of things in particular I'd like to address.

First, of course, I support this proposed rule to hold an election as soon as practicable after the filing of a petition because that sort of a rule supports the primary objective of the National Labor Relations Act, which is to protect employee rights to have a free and fair election regarding representation.

My experience is that typically by the time employees, or I should say a sufficient number of employees, have signed authorization cards they've already undertaken multiple attempts to obtain the benefits that they're hoping to achieve through bargaining on their own with the employer. They've approached the employer, and it has had absolutely no effect.

During those interactions one might call that a robust exchange of ideas: "Hey, pay me more money." "No, I'm not going to pay you more money." "Well, maybe I should get somebody to help pay me more money." "Well, no, that's not going to help you, either, and we're not going to pay you more money." A robust exchange of ideas.

During those sessions the employer has more than adequate opportunity to speak with its employees regarding its views. The employer holds

the keys during the unrepresented at-will status to freely and fairly treat their employees and create a satisfied workforce when it chooses to do so. It's when the employer chooses not to do so that the employees will turn to a third-party union. And again, during those sessions it has an ample opportunity to share its views through its conduct -- you can give a raise -- and its communication.

Now, in my experience, in a stipulated election situation 42 days out -- because, trust me, I have never ever had an employer agree voluntarily to hold an election before the 42nd day -- what I typically see, and I don't know if there is some psychological warfare study that employers use for this formula, but the first three weeks of the anti-union campaign tends to be a soft pedal. And what I mean by soft pedaling is they're really trying to feel out their employees. It's not that they don't know what to say. They just don't now who to say it to. So that first three weeks is aimed at figuring out who their targets are.

Then in that last three weeks before the election, that's the big push. They know which ones aren't worth bothering with, and they're going to go

after the weak link and see who they can get to change their mind. I don't think employers need six weeks to do that. They can do that in three weeks.

In conclusion, I would just say the Act does indeed provide employers to have the right to speak freely to their employees within the confines of legal speech. The Act does not provide a minimum time frame to do so, and I don't believe that Congress did intend that there be a minimum time frame, but simply that they have the right to do it. Thank you.

MR. PEARCE: Thank you. Thank you all. Is Ms. Crawford still here? Those in seating five, Mr. Ford, Mr. Hernandez, Mr. Messenger, Ms. Bunn, Mr. Sharma and Mr. Friedman, we have a logistical problem here, and I'd like to accommodate the testimony of Ms. Crawford so that she wouldn't be impacted by thousands of dollars to get back to her place of residence and her job.

I would like seating one of the voter lists to take place now. Ms. Crawford, when you're done you'll be able to exit. If Ms. Crawford, Mr. Velazquez, Mr. Torres, Mr. Meiklejohn and Ms. Davis can come forward now, I'd appreciate it. This testimony will be addressing whether or how the rule

should address voter lists.

Ms. Crawford, you can proceed.

MS. CRAWFORD: Thank you so much. I have been a registered nurse for 26 years and an employee of Universal Health Service, UHS, for 20 years. However, I am here today to share mine and some of my colleagues' point of view regarding the NLRB elections. I am not representing UHS in any way.

Last year RNs at my hospital and its sister hospital moved to organize a union without success. Please allow me to share with you how the current process could be changed to be fair and equitable to all employees.

I strongly support the Board's proposal to require personal phone numbers and e-mail addresses on the voter eligibility list to be shared with the union earlier and electronically. RNs communicate with each other and the union through cell phones, text messages and e-mails. This proposal would not hamper employer free speech interests.

Even before the RNs at our sister hospital filed for an election, the company had begun its aggressive anti-union campaign at my hospital. It communicated with the RNs frequently

every day in person and by sending messages over the internal electronic mail system. The company also sent anti-union text message blasts to the RNs' personal cell phones even though the system they used had previously been restricted to managing our work schedules.

In my experience last year, we had a difficult time getting accurate unit information to the RNs at my facility because of the lack of contact information that is provided. Where the employer had access to a myriad of methods to contact nurses, we lacked reliable contact information with which to inform the nurses of their options. We did our best to contact the nurses, but we were limited to outdated forms of communication.

We held multiple informational meetings off campus, but it was difficult to get RNs to attend another meeting. Most RNs work twelve hours, twelve hour shifts, and have families at home. They do not have the time or energy to travel to attend an informational meeting. Their families are their first priority. If we would have had access to their contact information we would have been able to provide accurate information in a manner that was convenient for them and their families.

As it is now, the process doesn't work. It needs to be changed to make it fair for every employee. This proposal merely gives the petition for a union a chance to respond to the employer's arguments and criticisms before the election occurs, and this in no way would limit the employer's free speech rights, as they can continue to speak with employees on paid time on every shift leading up to the election in person, by our work e-mail accounts, by having to attend mandatory meetings, and by text message on our personal cell phones during off work hours.

Therefore, employees don't get all the necessary information from the union to make an informed decision. Employees deserve to have access to all the information, not just the one-sided information that is being forced on us on a regular basis. The proposal would help to level the playing field. Thank you for allowing me the opportunity to talk about this important issue.

MS. SCHIFFER: Thank you so much. I appreciate your coming forward to talk to us. I think it's important to get views from workers. I have a question. During the campaign without e-mail or text or phone information, what were the forms of

communication, and you mentioned some of them, for the union to try to respond to the text blasts or the e-mails that were coming from the employer? What was the union's form of response to text blasts and e-mails that were coming from the employer?

MS. CRAWFORD: The union didn't have any response to that. As the employees, we were a little shocked to get a text message on our personal cell phone. Again, like I said, that was normally just used to tell us when you're were working and when to come in, so when we got that we were like "Whoa, what is that."

But the only way we could get information out to the employees is by going to their home. All we had is an address. If we would have had personal phone numbers or e-mail addresses we could have sent the information to them, and they could contact us or we could arrange a contact. Otherwise, we had to show up -- and it's very difficult when you have a 24 hour work period.

Nurses that work a twelve hour work shift, if you show up at their house at ten o'clock in the morning, they're not going to be very friendly because it would be like showing up at your house at ten o'clock at night. It's hard to know

what shift they work because that information is not available, either, on the list. Their address and name, that's all there is. It seems that it would be more fair to all the employees to have some personal information so that we can contact them and give them the opportunity to get information.

MR. PEARCE: Do you think having their e-mail addresses and cell phone numbers would be an invasion on an employee's privacy?

MS. CRAWFORD: No, I don't. Personally, I would feel that it's less intrusive than having an address. I think when you show up to somebody's house, they're kind of forced in a way to respond, but if you receive an e-mail you can easily delete it if you're not interested. And the same with a phone call. I screen my phone calls all the time whether I want to answer it or not. It's easier to disregard those if you choose to, but it's also easier, if you are interested, to answer the phone and set up an appointment that, "Yes, I would like this information."

MR. JOHNSON: Do you think an employee should have any right not to express a wish, saying, "I don't want that information turned over," if it's their personal information?

MS. CRAWFORD: Again, my personal opinion is that if the employer has that information, I think the organizing committee and the union should have that information, too. But I do think they have a right if they say, "Please do not call me again," that you should respect that right. But the same with the employer sending messages to my phone? I didn't give them permission to do that. I gave them permission to give me my schedule, but I did not give them permission to send other forms of text messages.

MR. JOHNSON: But for those employers, for example, that don't require as a condition of employment personal e-mail information, they just happen to have it, do you think that should be turned over without the employees having any opportunity or say in the matter?

MS. CRAWFORD: Yes, I do. I'd find that fair.

MR. PEARCE: Thank you so much. You don't have to stay. Ms. Dunn.

MS. DUNN: Good afternoon. My name is Katy Dunn, and I'm associate general counsel for Local 32BJ, which is a property services local up and down the East Coast. As part of my job at 32BJ

I research and give advice on social media issues and have also spoken on these issues at various conferences.

As SEIU explained in its written remarks, we were wholly supportive of the Board's modest contact information the types of employee contact information that employers are obligated to provide via the Excelsior list. In fact, we've recommended that the Board expand eligibility list information to ensure that it has the flexibility to adopt to technological changes over time.

As my time is short, I'd like to limit my remarks this afternoon to why it's unnecessary for the Board to restrict the use of the eligibility list to purposes related to the representation proceeding and related Board proceedings or to require the use of third-party platforms or masked e-mails.

These measures are unnecessary because unions already comply with a comprehensive federal scheme that sets forth numerous compliance requirements and penalties. The CAN-SPAM Act was passed in 2003 to craft a nationwide remedy for unwanted and deceptive e-mail. CAN-SPAM bars senders of e-mail from sending material misleading

or false information and sets forth penalties for misuse. In addition, commercial e-mails must include features such as opt-outs and accurate subject line headings.

Similarly, the Telephone Consumer Protection Act of the TCPA regulates unsolicited calls and texts to residential or cellular telephone lines via autodialers. It sets forth consumer protection such as opt-outs and carries steep penalties for violations of the Act. Finally, there are also industry groups such as the CTIA and the MMA that issue additional recommendations. There are already many cooks in this technological kitchen.

While the primary purpose of these regulations is to protect consumers in commercial relationships, they've created a best practices atmosphere in both the commercial and the non-profit world. Individuals have been conditioned to expect certain functionalities in their e-mails such as the ability to unsubscribe from receiving future communications.

Because of this, even though they're not required to do so, many unions who regularly communicate with their members by text and e-mail

have text and e-mail messaging programs that comply with the highest commercial standards. This ensures that members continue to elect to receive union communications and that they view our electronic messaging in a positive light. Employers are no different than unions in this respect, and many set up programs to communicate electronically with clients and consumers.

It is worth noting that despite the privacy concerns that various employer groups have voiced in their comments, many employers reserve the right to share e-mail addresses with third parties. I checked the website terms of use for many of the employer groups that have appeared before you as part of your rulemaking, and several of them, including the Chamber of Commerce, the American Hospital Association and the National Federation of Independent Business, all reserve the right to share e-mail addresses with third parties.

Because of the regulatory scheme that I just outlined, these employer practices like the Board's proposal are not a big deal. E-mail addresses have become the equivalent of postal addresses in the brick and mortar world. They are quite literally where people receive their mail on

line. Workers know how to respond to unwanted e-mail, whether it's by blocking the sender or marking the e-mail spam, just as they learn how to cope with unwanted bulk mail. Adding an additional layer of Board regulation to the present scheme is thus unnecessary and could have the unintended effect of complicating union compliance with existing regulations.

Finally, I would like to briefly respond to the wild speculation that unions may purposefully infect employer computers with viruses during an election campaign. The Computer Fraud and Abuse Act expressly prohibits attempting to access another's computer with the malicious intent to cause damage. Thus, not only is there no logical incentive for unions to participate in this type of behavior, it is already prohibited by law. E-mail and telephone communication is not new. Additional regulation by the NLRB is unnecessary and will not further the goals of an informed electorate and a decrease in litigation. Thank you.

MR. JOHNSON: Just a couple of follow-ups. So a few things here. One, let's just assume from the perspective of union speech quasi-political it shouldn't be subjected to kind of

commercial type regulation on the one hand. But let's also assume that there is some concern over employees' personal e-mail information because it is qualitatively different because it does not require physical space like a house where anyone can walk by and see where the house is.

Is your position on the opt-out matter such that if employees were regulated or unions were regulated by the Board to require an unsubscribed feature, even though you say that's a best practice already, that that would address concern over the opt-out because it would lessen the intrusion?

MS. DUNN: I think it's unnecessary for the Board to make such a prescription to require things such as an unsubscribe, one, because I think unions have no interest in continuing to contact people who don't want the union to contact them. And I think that, to the extent that the Board gets into technical regulations of contemporary technologies, you're going to run into trouble in the future just because technologies change so rapidly.

If there was, for example, some sort of misuse of the list by a union hypothetically, the Board would have the power in an election, in a

case, to respond and craft an appropriate remedy without prospectively saying what unions, or employers for that matter, need to include in their e-mail communications.

MR. JOHNSON: But I guess the concern is that some commenters have expressed, at least expressed a bit in the dissent, that if you're not going to have an opt-in on the front end before the information goes over to the union, why wouldn't you at least have it on the back end if this is somebody's personal e-mail address.

MS. DUNN: Is the proposal, though, that if it was required for unions to have some type of opt-out that employers would also be required to have a similar opt-out so that employees could tell their employers that they would choose to no longer receive any type of communications from their employer?

MR. JOHNSON: Well, I don't think we can regulate complete symmetry in the terms and conditions of employment and private employers. In essence, a lot of these employers and employees have consented to turn that information over, and maybe in some cases they haven't. What I'm trying to just feel out is your position on whether an opt-out on

the back end is something that we should end up regulating, or do you basically think unions should be left to their own devices with this information when they have it.

MS. DUNN: I think that it's unnecessary, one, because of the best practices that I described, and also just because employees are able to essentially do this on their own, whether it's by marking the e-mails from the union as spam or otherwise blocking the communications from the union, so it's simply unnecessary for the Board to get into that type of regulation.

MR. JOHNSON: Thank you.

MR. PEARCE: Thank you very much. Mr. Torres.

MR. TORRES: There has been a lot written about the privacy concerns and those issues, and so I won't dwell on those. I just wanted to note, from a more practical perspective, I think within the next five to ten years requiring the disclosure of e-mail addresses, personal or business, will have as much effect on expanding employees' access as requiring Excelsior lists to be provided on floppy disks. The rapid pace of technological change in personal communication habits would show us that any

purported benefit to be gained by imposing this requirement is far outweighed by the burdens imposed upon employer property rights and employee privacy.

The notice of proposed rulemaking notes that there are a few examples of employers who used its property to communicate during a campaign. As Member Johnson noted a moment ago, not all employers elect to invade the province of their employees' workspace in such a fashion. So it's certainly not a foregone conclusion that it's sort of the Wild West in terms of communications on non-business related matters.

It's not even clear, and there is no evidence that I've seen here, as to how many employees actually possess work e-mails. We're talking about broad ranges of individuals in the service industry and the manufacturing and construction industries, so I'm not even sure that that there is any indication that there would be any marked benefit by making such a requirement to the extent we're talking of business e-mails.

And third, as I said, employers are migrating to communication systems that discard e-mail and look at text messaging and unified communications that integrate with business

information, so I think there are serious questions about whether the Board should be invading the employer's property rights in such a significant fashion given the numerous other alternatives that unions possess in order to reach out and communicate with employees.

On the personal e-mail front, the generation that will be most affected by the regulations that you are considering are stopping to use e-mails in increasing numbers. They are using social media platforms, Tumblr, Instagram, Facebook. I suspect that the communication standards that will be most utilized five to ten years from now don't even exist.

And I think that that doesn't mean that we sort of broaden this obligation. We just understand and realize that unions have a myriad of avenues by which they can make outreach to employees that don't require us to be burdening employers' property rights or employees' privacy rights by disclosing personal e-mail addresses or Instagram accounts or text messaging accounts.

There are countless examples that you can find out there of individuals, political parties and other groups employing inexpensive and sometimes

free social media platforms to target and reach very specific audiences. We just heard from Professor Bronfenbrenner, saying that no union in its right mind would even file a petition unless they had 60 or 70 percent of the employees signed up on authorization cards. So I question, given those statistics that presumably the professor has researched, that there is any incremental benefit to be gained here by providing access to this type of information.

There was a recent article that I found about workers in China who organized themselves without a labor union by using social media and cheap smartphones. I think the need for this type of additional requirement needs to take into consideration the fact that there are technological advances out there that will continue to evolve that provide direct access to these employees in a manner that allows the employee to evaluate whether it wants to engage in the conversation that is being offered. It doesn't have to be faced with an e-mail in its inbox any more than it has to be faced with someone standing at their front door or any more than it has to be faced with someone ringing their phone. I would suggest that this proposal doesn't

serve any material benefit to the process.

MR. PEARCE: But isn't that the point? Aren't you making the point? Right now the Excelsior list is the law, there is an obligation to provide a name and address, and knocking on the employee's door unannounced, there are arguments that say that that's an intrusion on privacy. That's the law.

MR. TORRES: That's a fair point. But I could take that same Excelsior list, Google those employees, find their Facebook pages and send an invitation and ask that employee to accept my invitation to have a conversation. I can send an invitation to their LinkedIn account and ask them to have a conversation. I think that's the point. You can take the names of these individuals and, through technology, outreach them without having to provide their personal e-mail addresses. I don't think that there is any requirement that that is a necessary step in conducting any of these electronic outreach efforts.

MR. PEARCE: Do you think that the employer has a more proprietary interest in having possession of that information than the union would?

MR. TORRES: To the extent that you're

talking about an employer's work e-mail address, I do think they have a greater proprietary interest. As to their personal e-mails, I think it's a question of the terms and conditions under which it was provided.

I understand the concern of the woman who was here a moment ago about the employer using their information to text information. Well, I think the question there is was it provided to them in the circumstance where they understood it would be used for a more limited purpose. If it wasn't, then I agree with you that there may be some questions as to what the scope of the proprietary right really is.

MR. JOHNSON: A quick question. I think your point about looking at the whole universe of alternative channels makes sense. But one of the comments, and I think it was by SEIU, in fact noted that, for example, you're going to find Harry Johnson on Facebook or whatever. And that's not me, by the way. I don't have a Facebook account.

(Laughter.)

MR. JOHNSON: Basically, you might be looking at 300 or 400 people, so what utility is that going to be if the union doesn't actually get

the social media ID?

MR. TORRES: Actually, I think that that's an overstatement of the difficulty. I think if you can throw in someone's name and their city you can locate -- I realize there may be the Sam Joneses and the Harry Johnsons out there, but there certainly are innumerable individuals whose personal identification information is --

MR. PEARCE: And the Joseph Torreses out there, too.

MR. TORRES: Well, don't go to Mexico because you'll never find me.

(Laughter.)

MS. SCHIFFER: I don't think you could find any of those things for me.

(Laughter.)

MS. SCHIFFER: But do you think, then, that if the union's opportunity to inform employees, which seems to be the word for today, was to ask the employee if they wanted to be so contacted that the employer should have a similar sort of opt-in? In other words, if the employer was having a meeting, if the employer was sending an e-mail, sending a text message, giving a piece of literature that the employer could turn all of that down and say, "I

don't want any of that anymore."

MR. TORRES: Well, again, as I think Member Johnson said, we're not talking about an equilibrium of standards here. That's the differential here, I think.

MR. PEARCE: Thank you. Mr. Meiklejohn.

MR. MEIKLEJOHN: Well, at least I think I have a name that, if I had a Facebook account, it would be easy to find.

I'm going to start by talking about a case I had a few years ago where an Excelsior list, in accordance with the current standards, was provided to the union, and it was replete with incorrect addresses. And it was filled with incorrect addresses not because the employer was trying to hide anything or make the campaign more difficult for the union. It was because the employer didn't bother to keep them up to date because the employer didn't use the addresses to communicate with the employees.

When Excelsior Underwear was decided, before all of our times, addresses in the mail and personal visits were the vehicles for visiting and communicating with employees. As Mr. Torres has recognized or advocated, communication methods have

changed, they're changing rapidly, and he certainly points out that in the future there may be a need to update this rule further. But today, in 2014, e-mail addresses in particular are one of the principal means by which people communicate.

I don't believe anybody has identified any reasons that vehicle shouldn't be available to unions on an equal basis, and that, if the employer has that information, why they shouldn't have to share it so that both sides can communicate. It is not an invasion of the employer's property on the order of the union having an opportunity to speak to the employees in the plant. If we're trying to have an equal system, it seems like that would certainly be the place to start, having both sides having the opportunity to have face-to-face communications at work.

We're talking about a method that does not involve a significant invasion of the employer's property and certainly has less danger of invading the employee's privacy compared to home addresses. If I get an e-mail that I don't like, and I think this point has been made many times, but it's much easier to deal with that than somebody who's on my doorstep. I don't even believe there have been any

real significant accusations that unions have used home addresses for any purposes other than to campaign. And I don't believe that any need has been demonstrated in 2013 to add a regulation that would restrict union -- 2014. I lost a year there, didn't I?

MR. JOHNSON: It's a bit of a reboot.

MR. MEIKLEJOHN: There is no reason to impose a restriction on the use of the Excelsior information just because it's going to include e-mails or telephone numbers where there's no history of this kind of misuse. And as has been pointed out, the Board is really not in a position to enforce -- I think you understand that I'm talking about the last sentence of the rule that would limit it to purposes related to the representation case and related purposes. There has been no demonstration of a need for that. There's no reason to believe that unions are going to misuse the information.

I have one example of a case that's going on right now that illustrates the problems that would be confronted in implementing that regulation. About five or six months ago a union lost an election. One of my clients lost the election by a

tie vote. The union has obviously an interest in staying in touch with the employees, in the expectation that the employer won't keep its promises perhaps, but they have an interest in staying in touch. The employer appears to have embarked on a campaign of weeding out the employees who identified themselves as union advocates. We filed charges over the discharge of the person who served as the observer in the election, and we needed to contact witnesses to support certain aspects of his story.

Now, would it be a violation of this regulation if we were to use the Excelsior list from six months ago, assuming the new regulation was in place of course, but if we were to use that Excelsior list from six months ago to contact witnesses and to try to convince them to give an affidavit to the Board? I think you're creating many potential areas of dispute, fine distinctions where you have no real method to enforce it and where there is no real problem.

MR. MISCIMARRA: Mr. Meiklejohn, just one quick question. If you were in your position, do you think work e-mail addresses and personal e-mail addresses are the same? Is one more important than

the other? Work e-mail addresses give rise to the treatment of company information technology, resources policies and other kinds of surveillance type issues potentially. What are your thoughts about that?

MR. MEIKLEJOHN: I'll put myself in my own position. If both are available, I would advise my clients to use personal e-mail addresses to communicate with the employees and not to communicate through the employer e-mail addresses for the reasons that you've just identified.

The reason why I think both are needed is two-fold. One is because in many cases the employer may not have personal e-mail addresses. And the other is that there may be circumstances in which there are employees who set up personal e-mail addresses but that are not in the habit of regularly consulting their personal e-mail addresses. That would be also. I read my work e-mail much more regularly than I do my personal e-mail.

MR. JOHNSON: Should we change the rule basically for the Excelsior list, where it's personal e-mails that sometimes the employer has no occasion to see whether they're accurate or not?

For example, if the Excelsior list is

inaccurate, we have certain standards when it's basically the home addresses. Should that be a more lenient standard if it's personal e-mail addresses because those typically can sit uncorrected for years with an employer?

MR. MEIKLEJOHN: I don't recall the exact standards, but my recollection is that the list has to be pretty bad before it will result in overturning the election unless there is some indication that it was deliberate. It's in my testimony from two and a half years ago what the percentages were in that case that I referred to. I think there were more than 10 percent of the addresses that were bad, and it didn't result in overturning the election because it wasn't deliberate.

I don't remember exactly what the standards are, but I don't think that's something that can be addressed in the rules. When the objections are filed there would be a need to look at the issue on a case-by-case basis with regard to if the information is inaccurate enough to warrant setting aside the election or not. I think it would be one situation if the address was right and the phone number was right but some of the e-mail

addresses were wrong. It's a different situation if all of the information is inaccurate. I don't have a client that I can refer to you folks, fortunately, but I haven't figured out exactly what those standards should be.

MR. JOHNSON: We have to move on.

MR. PEARCE: Thank you. Ms. Davis.

MS. DAVIS: Good afternoon, Chairman Pearce and Members Hirozawa, Miscimarra, Schiffer and Johnson. Once again, thank you for allowing me to appear before you and to speak on these most important issues. My name is Doreen Davis. As you heard yesterday, I'm a partner at Jones Day, and I'm here representing the Retail Industry Leaders Association, and I'm accompanied today, as I was yesterday, by Kelly Kolb from RILA.

I want to first address my supposition, which is that, contrary to what some of the other speakers have said, I believe that requiring e-mail addresses and phone numbers is in fact a bigger invasion of privacy than requiring the provision of home addresses. The reason is that if you get a visitor at your home who's unwanted you don't have to open the door, or you can shut the door in that person's face and you can be done. You don't have

to speak to that person at all. You don't have to deal with any message coming from that person. An e-mail address, if someone has your e-mail address, you can't turn off your inbox. You do have the ability, of course, to mark something as spam or to block a particular sender. But in today's world that these e-mail addresses are given, they're being provided to the union member to also be provided to the union organizing committee, and e-mails can be sent incoming to employees from many different addresses. You could have a different person sending an e-mail every day so that you couldn't effectively block the e-mails coming into your inbox.

Similarly with your cell phone. I don't know about you, but I'm getting more and more spam type phone calls on my cell phone, and even though you try to block one number, a different number comes up, and you can't look them. So you don't really have the ability, either in your e-mail inbox or your cell phone, to just say no very easily like you do at your home, where you can shut your door.

With regard to the restriction on the use of the Excelsior list, I think that that would be a good start. I have personal experience in the last

two years, a case in the New Orleans region. It was a decertification election, and I talked about this in the comments, where the petitioner for the decert election was sent pornography to his home address repeatedly by the union. It was actually substantiated in the e-mail among the union organizers that they were going to do this to this guy because he filed a petition. Of course we got the election set aside, we got a re-run, but if that can happen now under the rules, I think, at a minimum, at a minimum, if the Board's going to consider requiring employees to turn over e-mail addresses and phone numbers, they have to allow the employers to seek the consent of the employee before that information is turned over.

And I'd suggest to you that with the two day time limit of having to turn around the Excelsior list, practically I don't know how that would work. I don't think there's enough time in the two days to go out to employees and get their express content to turn over that information, so I think you'd have to look at that time period as well.

Data breach issues are of extreme importance to my clients in the retail industry.

You've read too much about that. That is a particular concern of theirs in the event that they would be required to turn over personal e-mail addresses that they have of any employees. I don't know about all of you, but I you use my personal e-mail address for banking, for too much online shopping according to my husband, and for many other personal reasons I use my personal e-mail address. Turning those over makes it very susceptible to someone with an evil motive, and certainly not all union campaigns or union organizers have evil motives, but it could very easily lead to a breach of an employee's personal data.

And in the situation where the employer does not have personal e-mail addresses but does have company e-mail addresses, by requiring the employer to turn over the company e-mail addresses you are of course automatically requiring that the employer give access to the union to their e-mail system, which of course under current law is not the state of the law. It could be changed in the future, but as of right now employers are not required to allow union access to their company e-mail systems, but under this proposed rule that's the upshot of what would happen.

And then I just have an additional concern about the shift and location being required on the Excelsior list. Again, this is particular to retail employers. Employees often get a change in shift or change in department on the retail selling floor. One day they could be in one place, another day they could be in another. They could be covering more than one area, and they could also be changing shifts. What's going to happen is at what point, if the employer does not constantly update that list with the change in the shift or the department, does it put them at risk for having the election being overturned because the Excelsior list is not accurate? I think that's a practical problem, at least in the retail industry, with the requirement of the shift and the location. Thank you.

MR. MISCIMARRA: I just have one question. In the retail industry, if there are questions regarding the scope of unit, are there instances -- and I don't know -- where people may actually be in the unit on Sundays and outside of the unit on other days because of position interchange?

MS. DAVIS: Absolutely. It happens

frequently in retail.

MR. PEARCE: Well, that wasn't exactly a voter-less question, but thanks for your answer. I want to revert back to the fifth seating on the election date, so I've asked Mr. Ford, Mr. Hernandez, Mr. Messenger, Ms. Bunn, Mr. Sharma and Mr. Friedman to take your places. I appreciate your indulgence. Mr. Ford, you may proceed.

MR. FORD: Thank you, Mr. Chairman. Martin Hernandez will speak first.

MR. HERNANDEZ: Thanks for the opportunity to speak again in support of the Board's proposal.

MR. PEARCE: Mr. Hernandez, can you bring your mic a little closer?

MR. HERNANDEZ: Sure. As a union organizer, my point of view is that the Board should schedule elections as soon as possible. I would like to see elections held ten days after the petition is filed. I believe that most workers, no matter where they stand about the union, they also want the election as soon as possible.

It normally takes about 42 to 45 days to get an election if we sign a stipulated election agreement and longer if we have a pre-election

hearing. 42 days is way too long. Most workers get very stressed out before an election. In my experience, the main reason for this is that many companies bombard their workers with scary anti-union propaganda about what might happen if the union wins.

For example, in one recent campaign the company set up monitors in the workers' break rooms and in other areas where workers congregate. For a week and a half before the election the company continuously broadcast anti-union videos. The videos were negative and included misleading information. Several workers I talked to about the videos, they were so disturbed about what they saw and heard on those videos that they were crying.

Workers should not go through this painful process in a campaign day after day. We recognize that the rule requiring elections within ten days or even as soon as possible might not work in every case, so Local 99 and I support the Board's proposal to hold elections as soon as practicable. But the language should be explained that specifically the rule should require elections between 15 days after the petitioner receives the Excelsior list unless the parties agree to a later

date. Although petitioners can waive the right to have the list for at least ten days, I am not aware of Local 99 ever doing that.

Regional directors should not be allowed to schedule an election any later. If an election can be held on the employer's premises between the 15 days after the petitioner gives an Excelsior list, the regional director should direct a timely mail ballot or outside election. There should be no minimum time period between the petition and election. Employers can inform worker of their anti-union views whenever they want. Most companies, they start campaigning once they learn of union organizing activity, and that's usually long before the petition is filed.

Just to give you another example, a few years ago Local 99 had an organizing campaign at the company. By the way, this was a small employer with less than 100 employees. In our initial meeting with the workers, and this happened on a Friday evening, as I recall, by the next Tuesday the company, they had already brought in a union busting consultant and they were calling the workers into captive audience meetings. The company's strong anti-union campaign scared the workers and caused

Local 99 to suspend its campaign without even filing a petition. The employers, they already have enough time to do their campaign. They don't need any additional time. Thank you.

MR. FORD: Thanks again for the opportunity to speak. I'm going to make three brief points. A lot of this has already been said in other ways.

First, I wanted to reiterate that employers already can express their anti-union views to workers before there is an organizing campaign, and some employers actually do that. Walmart and Target are two examples of companies that show anti-union videos to workers during orientations.

Secondly, most other employers start campaigning as soon as they learn of an organizing campaign, but even those organizers who wait to campaign until the critical period would have ample opportunity to campaign if the Board's proposals are adopted. If you count out the dates, there's going to be at least seven days until the hearing. There is going to be at least one day before a DD&E is issued, another two days before the Excelsior list is due, and then there's the ten days that the petitioner can have the Excelsior list. That's 20

days. And of course it can be longer. There can be special circumstance that would postpone the hearing. DD&Es often take more than one day to issue, and so forth.

And finally, as Member Johnson alluded to, 8(c) doesn't strictly apply in our cases. Of course, the First Amendment does need to be considered, but there is nothing in either 8(c) or the First Amendment that gives any party the right to speak for any particular length of time. And finally, the proposed rule, and I think it's obvious but it should be stated, doesn't regulate campaign speech in any way. Thank you.

MS. SCHIFFER: I just have a question for Mr. Hernandez. Thank you for coming to talk to us. In your experience with workers involved in organizing, do you get the sense that they do not have enough information to decide whether or not they want to be represented by a union?

MR. HERNANDEZ: No, ma'am. Employees already have the information. It's very unfortunate that I have to say to workers that the only thing they wanted to do is to improve their working conditions. I have to tell them that once we file the petition the next 40 to 45 days are going to be

the longest days and the most painful days of their lives. That's a shame that we have to say that to the workers.

MR. JOHNSON: Two quick things. One, thank you for keeping your 2014 comments very tight in terms of non-duplication. And, two, it sounded like 20 days was around sort of the minimum bracket between petition and election, and it sounds like you have the position that 42 days is too long. Do you all have a position on what that should be if there was a minimum/maximum?

MR. FORD: Well, we don't really think there should be a minimum/maximum. We do think that, even under the proposed rules in the most extreme situation, there would be ample time for the parties to get their views out. In most instances, that period of time during the critical period is going to be three weeks or more, which isn't all that different than the current situation.

MR. JOHNSON: Would it be fair to say that you don't think 21 days poses any problems for an employer getting its message out?

MR. FORD: No, I don't.

MR. PEARCE: Thank you. Mr. Messenger.

MR. MESSENGER: Mr. Chairman, Board

members, thank you for the opportunity to speak today. I'm here on behalf of the National Right to Work Legal Defense Foundation. Since 1968 we've been providing free legal aid and information to employees who oppose compulsory unionism.

Today, to avoid repeating points that have already been made and also in the interest of brevity, I just want to make one comment about the proposed rule and the problem it will cause if the election time spans are shortened and that will impair the ability of individual employees to campaign against a union and get their message out to their co-workers.

Now, much has already been said about the effect that shortening the election will have on the ability of an employer to get its message out and to communicate with employees before votes are cast, but the effect on individual employees who have Section 7 rights will be much worse.

In my experience, in most organizing campaigns there is usually one or more employees who don't want to just be passive against the union but who actually want to speak out against it. The problem is that at the beginning usually these employees are very unsure of their options, unsure

of their legal rights and often disorganized.
After all, this isn't what they do for a living, unlike a paid union organizer or even a management consultant. This is all foreign to them, so it takes a long time for these employees to educate themselves about their rights or options, decide if they want to campaign against the union, and then actually figure out how to do it. Shortening the time frame will impair the ability of these employees to organize themselves and to get out their message, and, therefore, impair their Section 7 rights to engage in concerted activities with like-minded employees and to speak in opposition to unionization, which is the right under the act.
And so for this reason and for the other reasons stated in the written comments, the Foundation opposes the proposed rule.
MR. PEARCE: Is it your experience that employees who want to campaign against the union consult with the employer about that?
MR. MESSENGER: It depends. Often if the employer has some sort of advice, usually they'll so no. If an employee goes to their supervisor and says, "Hey, the union is here, what can I do," most

supervisors who are coached by their employer will say, "Sorry, I can't help you, I can't tell you this," or they read from a particular script. So most of these employees have really nowhere to go other than organizations like the Foundation to really get unadulterated information about what their options are and what their rights are.
MR. PEARCE: Isn't that script usually one that includes, "Call the National Labor Relations Board."
MR. MESSENGER: It may be. I don't know the script offhand. I don't represent employers. But oftentimes you get employees who call up saying, "We can't find information anywhere else," and that's one of the reasons often they call us or send e-mails.
MR. PEARCE: Do you tell them to call the National Labor Relations Board?
MR. MESSENGER: No. I generally inform them of their rights, what they can do, their legal options, what can be objectionable activity, what can't be, things to that effect.
MS. SCHIFFER: Do you think it would help, in connection with that, if when the petition is filed the employers are required to post a notice

to employees that tells them what's going to happen and describes the election process and also tells them how to contact the National Labor Relations Board?
MR. MESSENGER: Well, there already is a poster put up of course announcing the fact that there will be an election.
MS. SCHIFFER: I'm sorry, but I mean right at the time that the petition is filed, not right before the election is conducted.
MR. MESSENGER: At the time the petition is filed there is usually a notice posted saying a petition has been filed, this is occurring. I mean, informing employees that a petition has been filed and that there will probably be an election of course will be useful. And some employees may contact the NLRB. I obviously don't have knowledge of the employees who don't contact us and just contact the NLRB, so your agency would probably know better than I would about how many help inquiries you all get.
MR. JOHNSON: Really quickly, based on your experience in dealing with employees who eventually get to you, how long does it take your average or median employee from the point in time

where they decide they may not be in favor of the unionization of their workplace to make it to you?
MR. MESSENGER: It really varies, and it varies in particular upon how out in the open the post-election activity was. For example, in an organizing agreement situation, usually employees know pretty quickly the union is here, they're in the workplace, they're knocking on their doors. Sometimes of course campaigns are more stealthy, and employees don't really know that there is going to be a unionization drive until the election petition is filed.
How long does it take individual employees to get themselves together, so to speak, if that's what they choose to do? Again, it really varies, but it usually takes a few weeks, because, again, they have day jobs and families and everything else. This is something they do on the side, and the whole concept is foreign to them, and so bringing them up to speed on what they can and can't do and then for them to decide to exercise their rights can take a few weeks.
MR. PEARCE: Thank you very much. Ms. Bunn.
MS. BUNN: Good afternoon. I just want

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to say that my experience in the aggregate mirrors the results of the research conducted by Dr. Bronfenbrenner in terms of the timing of employer knowledge and the compelling testimony of workers and their representatives in terms of workers' experience during organizing campaigns. I.

I have nothing additional to add, but would be happy to answer specific questions. We support the proposed rule.

MR. SHARMA: And I'd also just like to make a couple of really quick points that are, I guess, in addition to what has already been said repeatedly this morning and afternoon, which is just simply the idea that employer rights are somehow impinged by a potential condensing of the election period. Again, that's sort of premised on this idea that employers don't know about the campaign until the petition is filed. And as Professor Bronfenbrenner and a number of other people pointed out, that simply doesn't seem to hold up in reality.

In addition to that, in that survey that I had mentioned yesterday, of the attorneys who responded reported that they counseled at some point on an organizing drive where the employer knew of the drive prior to the filing of the petition, 78

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report counseling on drives where the employer began its anti-union campaign prior to the filing of the petition.

And if you're looking for more examples, you should just look at your own case law. One of the most recent published decisions you issued was Lucky Cab, which you issued at the end of February, a decision that was fairly unremarkable, no offense --

MR. JOHNSON: We've already been told that what we're doing is very easy, so you don't have to repeat that.

MS. SCHIFFER: And I would say that I was not on that panel.

MR. SHARMA: That's why it was so unremarkable.

(Laughter.)

MR. SHARMA: If you look at the facts, the union filed a petition on March 30th but informed the employer of its organizing activity on February 25th. And the Board found that the employer knew of the organizing drive for months prior to that because employees solicited cards openly in front of supervisors in that case. And I'm sure if you went through your cases you would

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find many, many similar examples.

MR. JOHNSON: Right. But just to follow up, and I think I may have been on that panel, or maybe not, because at this point it's all a blur, but --

MR. PEARCE: You're remarkable.

(Laughter.)

MR. JOHNSON: At the end of the day what should we be regulating to address? I mean, that kind of surfaces the question. Let's say that we all have varying views on what percentage of the time employers have advance knowledge. I would gladly agree with you that it's well north of zero percent of the time. But are we agreeing that we are going to basically regulate the entire community, assuming everyone has foreknowledge, when even your own survey says that 22 percent of folks don't have knowledge?

MR. SHARMA: I would say that in no way are these rules regulating speech. They don't address the content of speech in any way, and, on top of that, they don't address the ability of employers to speak at any time prior to the day the election is held other than the ways that the Board has said that they're limited.

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People have testified about examples where employers begin their speech from the day the employee is hired. Nothing prevents the employer from beginning its anti-union campaign at any time, and therefore I would say that in no way are these rules regulating speech.

MR. JOHNSON: But just to be intellectually clear here, the idea that an employer is going to put in its handbook, for example, some language to the effect of, "We don't want a third party here, we don't like unions," or whatever the case may be, that's not a campaign in the sense of here are seven or eight different campaign issues about higher wages, better health benefits, what happened at other plants, things like that.

And so I think what we're trying to grapple with here is not shutting down that discussion getting joined on specific issues that actually happen in a campaign, because I think you and I both know that campaigns are more sophisticated than simply, "A union would be a great idea for you," and that's the end of the conversation.

And so I'm wondering if the AFL-CIO has ever done any studies on basically what stages a

campaign goes through, what kind of communications go back and forth, and how long does that process take. Do you have anything like that?

MS. BUNN: If I may just say a couple things in response. First of all, there has been several references during the day to the union as the third party, and what a union is is a group of workers who want to collect a voice.

MR. JOHNSON: Right. And you're the exclusive bargaining representative representing the workers.

MS. BUNN: And I think there have been a number of comments here when you have asked to workers about the union this and the union that, their response is that the organizing committee, you know, we talk to our co-workers. I think it is important to make that distinction.

But the issue of the timing, which is what I think you raised, we both addressed that, and several other people have, because the employer community has suggested that the first time it has knowledge that its workers are organizing and want to collect a voice is when the petition is filed. Those comments really were to address that, as a factual matter, that's really untrue.

But more broadly, I think the point is that employers communicate with their employees all the time, all day and every day, and they have complete control over that communication.

MR. JOHNSON: But is that the relevant question in terms of just simply having the right or the power to discuss or communicate generally versus the actual free-wheeling robust debate on a specific set of campaign issues? That's what I'm struggling with. Do you have any research on that?

MS. BUNN: The only research I have was from an employer lawyer who said, "First week, third party; second week, dues; third week, strikes; fourth week, please give us another chance." And that came from an employer lawyer.

MR. JOHNSON: But was that right after the petition was filed?

MS. BUNN: No. He was saying that that's handbook the persuaders use.

MR. JOHNSON: So they put all that in their employee handbook?

MS. BUNN: No. But on a more serious note, the answer is yes. I would say two things. First of all, yes, in answer to your specific question, all of that time that the employer has to

communicate has to be part of the discussion of whether there is the right to free speech. And secondly, you know, I understand, I really do understand the Supreme Court's rulings about robust and free speech. As a legal matter I understand that, but as a practical matter workers in the workplace don't have that robust debate. They have one side from the employer day in, day out.

You know, one case that I was going to raise but in the interest of time didn't, there was a campaign very recently, three weeks, 25 days, eight employees, 30 as an individual captive audience in three weeks. They actually wrote a petition saying, "Please stop, we understand your point of view, we've heard your point of view, we have plenty of information, we're grownups, we can make a decision," and nonetheless the captive audience meetings continued. So there is just ample opportunity all day, every day.

MR. JOHNSON: Right. And I think campaign fatigue could be an indicator of that. Did you ask any questions in the survey about the campaign fatigue question?

MR. SHARMA: No. Honestly, that's a concept conceptualized, I guess, to me afterward.

MR. PEARCE: Now, there are several of us here that would have differing views relative to whether or not a union-free workplace publication and employer's handbook constitutes campaigning.

My question is one that I've asked before, and that is: These conversations have been focused on time. Is the opportunity for communication to the employees impacted by technology, and should we be sensitive to technology when we're talking about opportunity and time in terms of communication to the employees?

MS. BUNN: I would say yes, as several other people have said also. Increasingly, we're seeing employers communicating with their employees on campaign messages through the internet, through e-mails and even through texts, as one of the workers said, and of course the speed of that is remarkable.

MR. SHARMA: I would just add one recent publicity campaign that I'm aware of where employees were provided anti-union videos on flash drives so they could take them home and watch them. That election took place in a very short amount of time, less so than what people are saying the proposed rules would create, the time period they would

create.
MR. PEARCE: So an anti-union flash drive would happen a lot quicker, you're saying, than a captive audience speech?
MR. SHARMA: Right. I think what we're saying is that technology can speed up all of this communication. I think that's absolutely correct.
MR. PEARCE: Thank you all. Mr. Friedman.
MR. FRIEDMAN: Thank you, Chairman Pearce and Board members for the opportunity to be here and close out this topic at long last. My name is Ross Friedman. I'm a partner at Morgan, Lewis & Bockius in Chicago. I'm speaking on behalf of the Coalition for a Democratic Workplace. The Coalition is an organization of many businesses that employ millions and millions of employees.
CDW does not believe that the "as soon as practicable" standard for scheduling an election is appropriate, because it singularly focuses on how quickly the election would take place at the expense of other very important considerations. I want to touch quickly on three main points: the perceived need for quicker elections, the problems that are inherent with the acceleration of the timeline for

the elections under the NPRM, and the Board's responsibility to further elucidate its position on how quickly elections could or should be held.
First, CDW believes that the proposed rules are in large part a solution in search of a problem. And I won't belabor the point here. Everybody knows the statistics, and they've been discussed several times today. But one of the things that struck me in preparing for this is I found this pie chart on the Board's website which shows that 94.3 percent of elections were held within 56 days in 2013. It's hard to imagine looking at that lopsided chart and coming to the conclusion that the R-Case process is taking too long such that it requires major changes. More simply put, I think the point is that our position is that the Board already has efficient and effective processes in place to ensure fair and fast elections, and there is no need to dramatically speed up that process.
Second, there are serious problems inherent with the acceleration of the timeline that the NPRM doesn't address. The Board's statutory responsibility is to assure employees the fullest freedom guaranteed in exercising the rights

guaranteed by the Act, and CDW believes that the "as soon as practicable" standard does not appropriately recognize that statutory responsibility.
It cannot be seriously disputed, I don't think, that most non-union employees and many non-union employers have a limited understanding of our complicated rules and processes that govern collective bargaining. And many, if not most, employees don't really know what it means practically or legally to be in a union or to work in a unionized workforce.
This is something the Board itself I think has recognized and attempted to cure through the notice posting rule and through the protected concerted activity website. Obviously, understanding those issues associated with the decision to vote for or against a union is vitally important to ensuring their fullest freedom, and that understanding takes time and a full opportunity for debate.
The focus only on how soon it would be practicable to schedule an election ignores some other important factors that must be taken into account when deciding when to schedule elections, such as due process, free speech and employees'

rights or ability to be educated about a complicated process that will affect their working life potentially for years and years to come.
So how much time is required? CDW thinks that the current time frames are adequate and that they serve the Board and the parties effectively, all the parties, employees, unions and employers, and that they give all of those parties time to get their points of view across and understand the implications of their actions. A significant shortening of that time frame runs a serious risk of depriving the parties of the opportunity to present their views and gives employees less time to learn about the process and weigh their options.
My third and last point is that the NPRM proposes changes to many of the Board processes in order to achieve accelerated elections. What it doesn't do is state anywhere what the Board thinks is an appropriate time frame from petition to an election. CDW thinks the Board should state what the time targets would be under the proposed rule and then seek comment on those specific time targets. This may slow the process down a bit, but I think ultimately it would serve all of the parties better.

The Board has held training sessions with the regional offices, it has studied this process for years and years, and it has to have an idea regarding how long it intends the representation process to take. The position of CDW is that the Board should put forth what those targets should be. There are other timing issues that are not addressed like, for example, will the parties get more or less time under the new rules if there is a stip. Not knowing this fact is likely to decrease the stip rate, which would cause delays and could unnecessarily complicate the process and could lead to more litigation.

Member Miscimarra earlier, in response to one of the speakers, noted that one of the goals of the Act is to promote stable collective bargaining relationships. Stips are the first and often an easy chance for parties to do this. These are parties that may be obligated to bargain with each other for years to come, and to be able to reach an agreement on a stip is no small thing and can set the tone for the bargaining relationship. These are important points that are implicated in nearly every position, but the NPRM omits any discussion of them.

So to sum up, CDW urges the Board to

maintain the current election time frames and time targets which have served the parties well and have resulted in the vast majority of elections taking place within a short time after the filing of the petition. Thank you.

MS. SCHIFFER: Just one question. I thought actually that we had invited comment on a time target, and specifically this panel had asked that, and so I wonder what you think the appropriate time should be.

MR. FRIEDMAN: Well, I think the appropriate times are the existing times. I think the point I was trying to make is if the Board wants to shift the existing times, the Board should say what they think the new times should be.

MR. PEARCE: Thank you all. We'll return to the topic of voter lists. Mr. Kirsanow.

MR. KIRSANOW: Thanks for indulging me since I have to depart imminently. A number of the points that we would make have already been made, so for the sake of brevity I just want to make one discrete point in addition to the points that were cited by the panel preceding the previous panel relating to voter lists, and that is the issues with respect to potential problems related to privacy

issues, confidentiality issues, fraud and abuse, the employer liability issues for inadvertent or intentional disclosure of information.

The one discrete point I would like to make is that the rules in some respects seem to create more problems than they solve with respect to the voter lists. In this particular respect, there is a presumption on the part of the rules, and I think it's a false presumption, that employers either uniformly or to a great extent maintain the requested information electronically, or, if not electronically, in a format readily available for submission to the Board.

I think that's a faulty presumption regardless of whether it's electronic, regardless of what the format is, regardless of what the available information is, not just from the standpoint of the smaller employers but also for larger employers as well.

Employers, regardless of size, maintain records in a variety of formats. Producing such records may seem simple to some, but, as I mentioned earlier in my testimony earlier this afternoon, the individuals in some employer locations are not human resources personnel. There may not be standing

human resource departments for a given employer, and the person who's in charge of personnel matters is the same person who is, as I think I mentioned earlier, signing bills of lading or repairing the tow motor. For that person to produce the requested information when it's unclear in what format it's supposed to be within the two day time frame is a bit of a challenge regardless of even the size of the employer.

Moreover, the provision of sensitive information, e-mail addresses, telephone numbers and the like, could render the employees vulnerable to harassment or worse. There is a wealth of information that's being provided, and Ms. Davis talked about that earlier in the access that e-mail information could provide to bad actors, whether those bad actors be employees, employers, unions or fourth parties or fifth parties who may get access to that information, especially when you consider not just e-mail addresses and telephone numbers but shift information.

That gives people a time frame. It gives them a picture for where the employee may be, where he's likely to be in the next hour or two hours, and unscrupulous individuals would have access to that

information.

The risks associated with the proposed rules I think would outweigh the ostensible benefits from any increase of that information, and the National Association of Manufacturers would submit that there is little in terms of the NPRM that shows a demonstrable need for changing the current status of the law related to Excelsior lists. Thank you very much.

MR. PEARCE: Thank you. Ms. Kutch.

MS. KUTCH: Thank you. My name is Jess Kutch. I'm the co-founder of Coworker.org. Coworker.org is an online platform for workers' rights. We launched in early 2013, and we're now hosting more than 30 workplace campaigns by individuals around the country. Before creating Coworker.org I served as organizing director for Change.org, which is one of the world's largest online petition sites. I also served five years in the digital department at the Service Employees International Union, SEIU.

I think I can offer the Board today some perspective about the use of e-mail by employees advocacy organizations and just about everybody else. I can also speak to the feasibility of

operating an e-mail portal or some type of messaging system, and then finally I'd like to address concerns about privacy and potential abuse of e-mail addresses.

In 2014 the public expects to engage with organizations electronically. We bank on line and we shop for health insurance on line. I'm even at this hearing today because I e-mailed the Board a request to appear before you. So every day we're increasingly organizing every aspect of our lives on line, and e-mail is still a major part of any organization's communications program. I think this was perhaps most evident during the last two election cycles.

In 2006 I managed an e-mail program for SEIU called Value Care Value Nurses. The campaign sought to engage non-union nurses nationwide around safe staffing and patient care issues. The union matched publicly available RN registry lists with commercially available e-mail addresses, and from those matches we built an e-mail list of 300,000 non-union nurses nationwide.

Now, I want to note that the union's ability to do this kind of e-mail matching is highly unusual and particular to nurses in the registry

list. It's also in most cases prohibitively expensive. But for two years we sent biweekly e-mails to that list. Our e-mails mobilized nurses around issued impacting their profession, spurring them to write letters to the editor, submitting testimony to the CMS and more.

I bring up this example to highlight that e-mail contact between unions and employees is nothing new. In this case the RNs had no prior contact with the union, yet tens of thousands engaged with our campaigns and took part in our action. Those who no longer wished to receive e-mails simply opted out by hitting the unsubscribe link on the bottom of that e-mail, and many did just that, but the vast majority remained subscribed to our list, and we assume that's because they found value in it.

I have no doubt that people who work for an employer where there is an active union organizing drive will be interested in receiving information from union staff via e-mail, and those who are not interested can unsubscribe, filter those e-mails to folders or block a sender. The fact that union organizers can knock on your door but can't schedule their visit via e-mail seems strange to me.

I'd also like to address the question of whether to address a closed off e-mail portal or messaging system. I recognize this could take shape in a number of different ways, and the Board doesn't go into much detail on that subject. But regardless of the details, I strongly encourage the Board to stay out of the business of delivering e-mail messages to people.

I can share my experiences at Change.org to give you a sense of just how complicated that might be. Change earns revenue from petitions sponsored by organizations, political campaigns and companies, and its e-mail list is what drives the vast majority of petition signatures. So as you can imagine, Change.org staff are therefore very careful to ensure that their e-mails are getting through to users and aren't blocked by spam filters or ending up in junk e-mail folders.

This is a term called e-mail deliverability. It's used to describe the ability get an e-mail into the intended recipient's e-mail inbox. And let me tell you it's not easy. E-mail providers are constantly changing the requirements for mass e-mails in an attempt to protect their users from spam. But these changes impact

everybody.

In 2011, only 76.5 percent of commercial e-mails sent reached recipient inboxes according to the industry leader Return Path and their experts of e-mail deliverability. Furthermore, e-mail blocked and flagged as spam increased 24 percent that year. Every outgoing mail server IP has a reputation score, and that score is impacted by a number of factors ranging from the number of e-mails sent to recent user spam flags. If your IP address gets hit with a low score it will be nearly impossible to get e-mails into your recipients' inboxes.

When I worked at Change we fre1uently encountered deliverability problems. On any given month a service like AOL would decide to block our e-mails. This would result in a steep drop in e-mail open rates and petition signatures because far fewer people were even seeing Change.org's e-mails. A drop in open rates would send our team scrambling to contact the responsible servers and negotiate a solution. It's basically a never-ending game of cat and mouse, and companies that rely on e-mail revenue have whole teams dedicated to ensuring deliverability. All of this is to say that running any kind of system that sends e-mails to

people is a complicated business.

Now, if the messaging system being proposed functions more as a private online message board, then the concern I have is primarily about access. Most online communication occurs through channels, social media, text messaging and e-mail. And as I stated earlier, the vast majority of traffic at Change.org was generated by its own e-mail list. Just 26 percent of the traffic on my own website, Coworker.org, has been generated by people directly entering in that address to its browser window. So if employees must affirmatively enter a chat room, very few will receive information from a union about an upcoming election.

I know I'm low on time. I was going to touch on that things get more complicated when you start requiring a log-in access, and I just would request that the Board be mindful that many people today are accessing the internet via their mobile phones. According to a recent Pew Research internet project, 67 percent of adults in the U.S access the internet via their phones and 34 percent of adults rely entirely on their phones for internet access. I'm sure if you've ever tried to log in to something on your phone, you know how difficult that can be.

So even if an employee is successful at finding the online messaging system, it's unlikely a worker will complete the steps necessary to access that system and communicate with others.

I'd just like to thank the Board for allowing me to testify today. I do believe that e-mail is one of the safest methods for communicating on line. Most providers like Google are vigilant at locating and identifying malicious attachments in e-mails. Employers' internal e-mail systems re also well protected by commercially available software. Those are my comments. Thanks for providing me with the opportunity.

MR. MISCIMARRA: Ms. Kutch, something you said actually scared me. Member Hirozawa tells me that every e-mail I send him ends up in his spam folder, and I've always suspected that it was intentional.

But if we have the forced disclosure of work e-mail addresses, and if hypothetically some of those e-mails end up in spam folders by virtue of the normal operation of the spam folder, my fear is we will end up getting 8(a)(1) charges and that I'll have to learn something about how technology works. Do some of those issues, again, maybe militate in

favor of focusing on personal contact information in this area rather than business contact information because of the possible peripheral issues that it may generate in other areas that we focus on, like surveillance is another one, or do you think they're really equivalent and we should just address personal contact information and work related contact information the same?

MS. KUTCH: If I'm understanding you correctly, I don't think that it's really an issue of whether it's an employer e-mail address or a personal e-mail address. You'll still be dealing with the same complications. An employer postmaster can block an IP address, but so can AOL or Gmail. The triggers are probably going to be different, but you're still running that risk that those e-mails are never reaching those inboxes.

MR. MISCIMARRA: But your advice would be if we go down the road of some sort of even supplemental third-party portal, we need to be cognizant of the possibility that spam filters may end up influencing whatever the Board may sponsor if we were to do that?

MS. KUTCH: That's correct.

MR. HIROZAWA: Do you have any views

based on your experience about privacy concerns that might be raised based on requiring employers to provide e-mail addresses or cell phone numbers of employees?

MS. KUTCH: So this would be the question of opt-in versus opt-out?

MR. HIROZAWA: That's one of the questions.

MS. KUTCH: I brought up the example of the Value Care Value Nurses campaign for that reason. Nurses on that list were able to unsubscribe. It was a very clear process. It didn't seem to cause confusion. I think that increasingly our e-mail addresses are available in the world, and I think, especially in an environment where employees are aware that there is an active union organizing drive, it's not going to be an issue of privacy to receive an e-mail from a union.

MR. JOHNSON: What's the theory behind allowing people to unsubscribe?

MS. KUTCH: Most unions use e-mail providers to send out mass e-mails, and so those are companies like Blue State Digital, NationBuilder, Salsa, Convio. All of those companies require an unsubscribe link, and the reason they require an

unsubscribe link, and it's an established best practice, but they don't want users flagging things as spam. They would rather they just unsubscribe from the list, and that protects their IP address so that the deliverability remains high.

So there are already sort of mechanisms in place in the market to ensure that that be an option when mass e-mails are sent out. Now, the other option is there will be, I'm sure, individual e-mails sent out, and I feel like that is a different thing. You don't unsubscribe from -- I can't unsubscribe from an e-mail from you.

MR. JOHNSON: You might want to, but maybe you technically can't.

MS. KUTCH: Well, I could block you or ignore the e-mail.

MR. JOHNSON: I guess what I'm thinking of is obviously unsubscribe developed as a matter of technology for some reason, and I'm wondering if you know why that was, other than the technical piece of the IP address.

MS. KUTCH: I'm actually not familiar with the history. I imagine it had to do in part with making sure deliverability remained high, so it was sort of a compromise between the e-mail

providers and the servers that send out mass e-mails, but that's just my guess.

MR. JOHNSON: And are there any organizations that you would sort of look to as a lodestar of being think tanks in the area of area electronic privacy like EPIC, anyone like that?

MS. KUTCH: You know, none come to mind. The e-mail deliverability industry leader Return Path has a ton of case studies, so they might be worth consulting on that issue.

MR. JOHNSON: And then the last piece -- I'm just going to try a summation of what you were trying to get across to us -- if you're not a nimble organization, trying to manage your own e-mail message board or some portal or any sort of mass e-mail system would be a big technical undertaking?

MS. KUTCH: Yes.

MR. PEARCE: In terms of opting in and opting out -- and let me know if you have had the experience -- would it be correct to say that an unsubscribe might be a safer route than an opt-in or opt-out that is administered by an employer, given that opting in and opting out may be a gauge to the employer of the interest or non-interest in a union being contacted by an individual?

MS. KUTCH: I'm not entirely clear on the process that's being proposed around opting in or opting out. E-mail's been around for more than 20 years, and active unsubscribing is well known among everyone I've ever met who's used e-mail and on the many e-mail lists I've operated. I think that's an acceptable way for people to opt out of e-mail lists and of receiving them.

MR. PEARCE: Thank you. Ms. Maciel.

MS. MACIEL: Good afternoon. Thank you again for allowing me the opportunity to speak to you on this important issue, particularly on the privacy implications. As you know, I still represent the National Grocers Association.

NGA is very concerned about the proposal's compulsory disclosure of employees' personal and confidential e-mail accounts and phone numbers on voter lists. This non-consensual disclosure constitutes in their opinion a gross invasion of employees' privacy and opens up employees to potential use and abuse of their personal information.

As I said before, many NGA members are small and medium size businesses who just don't collect and don't want to collect employees'

personal and private information. In fact, many employees in the grocery industry are part-time and seasonal workers. They don't have even work e-mails. The reality is that technology is not as prevalent in these types of small businesses as may be in other types of industries.

So while the proposal suggests a possible amendment to prohibit the use of the list from being used for anything other than an organizing campaign, such an agreement would not bind anyone beyond the labor organizers from using employees' personal information.

And as a key stakeholder to this Board, individual employees' interests should be paramount, and many employees do not want their personal e-mail address and/or phone number shared at all, so their privacy rights would be violated even if the use of the information were limited. NGA submits that the Board should at a minimum provide that employees be required to opt in to the disclosure of their personal information to labor unions so that it's an informed and knowing decision.

As we discussed yesterday in yesterday morning's meeting regarding the importance of employee consent to an electronic signature on an

authorization card, so too should employees be given the opportunity to consent to the disclosure of their personal and private information to labor unions.

The proposed rule lacks clarity on the type of personal information that must be disclosed; for example, it's what type of e-mail address, is it their work e-mail address, is it their home e-mail address or is it both. What if the home e-mail address is shared with other family members like minor children and they have access to it? Would they be then opening up to communications from labor unions?

The same thing with the type of telephone number. Are you talking about a home phone number, a cell phone number or a work provided cell phone number? Even where you've got work e-mail and work cell phone numbers -- and as I mentioned, many in the grocery industry do not have that type of information -- it opens up both the employee and the employer to unwanted potential union solicitation at the workplace during working hours, causing a significant disruption to business and operations.

How can an employer determine which employee's information to provide in the list if

they don't know who's going to be included in the unit? Under the Board's proposal, unit determinations will not be conclusively decided until after an election and after the voting list is disclosed. Without clear direction from the Board, coupled with this new requirement that they have to turn over and serve the Excelsior list within two days at the direction of an election, it's inevitable that labor unions will challenge the accuracy of the voting list, which will lead to objections to the election, more unfair labor practices and protracted litigation. That result is counterproductive to the Board's stated purpose of expediting elections in an efficient manner.

Because I have a little bit of time, not a lot, but I do want to touch on the privacy issue. I know other people have spoken about it, but this is important to the National Grocers Association.

Currently, there aren't any safeguards contemplated by the NPRM to protect against unforeseen abuses and causing irreparable harm to employees, so NGA submits it's incumbent upon the Board to establish the rules safeguarding personal information, including potentially monetary sanctions and criminal penalties to parties that

fail to maintain the privacy of such information.

Increasingly we're seeing large and global sophisticated companies that have been the target of significant data and security breaches. How can we expect small and medium size employers or the National Labor Relations Board or even labor organizations to protect data in light of increasing third-party criminal activity?

And I want to touch on the one point that the dissent requested comment on in terms of getting employees their own potentially agency sponsored and protected e-mail accounts to avoid the surrender of proprietary information. NGA submits that option raises a serious concern that the Board is putting a seal of approval on the union solicitations and communications to employees and could be perceived by workers as coercive or intimidating in that the federal government is now monitoring and approving union speech. Congress has required that the Board remain neutral while preserving employee choice, and any agency sponsored e-mail account would violate that mandate for neutrality in the Board's procedures.

Thank you for allowing me to speak today.

MR. PEARCE: Do members of your

organization have policies that reserve them the right to supply employee e-mail addresses to third parties?

MS. MACIEL: NGA's membership is made up of a wide variety of sizes, from single store operators to a handful of operators to some medium and larger size grocers, so it really does vary as to what type of information they collect at the beginning of employment. But as I mentioned, many of these employees are part-time and seasonal.

MR. PEARCE: I understand that, but there may be some members of your organization that have those kinds of requirements?

MS. MACIEL: I can't answer that question specifically because I haven't asked that of NGA's members, but I would presume that probably some of them do. I don't know how many.

MR. PEARCE: Would that impact upon your view of the disclosure of e-mail addresses?

MS. MACIEL: No, because I think even if employers have personal information of their employees, the employee should be required to opt in to disclosures at a minimum if that's going to be given to labor unions. I think employee choice in this regard, just like employee choice on electronic

signatures of authorization cards, that needs to be consented to by the employee.

MR. PEARCE: Would there be a distinction between that kind of consent and consent that an employee ought to have or possibly should have to an employer providing their information to other third parties? Would you say that opting in and opting out should be across the board for all third-party disclosure?

MS. MACIEL: I'm not sure I understand your question, because I don't know when --

MR. PEARCE: Simply, if an employer makes an employee as a condition of employment sign an agreement saying, "We reserve the right to supply your e-mail information to other organizations like the Kiwanis Club," or whatever, shouldn't that policy be an across the board policy, this opting policy?

MS. MACIEL: If an employer is disclosing employee private information to third parties outside of the terms and conditions of employment, then I would think that you should be able to distribute it to anybody, but I'm unaware of employers distributing their private personal information of their employees to anybody outside of

the workplace for reasons other than terms and conditions of employment.

MS. SCHIFFER: Could you clarify for me on this opt-in whether your position is that that would apply to the current Excelsior requirement?

MS. MACIEL: My comments today are related to the Board's proposal with respect to opting in for the changes. Currently, I understand that there is no opt-in obligation under Excelsior.

MS. SCHIFFER: And would the opt-in under your position also apply to the employee opting in to receive e-mail and phone communications from the employer as well regarding the campaign?

MS. MACIEL: I think that if an employer is communicating to its employees about the consequences of unionization as it relates to its terms and conditions of employment, that is part and parcel to what the employer can communicate about in any fashion.

MS. SCHIFFER: So employees would receive campaign information from the employer, but they would need to opt in to receive it from the union.

MS. MACIEL: Yes.

MR. PEARCE: One last question about opting in. How would you recommend this opting in

go? Should it be something that the employer administers?

MS. MACIEL: Yes.

MR. PEARCE: So wouldn't you think that, if an employer administers an opt-in policy with respect to unit contact, that could be perceived as polling employees' sentiments and desires about union activity?

MS. MACIEL: I don't think so, if that is what the Board is implementing in part of its regulations. So no, I don't think that that would be considered coercive or surveillance or polling.

MR. PEARCE: And why wouldn't you?

MS. MACIEL: I wouldn't think so, because you're implementing a regulation to protect and balance employees' privacy rights against the rights of employees to make sure that that information is being used for the purposes that it's intended to.

MR. PEARCE: And would you have a problem with a system that provides, as has been suggested, for an unsubscribability on the part of the worker?

MS. MACIEL: I think an unsubscribe situation doesn't really address the issue, because you're still then having compulsory disclosure of private information without employee consent, and

that's the heart of the problem. I think at the end of the day if someone has to unsubscribe, they're at least receiving that communication from a labor union at home or in their personal account or on their personal cell phone. Initially that first message is potentially unsolicited, and that should only be received with their consent.

MR. PEARCE: Thank you.

MR. JOHNSON: Let's assume it's an opt-out versus an opt-in, and let's assume it's an opt-out. Why was an opt-out any lesser form of informed consent assuming it basically says, "Look, if you do not opt out your personal information goes over to the labor organization?"

MS. MACIEL: I think it's a slippery slope, and I think that the opt-out provision, again, is one less step away from true employee consent. You have to receive that initial message to begin with in order to opt out, and if you don't opt out you're going to continue to receive that, and that would be implied consent.

MR. JOHNSON: What if it comes from the government and it basically says that -- I mean, this happens all the time in class actions, as you know, because I know your firm defends a lot of

them. There is a third-party administrator who is not the employer and is not the plaintiff's law firm, and it basically sends the notice out, and it says that your contact information is going over unless you opt out.

MS. MACIEL: I think communications from the government directly to employees in terms of whether they should or should not opt out bleeds into a risk of not having Board neutrality in the processes.

MR. JOHNSON: But we have a lot of notices that basically say, "By the way, we're totally neutral in all these election matters." Why couldn't a notice like that solve the issue?

MS. MACIEL: I still don't think it would solve that issue. I think it's a slippery slope.

MR. JOHNSON: And just one last thing. Basically, in terms of your experience in this area -- do you defend class action litigation?

MS. MACIEL: I do.

MR. JOHNSON: So are opt-outs commonly used?

MS. MACIEL: Yes. Depending on the jurisdiction, but yes.

MR. PEARCE: Thank you very much. Ms.

Hensel.

MS. HENSEL: Good afternoon. Again, thank you once again. It's been a pleasure to be before you and have an opportunity to share my views.

I'd like to start with a spirit of table cooperation here. The one thing I think we all seem to uniformly agree on is the idea of a government portal to facilitate the communications between the union and its potential hopefully future members. I questioned myself when I looked at it whether or not the portal could be viewed or if the Board had given any thought to it appearing that it was sanctioning certain communications simply by its operation, and on that ground I agree with the National Grocers Association. Unfortunately, from there we depart.

MR. JOHNSON: It has unified everyone on it who's commented on it, frankly, that proposal.

MS. HENSEL: Well, the world does need things to bring it together, so if government portals what's going to do it today, it works for me.

With respect to the technology issues, I would rest on Jess's testimony because she certainly is the expert. I couldn't repeat in any manner what

she said, but it certainly made sense to me. I don't think that the Labor Board is equipped to do that.

Anyway, information that should be contained on a list, this personal information, for 50 years we've had a name, we've had a home address, and including a phone number and an e-mail address does not violate anyone's privacy in any which way or form. I don't know if any one of you have ever googled yourself, but I can promise you that you can find all of that information on line. Occasionally, if it's a particular website, Spokeo or whatever, you might have to pay a fee if you actually want to access the profile, but I promise you the information is available.

You can also find out how much you paid for your house, exactly when you bought it and who you bought it from. So this notion that there is this private information that needs to be retained and kept close to the employer's heart I think is a bit of a red herring. The information's out there. There's no way around it.

Frankly, as you know, the employers are concerned about their free speech rights with respect to shortening the time period between the

petition and the election. The union is equally entitled to free speech rights. That means access to the entire bargaining unit, and that means access in the same or similar ways that the employer has access, which is through cell phone numbers, e-mail addresses and home telephone numbers.

The days of union visits to people's homes I think are -- I wouldn't say it's over, but I think it's a much less popular manner of organizing these days. Especially given the time constraints on people, it's much easier to make a phone call or send a text message or shoot out an e-mail to 15 people at once than it is to try to make these individual home visits. That's my position on privacy. I think it's a complete red herring. The information is out there.

With regard to any notion that the union is going to misuse information on the Excelsior list, this same concern was brought up in the Excelsior case, and I believe the determination at that time was, "We are going to deal with that if and as problems arise." I don't know of any long litany of Board cases dealing with how union organizers misused Excelsior list information. It doesn't exist. Again, I think that's another red

herring. We've had personal information for 50 years, and apparently we've done a pretty good job of using it wisely and using it respectfully.

With regard to the date of the turnover of the Excelsior list, I advocated yesterday for the earlier we get a position, the better. I think the earlier we get the Excelsior list, the better, because that Excelsior list helps to inform the position of the parties.

If we get that Excelsior list prior to or during the pendency of a stipulation negotiation, there might be a whole lot of issues that can be put to bed by the parties by simply being able to negotiate off of a list. Everyone's got the full information. We know who we're talking about. We know what their classifications are. We know when they work.

That way people can speak with full knowledge, and this includes the Board agent who's attempting to mediate this stipulation. Everybody can work at it with the full information. Of course, this requires the employer coming into the process with good faith and wanting to get to a stipulation. Again, I would urge you to consider requiring turning over an Excelsior list -- I'm

sorry, my time is up -- and turning it over prior to the final date for entry of a stipulation so that the parties have something to work with. Thank you.

MR. JOHNSON: It sounds like you were referencing something like a Spokeo that has a bunch of personal e-mail addresses on it. Do you have something in mind?

MS. HENSEL: Well, Spokeo.com is one. There's a hundred of them, sites where you can do a background check on just about anybody you want to as long as you pay your $39.95.

MR. JOHNSON: But those tend to be business e-mail addresses if you get them. I used to do a lot of marketing back in the day, and that's what I would typically find. Do you have a particular site that has personal e-mail addresses like that?

MS. HENSEL: There are so many different sites out where I have found people's personal e-mails, you know, when I'm looking for an old friend, say. I've never used them in the context of my work, but yes, they do exist.

MR. JOHNSON: So is it relatively easy to find personal e-mails just out on the internet?

MS. HENSEL: Whether they're accurate or

not, I suppose, is another question. Are you suggesting that we should rely on our own ability to research the matter as opposed to asking the employer to provide it?

MR. JOHNSON: Well, I don't know. At the end of the day it sounds like your position is that these things are easy to find out there and that indicates that there's no privacy. Is that correct?

MS. HENSEL: That is my position. However, insofar as it's the employer's obligation to provide information about their employees and they're most likely to have the most updated information, I still think they should be required to provide what they have rather than risk, you know, finding a personal e-mail address on line that's five years old and no good anymore.

MR. JOHNSON: Would it be fair to say that at least when people submitted their comments to us, or at least when you submitted your comments to us in your request to speak, that you didn't put your personal e-mail address on there?

MS. HENSEL: No, I didn't, but you can have it if you'd like.

MR. JOHNSON: I'm very flattered, first, but that's not necessary, second.

(Laughter.)
MR. PEARCE: Thank you all very much.
(Recess.)
MR. PEARCE: Mr. Wszolek has a plane to catch, so be kind. We're back in session. Mr. Wszolek, you may proceed.
MR. WSZOLEK: Mr. Chairman and members of the Board, my name is Fred Wszolek. I'm a spokesperson for the Workforce Fairness Institute. Thanks for the opportunity to address the Board on that portion of the proposed election rule that would extend the Board's Excelsior list requirements to include disclosure of an employee's telephone numbers, and, where available, e-mail addresses to the union seeking to organize them. We are opposed. We believe that an employee's personal contact information, whether it be a home or e-mail address, should not be disclosed to third parties absent the employee's consent.
In his famous dissent in the 1928 case Olmstead v. United States, Justice Louis Brandeis said "the right to be left alone is the most comprehensive of rights, the right most valued by civilized men." Today Brandeis's view is the law, and the right to be left alone, the right to

privacy, is recognized as an essential component of our liberty. It protects our individuality, allows us to exercise control over information about ourselves, and to make decisions free from coercion.
There is no express right to privacy in the Constitution. Its contemporary contours largely developed in American law over the past half century. In addition to important Supreme Court jurisprudence, as privacy has become increasingly threatened by new technologies and business methodologies, a variety of state and federal laws have been passed protecting individuals from unwanted disclosure of personal information.
The Board's proposal is inconsistent with these developments in the law. It improperly invades private space and is contrary to the reasonable expectations of today's workers. An employee's personal contact information is provided to the employer with the expectation that it will be kept private and used by the employer in the event of an emergency or when circumstances require that the employee be contacted outside of work hours and of course to send you the delightful tax document at the end of the year.
If the Board wishes to modernize its

rules in this area, it should do so in a manner consistent with our society's contemporary concern for individual privacy. That means putting the worker in control and not releasing any personal contact information absent his or her prior concept.
In the Board's Excelsior Underwear decision, the employer mailed an eight page letter to employees that allegedly made misstatements about the union and contained threats of retaliation. It then refused to give the union a mailing list of employees to enable the union to counter what it said. It was under those circumstances that the Board adopted the current Excelsior requirements to remove an impediment to communication and to allow for a fully formed and reasonable choice.
While disclosure of an eligibility list with home addresses may have been necessary 50 years ago under the facts in that case, disclosure of personal contact information such as being proposed is wholly unnecessary today. Today, if an employer communicates with his employees on the issue of unionization it will likely be by e-mail or the internet or at a mandatory meeting. The contents of these communications will become readily known to the union, which can counter them on its own website

or blog, all of which are easily accessible, or by contacting employees by the manner they have consented to.
Let me add that picketing, even the threat to picket, is inherently coercive because of the history of violence surrounding it. Today contemporary media with its 24 hour news cycle is saturated with stories of union intimidation and violence. I would submit an exhibit which I respectfully request be made part of the hearing record that catalogs a very small bit of it. It supports the conclusion that the existing rule that forcing the disclosure of employees' home addresses without their consent is intimidating, if not coercive, and that the proposal for expanding the disclosure of personal information is ill considered. Thank you.
MR. JOHNSON: Do you want us to overrule Wyman-Gordon?
MR. WSZOLEK: No. My understanding is that the court gave you the discretion as to what information is prudent to share and that now you could choose to decide that it's prudent to no longer share home addresses.
MR. JOHNSON: But the court seemed to

give the imprimatur or lend its imprimatur to that policy. What do you think has changed since then?

MR. WSZOLEK: I think all of our desire to protect our personal privacy has grown dramatically in the last 50 years, and the idea that someone can come knocking on your door at any time they want without your permission, without being invited, to pressure you to consent to unionization is just not the way we feel things should be these days.

MR. JOHNSON: Well, is there a Supreme Court case other than the FLRA case, which dealt with the Privacy Act/FOIA interplay on home addresses and which obviously was federal workers, which we don't regulate, is there some Supreme Court precedent that you're basing this on?

MR. WSZOLEK: No. I'm just basing it on the trend toward us wanting to control more of our personal contact information, ti control our privacy, and to avoid identify theft. There is just a whole range of reasons why we want more control rather than less these days.

MS. SCHIFFER: And this right to be left alone, would this contact restriction that you're proposing apply both as to communications about the

campaign from any party?

MR. WSZOLEK: Well, I suppose if you're in the workplace and the employer wants to communicate with you about the company, I'm not sure you can necessarily opt out of that. There has been great debate over whether people can opt out of releasing their e-mail address, which is an electronic address that doesn't exist in the real world, yet we seem to just accept as an absolute given that being told where you live is fair game.

MS. SCHIFFER: So you're saying it would apply to employer contacts through e-mail or through home address?

MR. WSZOLEK: I suppose it could. But the Excelsior decision involved a mailing to people's homes. Companies just really do0n't do that anymore. They have so many other methods of communicating with their workers that they don't need to mail eight page letters to people's homes. They can communicate in the workplace.

MR. PEARCE: Well, isn't that the point? If companies are not communicating by mail, then the union should be able to communicate the way the companies can, don't you think? We heard testimony about robust debate and discourses as part of free

speech and those kind of opportunities being protected. Wouldn't that be counter to that notion?

MR. WSZOLEK: If the employee consents to the release of his home address, perhaps he can consent to whether he wants to have that just be for mailing purposes or to be actually visited. They should have control of that and open the door or close the door.

MR. PEARCE: Well, would that apply to the employer? Should the employee be able to opt out of the employer sending them information or their position on unions or anti-union messages?

MR. WSZOLEK: I don't think we would object to applying the same stricture to a mailing from the company or the company coming and visiting you at home. That's your home.

MR. PEARCE: What about e-mails?

MR. WSZOLEK: If the employee consents to the release of his e-mail address for those reasons, that's certainly useful.

MR. PEARCE: So you're saying that the employee should have the right to opt out of getting that information via e-mail from the employer as well.

MR. WSZOLEK: Perhaps from his personal

e-mail address. If it's the company e-mail address, I don't think the employee can control the flow of content from the company's e-mail account.

MR. PEARCE: I see. And if the union wants to communicate with the employee in the company's e-mail account so that it has the same access as the company, do you have a problem with that?

MR. WSZOLEK: I think there is a property issue there, that the company need not necessarily turn over their digital property to the union.

MR. PEARCE: Thank you very much. Mr. Hogan.

MR. HOGAN: Thank you very much. I'm Aloysius Hogan, senior fellow with the Competitive Enterprise Institute, a D.C. free market think tank.

My colleague, Trey Kovacs, points out some of the unintended consequences that could arise from the Board's proposed rule. Of particular concern is privacy. I want to run through something you all are familiar with, but for people who may be watching this or reading the transcript ultimately, it's Fisher versus Communication Workers of America. It displays some of the inconsistencies in determining when the federal labor law preempts

state law.

The case involves the Communication Workers of America Local in North Carolina, where its union president, John Glenn, posted in a public area at the company's North Carolina facility the names and Social Security numbers of AT&T employees who chose to rescind their union membership. At first the AT&T employees filed an unfair labor practice with the NLRB claiming that their NLRA Section 7 rights were violated by being coerced into exercising the employees' right to self-organization. The NLRA protects every worker's right to refrain from exercising their Section 7 rights.

A former general counsel, Lafe Solomon, refused to prosecute CWA for posting and disseminating the AT&T employees' Social Security numbers, but the CWA and NLRB agreed to a voluntary settlement where CWA admitted no wrongdoing. After that, the employees, with legal assistance from the National Right to Work Foundation, filed a lawsuit in North Carolina under its Identify Theft Protection Act. The trial court and the North Carolina Court of Appeals found that the unions are entitled to a special exemption from being penalized

for revealing employees' personal information. Both North Carolina courts ruled that unions may put employees at risk of identify theft because the activity is covered by the NLRA and consequently may not be punished by state authorities. North Carolina's courts have held that the federal labor law preempts state identify theft law even though it is arguably unrelated to national labor policy and involves deep-rooted local interests.

Our concern, Competitive Enterprise Institute's concern, is that the new rule which would supply unions with employees' phone numbers could put employees more at risk. You know, you run into some of the same concerns with Freedom From Union Violence Act that's been proposed to make up for the divot, let's say, that was taken out of the Hobbs Act with the Enmons case in terms of union violence and extortion.

You're running into some of the same issues here with the remedies that people would have when they face forms of coercion, extortion and violence at the hands of unions. There is a problem between the lack of federal enforcement if the general counsel doesn't move forward on something in a way that the workers find useful, if the states

won't move forward, if there are federal exemptions judicially created, and if, as has been previously mentioned, legislators are not moving forward with correcting some of this, it can cause a problem.

I wanted to move to another quick point. As I mentioned earlier, I analogized to the Labor-Management Reporting Disclosure Act of 1959, and suggested that that provides a ready structure for elections in the union context. And the guide for election officials regarding conducting local union officer elections provides a reference in Chapter 7, Inspecting the Membership List, which states, quote: "Candidates in union officer elections also have a right to inspect a list of members and their addresses subject to a collective bargaining agreement which requires union membership as a condition of employment. This right to inspect is limited to once within 30 days before the election, and does not include the right to copy the list."

And I want to take up the last few seconds here to point out that an opt-in avoids some of the problems of undeliverability and flagging and a degraded score that had been mentioned earlier. Really, it comes down to freedom and people's

liberties. I might go to a bar tonight and give my e-mail address to somebody, but that's a free choice. When the government gets in between and starts mandating, that's what people don't like. Whether it's the government getting between the student and the university or it's the government getting between the employee and the employer or the government getting in between a doctor and the patient, as it were, that's where the line is drawn, when it's government coercion versus, for example, an association which could fight for improving your situation or whatever association it may be, and they have lobbyists and you freely associate with them. You may pay the dues and join a couple of associations. But when the government is mandating stuff, that's where the dividing line is.

MR. PEARCE: First of all, this NPRM doesn't propose the disclosure of Social Security numbers.

MR. HOGAN: That's exactly right, but that was obviously at issue in the Fisher case.

MR. PEARCE: Do you have an idea as to how many union coercion cases there are versus the number of employer threat and unfair labor practice cases sent out via e-mail and text?

MR. HOGAN: I don't have a statistic on that. I know where you're going with that, but I don't have a statistic on it, though.

MR. JOHNSON: I understand the state action point, your last point, and obviously we're a federal agency, so if we establish rules it's going to be state action. Going back to the first point, is what you're saying basically if we jump into this area we are going to have to construct a remedy, because otherwise, because of Garmon preemption or Machinists preemption, no state court is going to be able to follow up with state law that could be an effective remedy?

MR. HOGAN: You're exactly right.

MR. PEARCE: Thank you very much. Ms. Sencer.

MS. SENCER: Thank you for having me. This is my fourth panel here, but I'll reintroduce myself since this is my first one today. My name is Caren Sencer. I'm a shareholder at Weinberg, Roger & Rosenfeld. We are a labor firm based in Alameda, California, four offices, lots of clients up and down the West Coast, mainly in California, Hawaii and the rest of the western states.

I'm going to start at a different point.

I think that regardless of the format that it winds up in, at the very least the standing Excelsior list rule should be formalized. The reason I say that is that although it's been in place for 50 years and has not been disturbed, this agency tends to have some flip-flop decisions in its history, and to protect it regardless of what the membership of the Board is at any given time, that very basic provision in some format should be protected.

I do, of course, advocate for including more information than the home address or the address as it is. The address is not really a great way to get in touch with people, nor does the list that you receive necessarily even include a home address. One thing that I see frequently with one of the client groups that I work with is they have a lot of seasonal workers that they're organizing, National Labor Relations Board covered, but somewhat agriculturally related, packing houses, salad plants, those types of things, migrant work, sometimes migrant work for the same employer throughout the year, but at three different locations for the same employer throughout the year.

But for purposes of what they give the employer for an address, they receive their check

every week by hand, but their listed address is a P.O. box. When you're organizing you can't go visit somebody at a P.O. box. The Agricultural Labor Relations Board, which you've heard me talk about before, requires that the employer provide an actual residence to the union within two days. The employer in that case does have to go out of their way to find that address, but it actually requires a street address to be provided so that there is actually a way to have communication.

In those same industries you find that employees are not recalled to their seasonal work by means of a letter to their P.O. box. They are recalled by means of a call to their cell phone. It just seems like a logical extension of that to have that same method of communication that the employer uses to reach the employee be the method that's given to the union as a way to reach the employee. That doesn't seem particularly radical.

I also advocate for the inclusion of the shifts. I know some people have said that they think this might give rise to something like increased property theft. If the union is doing their job and organizing they should be learning what the shifts are about anyway, but earlier in the

campaign it actually becomes less disruptive to the rest of the family if the union has the information regarding the shift.

It's less disruptive to the rest of the family, because then the union representatives are visiting at a time when they know that I'm not there. They know that I work nights, let's say. Let's say I work at a 24 hour facility and I work nights. If they come and knock on my door at eight o'clock in the morning they've probably disrupted my sleep cycle, which makes it harder for me to perform my job the next day and may interrupt anything else that's going on inside my home. Having the shift information there would be quite helpful in ensuring that the rest of the family as well as the sleep schedule of employees who work on something other than the nine to five shift are not disrupted by visits from union representatives.

The ag board, again, also requires these lists to be produced in two days. It's not particularly burdensome. Most employers keep some type of electronic recordkeeping now, and they use that electronic recordkeeping for their payroll system, amongst other things. Larger employers or employers who have part-time help have even more of

a reason that this information is digitized in some way: so that it's easily accessible when they need to call additional employees in. Producing these kinds of lists and producing then in a short time frame is not particularly overwhelming.

There was one question that was raised earlier regarding people who are challenged and are going to be challenged and how that would be dealt with if there are more challenges. In the current situation, when there is a stipulated election agreement and some people are voting by challenge due to the agreement of the parties, those people show up on the Excelsior list even if they are going to be challenged. I don't why this raises any more concern that there are a couple more people on that list who will vote as challenged ballots but will still show up on the Excelsior list.

In short, I think the Board's rule actually should be more broadly stated to provide all contact information or any contact information that the employer may have, and that way you're not tied down to how the technology may change over time and what methods of communication might be available to the employer and therefore to the union by extension. Thank you.

MR. PEARCE: In your experience, do you know whether or not employers have an obligation to keep a list relative to shifts and hours worked and contacts based on responsibilities for wage and hour or other governmental agencies?

MS. SENCER: For some things they do and some things they don't. I do a lot of work with Teamsters. There's a lot of drivers involved. They always know the hours that they work because they're subject to the DOT hours of service regulation, so they always know what they are. The same is true if you work with anyone who's in healthcare. They need to know how many hours healthcare staff has been on shift because they like to make sure that they get rest due to patient safety concerns. They also now how many are going to be on shift because they have ratios that they have to keep.

So to some degree that really depends on the industry and whether or not there is other regulation that requires them to keep it. But they tend to keep that information because they want to make sure that they don't violate anything like overtime requirements, too, so they always know how many hours a week employees are going to be working.

MR. JOHNSON: One quick follow-up.

Although California was sort of my adopted state before I came back here, it would be fair to say that employers are very heavily regulated in California, so they have to keep this information in many dimensions. Right?

MS. SENCER: Yes.

MR. JOHNSON: And it would also be fair to say that the employees we're talking about are essentially seasonal or migratory, so the opportunity for the union to communicate with them in terms of physical space is fairly limited because they're moving around.

MS. SENCER: Yes and no to some degree, because many of the unions that do organizing of groups who have migrant labor, they have offices that are set up in each of the areas where they may be working throughout the year, organizers who are down in those areas. And depending on the length of the season, and some of these seasons can be longer than others -- I mean, I found out recently that back baklava has a season. It's a couple of months in the early fall.

MR. JOHNSON: So we're not in season yet?

MS. SENCER: We're not in season yet. But it turns out they have a season, and this

particular facility has the same people who come back every year to work in it. They actually do live in the area, but they just have other jobs the rest of the year. In that case the physical address is really helpful, but other information would be very, very helpful. When it comes to a salad plant with three locations, and I'm thinking of one with locations in Yuma and El Centro and in Salinas, across two states, those people all use post office boxes and cell phones.

MR. JOHNSON: But most of the workers we regulate are not nomadic, essentially.

MS. SENCER: I would say most but not all. These are people who are covered by the National Labor Relations Act.

MR. JOHNSON: And California's made a different call essentially on privacy versus union access. I mean, there's basically the LA County versus LACERA case, which was a big one that came in last year, but even in that case the California Supreme Court said nothing in the relevant statutes or case law appears to prohibit agencies such as PERB or ERCOM, two of the public equivalents of us, from developing notice and opt-out procedures that would allow employees to preserve the

confidentiality of their home addresses and telephone numbers, so even in California the Supreme Court gave a nod to the consideration here of privacy.

MS. SENCER: And there is always a consideration of privacy, but it is a balancing act you are always trying to strive between.

I'm going to anticipate that a question might be asked about the opt-out versus opt-in on this. I think that an opt-out, if either are being considered, that an opt-out makes it easier for an employer to make a fully informed choice. And it is less of a way for the employer to take the pulse of the bargaining unit regarding what they want. If you have to opt in through the employer, that is subject to all kinds of pressure on the employee for making their voice known.

MR. JOHNSON: One might say it's equivalent to handing out, you now, union related hats, for example, and seeing who takes the hat and who doesn't.

MS. SENCER: But it's okay for the union to take the pulse of the bargaining unit. Under current law it's not okay for the employer to do it.

MR. JOHNSON: Right. That's what I'm

saying. It's the employer that's the one who's in charge of deciding or monitoring who's opting in and who's opting out.

MR. PEARCE: Thank you. Mr. Messenger.

MR. MESSENGER: Mr. Chairman and Board members, thank you again for the opportunity to testify today. Again, my name is Bill Messenger, and I'm with the National Right to Work Legal Defense Foundation.

Now, many have already spoken and written about why disclosure of employees' personal information, e-mail addresses, work schedules and phone numbers to unions violates their right to personal privacy. And while it's true, today I'd like to address my comments abut the problem created by these disclosures to misuse of this information by union supporters and by third parties.

Information is very difficult to protect even under the best of circumstances because, of course, it can easily be copied and easily disseminated. And here the rule contemplates at least implicitly that this information will be disseminated by unions. In order to use it in an organizing campaign, the union must naturally share this information with its agents and potentially its

supporters, including sometimes employees in the bargaining unit at issue.

This information doesn't do the union any good sitting in a closed box. They need to use it. And of course once these individuals obtain the information, they in turn can disseminate it to still others, either intentionally or unintentionally, simply by being careless with it.

Once employees' personal information is out there, it's both inevitable and foreseeable that some of those individuals will misuse it. An easy example. An individual who has personal information about an employee could use that not only to target them for union related reasons but simply because they have a personal grudge against that person or perhaps to stalk a female co-worker they have an unhealthy attraction to.

The identify of course can most obviously be used for identify theft purposes, which is one of the fastest growing white collar crimes around. For these reasons, the Board can't simply require that citizens' private information be given to another organization and simply hope for the best that they'll take care of it. The information needs to be safeguarded.

And the problem is I don't believe that the Board can effectively require that unions safeguard this information. The first question should be: How could you write regulations that impose certain protocols to make sure this information is kept confidential and only used for its intended purpose. Then, if you could craft such regulations, does the Board have the legal authority to even do it? Does it have the authority to require that unions follow certain protocols for this information? Could it punish a union for not doing so? You know, making failure to protect information an 8(b)(1) violation is a rather round peg/square hole type situation.

And then even if you could do all those things, as a practical matter how would the Board actually enforce it to ensure that unions and their supporters safeguard this information and use it only for the intended purpose? Of course, these problems are multiplied if you're talking about not just the union but how the individual supporters use it. You can even have jurisdictional problems, because if the supporter we're talking about is a direct union agent the Board might not even have authority to do anything to that particular

individual who has that information.
In short, I don't see how this agency can ensure that an employee's personal information once it's given to the union isn't misused by others, including without the union's intent or without the union's knowledge. The only way to avoid these problems is for the Board not to require this personal information be given to unions in the first reason. For that reason and others, the Foundation opposes the disclosure contemplated by this rule. Thank you.
MR. PEARCE: How an employer ensure that personal information is not leaked? Let's say we have a love triangle going on on the plant floor that includes a confidential employee that has access to all of this information and all of that information gets out. That happens, doesn't it?
MR. MESSENGER: It does happen, but there the government is not compelling that disclosure. So when one individual shares their information with another, or in this case an employer, that potential is there, and there are some state laws that can protect that, especially since employers are generally very liable for their actions.
MR. PEARCE: But isn't the employer

compelling that disclosure? The employer can require employees to provide that information for its database.
MR. MESSENGER: Yes. But the employer is a private organization. It's a whole different ball game when the federal government is compelling that disclosure. So now, as the government, you have a duty, I believe, to ensure that this information is safeguarded. If two private parties don't use information correctly, perhaps that is a justification for more regulation of them.
But speaking to this rule today, the question is how can this agency ensure that the information given to unions isn't so much misused by the union intentionally but is safeguarded so it isn't misused by others, and I don't see how it can be done.
MR. MISCIMARRA: Mr. Messenger, this is kind of a question I asked before. In your view, does work contact information stand on the same footing as personal contact information? And this would be the example. Let's suppose we concluded that requiring the disclosure of work contact information gives rise to other problematic information for us, like a solicitation that may

occur then on working time and other things, surveillance issues.
If we were to come out -- and I tell everyone this is hypothetical -- but if we would hypothetically come out no forced disclosure of business contact information, the employer is only required to disclose employee contact information like e-mail addresses if the employer happens to have it, but there is no requirement that the employer have it, we require unions if they end up sending e-mails to employee personal e-mail accounts that they have an unsubscribe link with appropriate sanctions if either that link is missing or not given effect if or when an employee unsubscribes, that kind of approach, is that better in a material way than having forced disclosure of work related information and personal contact information, or is that actually worse, in your view, for personal contact information to be in the mix?
MR. MESSENGER: I think from the employee's point of view the personal information is worse. The problem with the work information, a lot of times there's a blend and employees will use work e-mails for personal purposes. That also brings up a whole host of employer related issues, you know,

control over their own systems and IT systems such.
The personal information purely about employees, let's say Hotmail accounts, their own personal accounts, that doesn't create those problems for the employer, but from the employee's point of that might be even be worse, because, again, for the employee themselves it's no longer associated with work.
So if you do have an employee who keeps a very firm line between their working world and their working e-mail and their personal e-mail, like for example I do, I would say it's worse if my personal e-mail is floating out there than if you could find my work e-mail. I mean, my work e-mail, you can find it real easy. But that's for work. There is a reason it's out there, so people can contact me. But my personal e-mail, I would find a bigger violation of my privacy than disclosure of my work e-mail.
MR. JOHNSON: What if there was an opt-out on the front end as opposed to an unsubscribe so that basically people had the same choice to allow their personal e-mail to go over, just like they had the choice upon being employed by the employer to agree to the condition of, "Well,

you have to disclose this contact information?"
I'm talking about an Opt Out, that the employee get full notice that if you do nothing the default is this information is being turned over.
MR. MESSENGER: I see two problems with the opt-out, the first of which of course puts the onus on the employee to do something. I don't believe the employee should have to do anything to protect their personal privacy. They should make the affirmative choice to put that out there. They shouldn't be put in a situation where, if I do nothing, something happens. Just as general human nature, the default usually happens. There's a reason, you know, companies give rebates instead of reducing the price. A lot of people just don't send in the rebates even if they could.
MR. JOHNSON: For example, our votes in our election are based on who shows up, and so if you don't act you're stuck with the consequences of that.
MR. MESSENGER: And then the other problem with the opt-out which I can't quite wrap my mind around is the time frame. We're talking about that under these proposed rules on the 9th or the 11th day the information will be given out, so these

employees will have a very short time frame to make the decision. And then of course there's the question of who provides the notice. I believe, as Chairman Pearce mentioned, having the employer doing that creates polling issues.
If the employer can go around saying, "Who wants to opt out," and then if the agency does it you have a speed issue. When the petition is filed the agency would have to send out by mail a notice almost instantly to everyone involved, besides just the cost of having to do that every time an election was done. Even if the agency did that, the employees would have what, two or three business days to respond to that before the information goes out, because once that list is given the cat's out of the bag. You can't take it back.
MR. JOHNSON: If the timing was a bit different, would you find any length of time for an employee to consider an opt-out to be acceptable?
MR. MESSENGER: Not acceptable, but obviously better. The longer the length of time the better it would be, as opposed to the alternative of having no option at all. So as opposed to worse options, you know, that's better than not having any

option to opt out at all.
MS. SCHIFFER: Are your objections the same arguments with respect to the current Excelsior list requirements?
MR. MESSENGER: I believe they've made similar objections, the identity theft issue somewhat lower. But the true value of the current Excelsior list isn't the address and contact information. It's really finding out who is employed at a particular facility. It's not that hard to find out where somebody's address is once you know their name.
The true value of an Excelsior list to a union is now they know who the 200 people are who work at that particular facility. Without that list they don't know who the person is.
MS. SCHIFFER: You don't think the unions need the addresses? Is that what you're saying? You don't think the unions are interested in getting the addresses?
MR. MESSENGER: It probably makes life easier for the unions, but the privacy interests aren't quite as powerful as when you're talking about phone numbers and e-mail addresses. As some speakers have talked about before, you know, to go

to someone's home it's easier to shut the door. You know that someone is there, and also, quite frankly, it's easy to find. Once they have your personal telephone number and e-mail it's much easier to be contacted and much harder to stop it.
MS. SCHIFFER: So would you have an objection to codifying the Excelsior requirements, then?
MR. MESSENGER: I don't see the need for it. I believe it's been what, 50 years?
MS. SCHIFFER: But you wouldn't object to doing it.
MR. MESSENGER: Not offhand. I mean, it's been there for a long time. I don't think it's going anywhere.
MS. SCHIFFER: And the evidence of misuse with that information, do you have that for us?
MR. MESSENGER: There has been misuse of information. The Fisher case is mentioned here. Another example in our comments, and this wasn't from the Excelsior list but from other information, is the Pelletier case out of Connecticut, where the unions retaliated against an individual who filed a decertification petition by signing her up to every magazine known to man, which created huge amounts of

difficulties for her.
MS. SCHIFFER: But that wasn't an Excelsior list issue.
MR. MESSENGER: But it was information provided to the union. You know, the more information the union has or the individuals have, the more it could be used for identify theft purposes and harassment purposes. So can an address be used for harassment? Yes. An address and telephone number? More potential. The address, telephone number, work schedule and e-mail? It keeps adding. So the Excelsior list in and itself today does contemplate an invasion of employees' personal privacy, but that's not a justification for saying it's not worse to require even more disclosure.
MR. PEARCE: Thank you, Mr. Messenger. Dr. Murray.
MR. MURRAY: Chairman Pearce and Board members, thank you for the opportunity again. I'm Darrin Murray with Loyola Marymount University. I'm adjunct faculty there. I'm here representing SEIU and providing some additional information from a worker involved in a recent campaign.
It's not part of my prepared comments,

but I'm beginning to wonder if I'm the only person in the room who finds it really easy to get rid of an unwanted e-mail with a single click and doesn't find it a whole lot of effort to actually do that. It's just something I'm sitting here wondering about.
This morning I discussed LMU's inclusion of fieldwork supervisors in the bargaining unit, and I talked about how that decision I thought was problematic, not based on a clear and complete understanding of the facts, and how it resulted in limiting my ability to speak freely and openly with my colleagues about the benefits of forming a union.
After that hearing the university provided the Excelsior list, which was due on a Friday. They filed it with the region electronically a minute before midnight when the region was closed. This meant that the union didn't get the list until Monday, and this interfered with my ability to speak with my co-workers about the union.
Under the new rule, the employer would have been required to serve the Excelsior list to the union at the same time as the region so they would have had the weekend to campaign. If the

university was truly interested in encouraging us to make a good, fair decision, then I don't think they would have needed to take advantage of the current rules, manipulate the process, and keep that list from us as long as possible.
They obviously knew who these fieldwork supervisors were, and they could have supplied that information for us to also participate in the process that they had free and unabated access to while we didn't. They knew who the fieldwork supervisors were from the beginning.
LMU had been using work e-mails to send anti-union messages to employees right from the beginning, even before the hearing and the petition was filed. I've given you a copy of one of the first e-mails that our provost sent and then subsequent e-mails directing employees to an anti-union website ironically called "conversations" when there was nothing but an anonymous box to write comments. It may have been answered on a frequently asked questions page site in the website, but it was a website that explicitly said, "We urge you to vote no," and presented the anti-union message.
My contention is that I couldn't contact my co-workers to give my side of this and my

experiences, and that isn't fair. Employees trying to form a union should have the same ability to contact our co-workers and speak to our peers by e-mail. The university has numerous ways to contact its individual divisions, individual schools, individual departments, and frequently collects alternate e-mail addresses for adjuncts that don't regularly check their university e-mail account. If the voter list at least included phone numbers and e-mail addresses, I could have e-mailed them to contact them and tell them how I felt about the bargaining unit.
Adjunct faculty are often pulled in multiple directions. We either have multiple positions or teach on multiple campuses. Some of us come to class, teach our classes, hold office hours, and may spend four to eight hours total on campus, and obviously a lot more time in other places grading and answering e-mails and those sorts of things, but our hours on campus are extraordinarily limited most of the time.
I want to bring my colleagues together. I want to contact them. I want to create a stronger sense of community. I need to be able to do this. I don't have the resources to do that on my own. I

need the support of a union and other folks. The university has worked real hard at creating a third-party message. I want to tell my co-workers that we are the union, we are the ones organizing, but I feel limited in getting that message out there. I can't do that if I can't contact my colleagues. We're still trying to cobble together accurate contact information for our unit and especially for the fieldwork supervisors.

Oddly enough, and I'll let you draw your own conclusions on this, one of my colleagues who was against forming a union somehow or another had a complete list of every e-mail address for every adjunct in the entire university and was able to send out his e-mail message to everyone. I have to wonder how he got that list when we're going so many more difficulties in accomplishing that.

It's not fair that the employer can bombard us with anti-union messages and information and e-mails and websites, and we're stuck with a paltry list of home addresses, a few phone numbers and e-mail addresses that we're trying to gather ourselves. I believe that I am entitled to the same access to my co-workers that my employer has, no more and no less. The proposed amendments would

help me as an employee have more of a voice to speak to my co-workers about the benefits of joining a union. Thank you.

MR. PEARCE: Your employer during this campaign, were they sending out an anti-union message via e-mail?

MR. MURRAY: Absolutely. It was even more so in the website that we were directed to by e-mail, and it was in the meetings that were held by each of the deans, these small group meetings that were coordinated and publicized by e-mail.

MR. MISCIMARRA: Dr. Murray, were the e-mails that were issued by the university in the case that you described sent to home e-mail addresses or university e-mail addresses or both?

MR. MURRAY: I don't have access to that list, so I don't know exactly what they're using. This is a blind e-mail list. It's a mailing list they have that if I was to try to e-mail it, I'll get a message back saying that I'm not authorized to e-mail to that particular list. I received it at my university e-mail address. There may or may not be personal e-mail addresses in there. I have no way of knowing. I can't access the list.

MS. SCHIFFER: Can you tell me, as a

worker, an employee involved in this campaign, what the impact would be on you to have your phone number and e-mail available to the union?

MR. MURRAY: I've met any number of union organizers, and I found them perfectly pleasant folks. I am fascinated and may get a paper out of the rhetoric of kind of casting union organizers as kind of this nefarious organization, and that if they just get one personal e-mail something tragic is going to happen.

I find them perfectly lovely folks and would be happy to have a conversation with them. I'm sure not be everybody feels that way, but I believe they can be dealt with the same way that we deal with telephone solicitors or junk e-mail: by simply deleting it and not responding.

MR. JOHNSON: One quick follow-up, though. If we're talking about work e-mail and it's actually sent to the employer's premises where somebody may or may want be on working time, they're going to have a tendency to open at least the first few e-mails, I assume.

MR. MURRAY: Well, the line between personal and private e-mail, I think, is already pretty blurred. I think that's a blurred line

anyhow. So sure, somebody may open one or two and realize, "Okay, this is not an organization I want to hear from," but I still don't think it makes it all that difficult to just click on delete.

MR. JOHNSON: Right. But at the end of the day that might all be occurring on working time, so if there's 600 e-mails coming in to the employer's e-mail accounts and 600 people open up a message that's five pages long and start reading it, that's going to take some time. Right?

MR. MURRAY: The e-mails from the university that are telling us to go to this website are occurring on work time potentially as well.

MR. JOHNSON: Right. And you are getting paid for that. Right?

MR. MURRAY: My situation is a little unique. I'm definitely not checking e-mail while I'm teaching a class. I may have students that text during class, and I tend to call them on that. I'm not going to do the same thing while I'm teaching a class.

MR. JOHNSON: I understand. Probably even you can't multitask that well. You study communications. Right? When people get e-mails they tend to open them. And if they're at work and

they happen to get one while they're standing at their desk during working time, they may open that when it comes in.

MR. MURRAY: And also from the prince who has $5 million that they want you to deposit in their account free of charge as well, and we just delete those phishing e-mails as well.

MR. JOHNSON: But let's just talk about --

MR. MURRAY: And there's far more of those than union messages.

MR. JOHNSON: Well, let's just talk about the exhibits that you've handed out to us. You would expect the normal person to spend more time on this material than you would on the "I am a prince who has been disinherited from my rightful royal largesse, and if you send me your Social Security number and bank account we can split $10 million."

MR. MURRAY: Yeah. And certainly these letters from our provost and the website are multiple pages and very complex and an interesting rhetorical artifact on its own in terms of how it's attempting to third-party the whole union thing and just walk that close to the line of threatening to reduce our wages by saying, "Well, look, these

people didn't get as good of a contract, they're making less than you," without getting the whole story and which could take up a substantial amount of time. So yeah. I mean, if that's what the university feels is an appropriate use of our time, I would hope I make my message more efficient than theirs, but I think I deserve the same access that they have to my co-workers.

MR. JOHNSON: And that would be an involved back and forth discussion. Right?

MR. MURRAY: I don't know how involved it would be. There would be some discussion, yes.

MR. PEARCE: Thank you all very much. Maneesh Sharma, Maury Baskin and Elizabeth Milito, you can proceed.

MR. SHARMA: I don't think there's much for me to add to what's already been said as far as e-mail addresses and telephone numbers go except for the one idea that it could lead to identity theft. I'm not a technological expert, but I don't understand how possessing an e-mail address or a phone number can lead to identity theft. If I thought that was a major concern, I don't think most of the attorneys in here right now would publish their e-mail addresses on their firms' websites or

allow it to be published in the state bar directory or disseminated in the many ways in which e-mail addresses and telephone numbers are disseminated.

The only other things I wanted to talk about were the inclusion of the job classification shift and work locations on the Excelsior list. I just wanted to comment on how we think it will reduce potential litigation. Unions would have a better idea of who the workers are on the list and who they don't recognize. Many workers work in locations where they don't interact with all of their co-workers. Bus drivers are a good example. They might get a list with names that they just don't recognize. That information would allow them to not have to challenge those voters in some other way, and it will allow them to understand who those voters are and to recognize them. That's really all I've got. Thanks.

MR. PEARCE: Thank you. Mr. Baskin.

MR. BASKIN: Thank you for having me back to talk about this important issue on behalf of Associated Builders and Contractors. I'm also not going to repeat what you've heard from a number of witnesses already, except to say that this is one of the most burdensome and one-sided proposals of the

many burdensome and one-sided proposals that you are considering and have been considering for two days. On behalf of ABC, we object strongly to both the shortening of the time for employers to issue the voter eligibility list and the added burden and invasion of employee privacy of the newly required and deeply personal information you want employers to include for the first time.

But the construction industry has a special concern, which is really the focus of my testimony today, because construction is unique. We have the Steiny/Daniel formula to deal with, unlike other industries in which the contractors are supposed to provide a list not only of the people who are working for them at the time of the petition, but everyone who's worked for them 30 days in the past year and 45 days over the past two years. And having worked with contractors, first, many of them don't have electronic recordkeeping, which may seem strange to some, and many are quite sophisticated and have all kinds of electronic recordkeeping, but none of them seem to have the Excelsior button in their payroll system. It doesn't just spit out these kinds of records.

In fact, of elections I've had using the

Excelsior lists in the industry, I can't recall one where they provided it to me to provide to the Board early. The full seven days seemed to be needed. Now we're telling them that they have to do it in two days, which is clearly going to not be easy to put together, adds a new burden to them, and for what reason other than to speed up the process and give the unions more information faster and make for faster elections, which should not be an end in itself.

That's really our concern about it. We certainly also object to the notion that it should be provided in advance of the petition, which we heard in some respects yesterday and today. That's in a way worse. We don't even know who the eligible voters are in that situation. We heard some of this earlier about the problem with omissions and inaccuracies on the list by forcing them to put it together faster and really in great haste. You're increasing the chances that they're going to make mistakes and omit people. There is a case in 2012, Automatic Fire Systems, a construction contractor who left some names off the list, a small number of names. They went through the election, the union had not gotten a single vote, but the Board threw

out the election because a few names were left off the list. That kind of thing is bound to happen more often with this sort of speeded up process in the construction industry in particular.

We think it's grossly unfair of the Board to put that kind of time pressure on employers that you're proposing here and then punishing them for the errors that are caused by, with respect, your unreasonable deadlines, so it's no wonder that many employers certainly in the construction industry are outraged by this proposal. I think there were nine times as many opposition comments filed by individual contractors this time as opposed to last time, even though they were told that the comments they've already filed still count.

There were a few other points that were brought up that I do want to respond to. There was a question about abuse by unions of this information, that we shouldn't worry about it. I want to mention another case that was not mentioned earlier, the Pulte Homes case against the laborers union in which the union hacked into and assaulted the company's e-mail system as well as home e-mail systems. The Computer Fraud Act was brought up. The company filed a lawsuit. They were not able to

get an injunction even though the court did say that they had shown a violation of various serious issues that had arisen and really should not be countenanced.

I think what it really boils down to is that there is the notion that the employers should be at the ready to turn themselves upside down over this type of thing and that it's just another cost of doing business. That's what the Board said in the notice poster case, really. It seemed like a minor thing to folks on the Board. I'm not speaking to all of you personally. Most of you were not present.

But it really affected the business community, and they came back strong and went to court because it was yet another intrusion of the government into the workplace that had no justification. It was not necessary and it was not supported. I've said my piece, and I'll happy to answer any questions.

MR. PEARCE: Wasn't Automatic Fire System a case dealing with the employer unilaterally omitting names after those names were in existence on another list?

MR. BASKIN: Yes. It was an omission as

opposed to an error, but of course both are subject to the same general standard. They cited cases involving errors. The Board hasn't said what it's going to do. If you're going to do something like, you certainly should be modifying or making clear what's going to happen with the increased likelihood of errors, though the correct answer is not to do it at all.

MR. PEARCE: But you would say that if we did do it that we should be sensitive to errors.

MR. BASKIN: Yes. Absolutely.

MR. JOHNSON: Do you have a problem with the job classification piece?

MR. BASKIN: Yes. I'm glad you brought that up, because in the construction industry people change jobs all the time, even within a day. They change jobs, they change job sites. The type of work that they're doing makes it even more challenging to identify and certainly more likely that there are going to be errors.

MR. PEARCE: With respect to the Steiny/Daniel formula, if a petition is filed in a situation where they're seeking a 9(a) certification as opposed to an 8(f) and the employer decides that they want to campaign, they're going to have to

utilize the formula to find the people anyway, aren't they?

MR. BASKIN: Not necessarily. If the petition is filed, eventually there is going to have to be an eligibility list created. We're talking about the Board's rule to accelerate the list. Yes, a list will have to be created. We're not asking you, although we wouldn't object to your revisiting the Steiny/Daniel formula, but assuming that's settled, that's what the contractors have to deal with.

So yes, they would have to do it anyway, but they don't have to do it before the petition, and they don't have to do it within two days after the decision. That's what your proposed rule is changing, and that's what we object to.

MR. PEARCE: Thank you. Ms. Milito.

MS. MILITO: Thank you very much for inviting me to speak on this topic. You've heard from many other eloquent representatives of the employer community, most recently Mr. Baskin here, so I'm not going to repeat but will just state that NFIB shares the concerns of those representatives.

I would just this afternoon like to highlight NFIB's particular objection with a

proposal that will require that the voter eligibility list be turned over within two days, which for a small business owner would, quite frankly, be almost impossible.

I spoke in my earlier testimony about the administrative handicaps that small business faces, and I've spoken with small business owners faced with an election petition. And producing the list, the compilation of the information, really brings everything in the office to almost a grinding halt while they do this. And as Mr. Baskin said, it really does take them the full seven days as it is now, so two days would really be just impossible. I'm happy to answer any questions, and thank you again for asking me to speak.

MR. PEARCE: Don't employers have to keep track of overtime, and don't they have reporting requirements to other government agencies relative to the number of employees and which employees are working how many hours and things like that?

MS. MILITO: Well, certainly they do have lists. But as Mr. Baskin testified, they don't have it in the format required by the Board right now. There's not a button they can push where the Excelsior list just comes out. It's the compilation

of the information as required by the Board that's different, and of course if you're requiring that employers provide new information, that's an additional burden, too.

MR. JOHNSON: Can I just ask? I seem to remember that in your introductory comments it sounded like the NFIB average numbers about ten employees. Is that correct?

MS. MILITO: That is correct.

MR. JOHNSON: So I assume, in terms of the burden, you're talking about not the ten employee employer but some other kind of employer.

MS. MILITO: Correct. Our average member is ten employees, but we certainly have thousands of members that have more than ten employees.

MR. JOHNSON: In terms of the burden, based on your experience and the your members' experience, where does it start to become onerous in terms of the number of employees and number of facilities that might be at issue?

MS. MILITO: I don't have any hard data, so it's going to be more anecdotal. I think when you're talking about the 50 to 100 range, in that range, you still have businesses that don't have, as I said before, a professional HR representative, but

there's somebody in there that's kind of doing the multi-function thing. I'd say anywhere around the 50 range. It falls on the business owner more times than not. I mentioned before that I've talked to business owners who are kind of helping their office managers, their HR people pull all this together.

MR. JOHNSON: So that's kind of the donut hole.

MS. MILITO: Yes.

MR. JOHNSON: And once you get up to how many employees do you actually have in your members' experiences do they have an independent HR department?

MS. MILITO: It's usually around 50 to 100, somewhere in there, when they kind of decide they need some professional help.

MR. PEARCE: Thank you all. We're now at the bonus round, Specific Questions: Whether or how the NLRB could provide assistance to unrepresented local unions in complying with election procedures, Gina Cooper.

Next is: Whether or how the NLRB should provide assistance to unrepresented small businesses in compliance with election procedures, Elizabeth Milito.

Next is: Whether the procedure used by the Board in this rulemaking demonstrates that the Board values the comments of the public, Curt Kirschner.

Next is: Whether the petition bar to election should be changed from six months to twelve months if the petition is withdrawn shortly before the election, Joseph Torres.

And finally: Whether non-parties should be served with Board filings, J. Aloysius Hogan.

Ms. Cooper, please proceed.

MS. COOPER: Well, once again thank you for allowing me to be here to speak with all of you today. My name is Gina Cooper, and I'm still the director of organizing for the Industrial and Professional Industries of the International Brotherhood of Electrical Workers AFL-CIO.

When I testified yesterday I addressed the 63 percent union win number and talked about how little that number meant in reality. Today I'd like to address another number, the percentage of time that the parties enter into a stipulated or consent election agreement, which is done in 90 percent of the cases.

As a very experienced organizer, I know

that that number does not necessarily prove that the process is balanced or fair. In my experience, employers wield as much power in these negotiations as they wield in an actual hearing. Again, the threat of delay and mounting expenses from prolonged hearing pressures many petitioners into agreeing into almost anything to get to a timely election. Delay, as I testified yesterday, always works against the petitioner. And the expense of lengthy proceedings also puts added pressure on the petitioner to agree to inappropriate units.

For example, many petitioners cannot afford to have an attorney present throughout a lengthy hearing, and local unions often cannot even afford the cost of a transcript. Here are just two examples of these time and expense pressures on petitioners in the negotiation process.

First, in the El Super case the petitioner, under pressure from the employer, recently agreed to include supervisors in the unit just to get to a timely election, and in the 2010 BG&E case the employer threatened its employees that it would drag the hearing out for over a year. After ten weeks of aimless hearing, the IBEW reluctantly agreed to a unit that was virtually a

wall to wall it. The IBEW had initially sought a production and maintenance unit, a unit that is presumptively appropriate in the utility industry. So I do have substantial reason to be skeptical of what the 90 percent figure really stands for.

I was also asked yesterday how the Board could improve processes, so I brought a couple of suggestions along today. First, the IBEW believes that the Board could diminish employer domination of R-Case proceedings by taking control of the process. Accordingly, we recommend that the Board take an active role in this fact-finding process.

Thus, the hearing officer could subpoena witnesses and documents and question witnesses on the appropriateness of the petition for unit. The parties can cross-examine the witnesses after the hearing officer questions them, but the employer would not control the proceedings, as it does now, by presenting the case against the petition for unit from the start.

If it appears appropriate after the hearing officers and the parties' questioning, the employer's case against the unit could be deferred until after the election and its due process rights therefore preserved. Additionally, the hearing

officer could also preside over the negotiation process. He or she could insist that the employer present legitimate proposals to alter the petitio for unit. He or she could prevent the employer from dragging out the process by pretending to consider the petitioner's proposals during lengthy breaks only to return and reject them. The hearing officer could also cut short any employer attempt to include inappropriate employees such as supervisors into the unit.

Second, the IBEW also proposes the Board help cut the cost of hearings to petitioners who cannot afford them. One way the Board could do this would be to renegotiate agreements with reporting services. As we detailed in our written comments, transcript costs of $1.95 per page add up rapidly to $12,000 in one case and $20,000 to $30,000 in a couple of others. Thus, we ask that the Board negotiate a reporting service agreement that would permit it to provide a free copy of the transcript to any unrepresented petitioner who can attest that it cannot otherwise afford a copy of the transcript. We feel these measures could help in creating a fair and balanced election process. Thank you.

MR. MISCIMARRA: Does that last

suggestion presume post-hearing briefing? That's another part of the proposed rule. Or are you suggesting that we provide the transcripts just so the local union would have a copy of the record?

MS. COOPER: For post-briefing, yes.

MR. JOHNSON: It sort of seems like your proposal breaks down or your suggestions break down into two categories. One is to stop employers from doing inappropriate things, and the other is some sort of financial aid for petitioning unions that don't have legal advice, that don't have anything along those lines. They don't have enough money to pay for the transcript. Obviously, as a neutral government agency we can't start, A, giving legal advice, or, B, aligning ourselves with any particular party.

What I would be interested in is to the extent that there are IBEW locals that you would know of or other unions that you would know of, what sort of the equal access to representation of justice proposal would look like. Would somebody have to attest at the beginning of a representation hearing or process essentially that this union is indigent, it's independent, we're not affiliated with an international, and then the transcript would

be free? I don't know exactly what financial component of this you're talking about. That's one thing.

The second thing is: Do you know we have an app? There is a lot on here about the National Labor Relations Act that I have been told by various parties is of immense value to understanding how the law works. I don't think it goes down to the granular level of covering stipulated election agreements, but it's certainly something that any party, be they a small employer or small union, that anybody can avail themselves of and that the agency already has.

To the extent we need to have better materials on the website, and this doesn't have to be subject to the public comment process, you can certainly send a letter, for example, saying, "Can you address X Y and Z." And that's free. All that stuff is freely accessible.

And vis-a-vis the financial aid piece, obviously in this sort of venue we can't discuss that. That probably would be the subject of -- there is no part of the NPRM I think that even addresses that, and I can certainly talk it over with my colleagues, but I would need to know more of

a concrete proposal in terms of what you're thinking about.

MS. COOPER: We would not be opposed if a copy of the transcript was provided to both parties equally.

MR. PEARCE: But I take it that your point is that there is an inherent disadvantage where you have a union that may not be affiliated with an international or may be an independent union started at a plant having to try to manage a representation proceeding. Oftentimes I have experienced that they're not represented by counsel.

MS. COOPER: Absolutely.

MS. SCHIFFER: Your suggestion about having the hearing officer monitor the stip discussions, how exactly do you envision that that would work?

MS. COOPER: I do believe that the hearing officer in the pre-hearing could certainly subpoena the witnesses. It would certainly keep things on a more neutral basis. They could subpoena the witnesses, they could ask questions, and of course both parties would then have the right to cross and talk back and forth and ask questions afterwards. Right now as it sits, the company has

control over that process, and we just think it would be a much more fair process to the workers to be able to have the neutral party be the one that's talking through the unit.

MS. SCHIFFER: I think I understood that, but the part about having the hearing officer monitor the discussions around the stip, how would that work?

MS. COOPER: Well, I think I would leave that to the Board to decide, but I do think that having the initial conversations where they were not talking directly but they were talking through the hearing officer and that the hearing officer would require them to give concrete proposals back on unit identification would be very helpful in this situation.

MR. PEARCE: Thank you very much. Ms. Milito.

MS. MILITO: Thank you very much for asking me to speak about this topic. Let me start off by saying that for a small business owner nothing is a substitute for more time. And while we appreciate the Board's willingness to consider ways in which it might provide assistance to small businesses, I respectfully suggest that the NLRB

might likely be the last place where a small business owner would turn to for help in the midst of a labor organizing drive.

Small business owners are legally bound to follow, and therefore to know and understand, every rule and regulation that impacts them. That includes the differing requirements promulgated by every jurisdiction in which they operate. As a practical matter, this presumption is fiction. No small business owner, let alone a reasonably large staff of experts, can recognize, understand and implement the thousands of pages of rules that they must obey. Further, this continuing task must be undertaken while operating a business well enough to make its continuation worthwhile.

Despite a legal presumption that is impossible, most small business owners make a good faith effort to comply with all regulations and laws. That means they must frequently seek information about government rules and how to comply with them. But a poll conducted by the NFIB Research Foundation on contacting government showed that small business owners prefer to get information about government rules from private sources such as another business owner or trade association, not a

government agency.

Why the lack of contact? The reason is simple. Small business owners are considerably more likely to see the demanding or negative face of government than the collaborative or positive side even when the owners initiate contact. They are not comfortable asking for help from an entity that has the ability to fine, penalize and prosecute them. The interface between small business and government is far more personal than with larger businesses and arguably far less satisfying since the very resources for rules and permits, let alone that the different agencies within the government can be a source of great frustration to small business owners.

In our poll, overall 38 percent of owners reported no contact with a government agency within the last three years, and 20 percent reported contacting a government agency only once or twice. Another 17 percent reported that they had initiated contact many times, but those contacts were primarily for permits or licenses from a state or local government agencies. Federal government is the level of government least contacted by small business owners.

I've been working at NFIB now for over ten years, I have the pleasure of speaking with small business owners every day, and very frequently the owner is calling because of an employment, HR or labor. As you can imagine, and for the reasons I've stated in my earlier testimony, it can be a significant challenge for small business owners when it comes to dealing with labor and employment matters.

And without in-house expertise small firms will need outside help, but finding that help, that outside source, will take time. I have already noted in my earlier remarks why time is important, and there is simply no substitute for time. It is for these reasons that NFIB urges the Board to withdraw the proposed rule. Thank you very much, and I'm happy to answer ay questions.

MR. PEARCE: As Member Johnson had indicated previously, you know we have an app for that. Right? Do you know if members of your association are aware that there is an app and that there is information contained in that app that is geared towards employers as well?

MS. MILITO: I can tell you that I have studied your website and that on some few occasions

I have actually referred members to your website to find a number for a regional office. I have studied your fact sheets in great detail. I like your chart that shows the election process and the ULP process, the flow chart. I'm a big fan of flow charts.

I can tell you with regards to the employer information that there are bullets on what an employer can't say. There is nothing on there -- it talks about, you know, what an employer can't do. There's nothing about employer rights on there. There is some information. I'm not denying that there's information available, and some of it is helpful.

MR. MISCIMARRA: Ms. Milito, let's assume hypothetically that the Board elects not to make any changes in our current election rules. We have an interest in trying to ensure that elections take place in a lawful way, and small business owners, I take it from your testimony, have difficulty just understanding the rules of the road.

And I'm wondering: Do you have any specific suggestions apart from potential changes in anything that the Board could do that would make it easier for small businesses as employers to understand the rules of the road in a way that they

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would perceive to be neutral so that they can just remain lawful?

MS. MILITO: Absolutely. I follow. I think just making it clear on there that employers can contact the Board. I'll be honest with you. I spent time in preparing my testimony studying your website. And as I said, I did find that there is some very helpful information on there. I've gone to your website before, obviously. But just making it clear on there that employers are also free to call the Board.

I mean, one of the members I spoke with wasn't even sure that he could call with a question to get -- I can't remember what the form was that he needed, but it wasn't even clear on there. For instance, the Department of Labor makes it pretty clear that employers, employees, you know, that both can call, that both sides can call. As you said, you can't offer legal advice to either side, but the public can call.

MS. SCHIFFER: Any other suggestions that you would have that you think would provide assistance to small businesses?

MS. MILITO: I think their comfort zone is going to be with outside help, that ultimately

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they're going to need outside help in responding. They're going to need legal help.

MR. JOHNSON: Well, would you want us to have a referral service or a referral to a referral service?

MS. MILITO: I think as a practical matter that would be difficult. It would be difficult just because of the logistics, and coming up with a list in all geographic areas of the country would be hard to do.

MR. PEARCE: And I think we'd have other problems as well. Thank you. Mr. Kirschner.

MR. KIRSCHNER: Good afternoon, Chairman Pearce and members of the Board. I'm appearing again on behalf of AHA, ASHHRA and AONE, and this afternoon I'm accompanied by Lawrence Hughes of the AHA.

For this final panel -- and congratulations on that -- we appreciate the opportunity to speak on the topic of whether the process being used by the Board reflects that the Board values the comments of the public.

First of all, I want to commend the Board on this public hearing process. As someone who participated in the 2011 oral public meeting, this

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meeting is a significantly more thoughtful approach and more orderly than the process used in the previous round. What's been particularly gratifying to me, and I'm sure to many others who have been participating in this process, is the significant engagement that each of the Board members has had with the panelists. I think, as someone who's appearing on behalf of an association, having that interchange with the Board members is extremely valuable. It's certainly been productive for us, and we hope it is as well for the Board members.

We do have a significant concern, however, about the Board's overall approach to this notice of proposed rulemaking. In our view, the 2014 NPRM, which essentially replicates the 2011 NPRM, is inconsistent with President Obama's executive order and the Board's own prior practices and does not adequately engage with the affected communities about what changes this particular Board feels should be made to its election procedures.

In Executive Order 13563, President Obama stressed that rulemaking, quote, "must allow for public participation and an open exchange of ideas." Executive Order 13563 requires that, quote, "before issuing a notice of proposed rulemaking, each

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agency, where feasible and appropriate, shall seek the views of those who are likely to be affected," close quote, by the rulemaking.

While this executive order is not technically binding on the Board, and, as is noted by the Board in footnote 34 of the NPRM, while it's not technically applicable, we believe that the order should inform the Board's general process, and we think that has not occurred here.

Except for a couple of discrete issues, the Board has not followed this path. Instead of seeking to obtain the views of those who would be affected, the Board has issued a detailed, complicated and extremely lengthy rewrite of many of its representation procedures from start to finish. The compounding effect of so many simultaneous changes is unknown, leaving many in the employer community to fear that the impact of these proposed changes will raise concerns about both their efficacy and legality.

Beyond the overly prescriptive nature of the NPRM, we also have a concern that the 2014 NPRM does not incorporate a single suggestion from the over 65,000 comments that were submitted with respect to the 2011 NPRM. As a dissent to the

current NPRM has noted, there was apparently no significant qualitative evaluation of the information received from the prior public comments that were received in 2011. We are concerned that this signals a reluctance by the Board to engage in real dialogue over proposed rule changes, especially since the Board has already responded to these thousands of comments when it submitted its revised final rules in December 2011.

The 2014 NPRM, however, ignores the December 2011 revisions, reverting to the rules as first submitted in June 2011. An attempt to incorporate or at least respond to the prior comments would lessen the fear of the employer community that the public comment process is from the Board's perspective largely perfunctory.

As my partner Roger King noted in his remarks yesterday, the Board's NPRM process here is in stark contrast to the process used by the Board when if promulgated rules regarding bargaining units in the acute healthcare field in 1988 and 1989. Those are detailed in our written comments.

But I would like to note that the U.S. Supreme Court, in affirming the Board's rules there, relied upon the extensive notice and comment

rulemaking conducted by the Board and the Board's careful analysis of the comments it received, which we think are an important component that should be included in this current round of rulemaking.

As evidenced by the sheer volume of written comments received in reaction to the NPRM, the proposed rule changes obviously affect parties throughout the country. We believe that the Board would demonstrate that it values the input of the public, including the employer community and employees themselves by adopting an alternative approach.

We suggest that the Board should put on hold its currently proposed rule changes and instead adopt the approach for all of its proposed changes that it is conducting with respect to its policy regarding blocking charges.

By presenting open-ended questions regarding what changes would work to make the representation process faster and fairer, the Board could develop a record on which it could have a consensus regarding the ways in which it should modernize and streamline its rules. As has been expressed by others, the key component of this approach would be to develop a consensus by this

Board regarding the appropriate time period that should exist between the filing of a petition and an election, balancing the interests of employees, laborers and employers while complying with the Act.

You've already received significant input on this issue, and we think that if the Board could resolve this single matter, that single issue, that that would be the key to developing a consensus by many parties regarding other appropriate rule changes regarding the Board's representation process.

On behalf of AHA and myself, thank you very much for the opportunity to pride these comments.

MR. PEARCE: Do you think that we're acting in contrast to what is required under the Administrative Procedure Act?

MR. KIRSCHNER: Not currently.

MR. PEARCE: Well, that's nice to know. And you also are cognizant of the fact that the representation rules as they currently exist are a refinement of rules that had existed 20, 30, 40 years ago.

MR. KIRSCHNER: Correct. The current rules, I don't know that anyone would step forward

and say that the manner in which the current rules are drafted are a hallmark of clarity or a modern approach, as has been noted. There are concerns, though, with changes where it is not clear where the board is headed with those changes, and I think that's why the Board is hearing so many concerns being raised by the employer community to all sorts of changes, because there is not an indication from the Board about where it's really headed with respect to the length of the election period.

MR. PEARCE: But I guess the point that I'm making is that there have been incremental modifications to the representation rule over the course of decades, none of which were done pursuant to -- with the exception with the healthcare rules. Any of those incremental modifications with respect to the representation procedure were done within the notice and comment period. It was just done.

Wouldn't you say that pursuing these rules and modifications that are focused on procedure and providing a notice and comment period is much more engaging than what our history has shown in the past?

MR. KIRSCHNER: The Board's current representation procedure is a combination of both

the articulated written rules as well as various internal Board procedures and protocols. Obviously the Board has evolved over time its protocols, for example the target date for an election, and the Board is free to do that. However, where the Board has a written regulation, it would need to follow the appropriate process for modifying those.

And so I think that, yes, if you are changing your written regulations about the representation process you need to go through a notice of proposed rulemaking. What we're suggesting, though, is that rather than start with a very detailed set of prescriptive changes where it's unclear where the Board is really heading that it would be better to follow the path of what you're doing with blocking charges, receiving input.

We think that if a consensus could be developed on the Board with respect to what the target date should be on an election, then I think you would see far less objection from the employer community about refinements to other process within the representation process so that it actually could be modernized and more clear for everyone concerned, employees, labor unions and employers.

MR. PEARCE: The current rules don't have

a target date for elections.

MR. KIRSCHNER: They don't.

MR. PEARCE: Now, with respect to the 65,000 notice comments, that was all provided to the NPRM that was issued in 2011, a different Board. We have a new Board, new eyes and so forth. Wouldn't you say there is value to be able to utilize the ability to observe and absorb the 65,000 comments that were previously submitted?

MR. KIRSCHNER: Yes. In our view, however, it would have been helpful for the Board when issued its new notice of proposed rulemaking to give some indication of which of those prior comments had an impact on the particulars of the rules. If we assume that the Board's going to follow the same process now that it did in 2011, the next step for the Board would be a final rule that is issued.

If that is what occurs, then we will have no indication in the public what this Board thinks of with respect to either the 65,000 prior comments or the 9,000 new comments that you've received. It would have been helpful from our perspective to get some indication of where this Board is headed with respect to the input that it's already received.

MR. PEARCE: Well, I think we're obliged to acknowledge all of the comments and address those in a final rule. Wouldn't that criticism be a little premature at this point? This is an open comment period.

MR. KIRSCHNER: Yes, it is, and if the Board is going to come out with a new proposed rule rather than the final rule which allows greater iteration, then perhaps my concern is not well taken. But if the Board is going to follow the same process as it did last time, which is the notice of proposed rule, which has itself in a way a very defined rule included with it, and then a final rule, there is no further give and take between the Board and the public with respect to the contents of that.

MR. JOHNSON: Let me throw some ideas out.

MR. PEARCE: Can we have Member Hirozawa first.

MR. HIROZAWA: I was just gong to say, Curt, if it makes you feel any better, we don't know where we're headed, either. There are a lot of difficult decisions that are going to have to be made, a lot of questions where there are significant

considerations on both sides, and there will be a lot of discussion among the members during the coming period of time.

We got a lot of extremely thoughtful and helpful comments three years ago and we've received more this time, so we have a lot to work with. We have five members who I think you can tell are all very fully engaged. And I think that it's clear that none of us and obviously no members of the public will know where this is going to come out until there has been some decision first on whether there will be a final rule and then on what exactly what will and won't be addressed and how it will be addressed.

But in terms of the views of the public, I think that I speak for all five of the members here that we all consider them very important and an essential part of this process.

MR. JOHNSON: I always love talking about process improvement, and that's basically what your comment was about. The way that I view it is that the regulated community is somewhat unsettled because there is not really a discernible trajectory at this point and so you're basically looking at a giant mosaic of all these potential changes without,

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from your point of view, kind of an iterative input from stage to stage.

What if -- and I'm saying this with the full expectation that heavy objects will be thrown at me from my fellow members -- but what if there was another stage where we essentially narrowed down whatever the issues were, the inflection points were, to certain key ones? You mentioned your point of view, that you think from a process point of view that if we just got the one time frame settled or discussed, that that would focus the discussion in the sense that the regulated community could very quickly come to some conclusion on where we're going on this and perhaps some mass agreement.

But leaving that all aside, that's your view of what would be helpful. If we narrowed things down to a more limited set of issues and it was consistent with the Administrative Procedure Act, because I don't want to be speaking out of school about what we could or couldn't do, and then had another request to speak type thing, not necessarily another comment period because we've already gotten back to you on your FOIA request on that in terms of where the Board ended up ultimately coming out, would that being more helpful?

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MR. KIRSCHNER: Yes. I mean, it would be helpful. It depends on what it's narrowed to. In terms of the future process of the proposed rule, my guess is that in the end any compromise that reflects a consensus of this Board is going to probably leave some members of the employer community and/or some members of labor unhappy. It would be difficult to have some final world that has a consensus on this Board that would make everyone a hundred percent happy.

Nonetheless, I think that having this Board achieve a consensus would be a huge step forward. And if that would be reflected in part by a narrowed set of requirements or regulatory changes plus a target deadline and then having some public comment period, personally I think that would be a major step forward and a better process, because people would know then when they're providing comments where this particular Board is headed with the regulatory changes.

If you are able to do that type of process, I think it would be a significant improvement than, say, what we saw in 2011. There were various legal concerns raised with respect to that. It ended up being set aside because of a

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procedural issue. Several of the components of the current NPRM do raise legal concerns, and so if those are addressed in the next stage, then I think many in the employer community might have a different level of concern, particularly if the target date for the election is identified.

MR. PEARCE: Thank you very much. Mr. Torres.

MR. TORRES: Thank you, Chairman Pearce. I wanted to briefly outline the reasons why I think the Board should consider revisiting its policy permitting the refiling of election petitions within six months of voluntary withdrawal.

The current Board precedent, if you look back to the origins in Sears Roebuck, offers little substantive reasoning about why the Board drew a distinction between voluntary withdrawals and election bars, and more fundamentally there is little guidance as to whether that reasoning is still valid given current practices. In my experience and in the experience of other practitioners with whom I've discussed many of these withdrawals, at least in recent times they have occurred much closer to the time of the actual election.

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As we all know, elections can be disruptive. They are costly and they are time consuming, especially as they progress, and one stated purpose of the NPRM is to promote greater certainty in the election process. And so it seems to us that to the extent that the employees or union in the course of an election elect to keep their powder try and await another day, that is obviously their prerogative.

I'm not suggesting that we task the regional directors with embarking upon examining the reasons in every instance why that may occur, but I would submit that to the extent that they elect to withdraw the petition voluntarily on the eve of the election or close to the election, that should bear greater consequence for electing to wait so long to do so in the interest of promoting some greater certainty to this process.

In terms of what that time period would be, I think it probably needs to wait in part to get an answer to some of the other questions that the Board is grappling here with in terms of what the timing of elections should be. But it seems to me that the shorter the time period the earlier in the process that bar should apply, so that the

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withdrawal of the petition should result in a one year bar, the same way that the outcome of an election would arguably apply to the entire time period if in fact it ends up being as short as some people have surmised here.

I think that to the extent that the labor organizations are looking for greater certainty and greater speed in these elections and that they occur more quickly, it seems to me that a corresponding consideration should be given to whether, if they choose to withdraw from that process, whether there should be a consequence that more parallels the outcome of an election rather than giving them some greater ability to reengage in some shorter time frame.

Employers obviously want certainty, too, and I think employees want certainty as much as possible, and so it seems to meet that a fairer process, especially if the Board is going to consider some shortening of these time periods, would be to take the voluntary bar and run it co-extensive with the election bar.

I appreciate your letting me have the opportunity to address you on these and other matters over the last two days.

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MR. JOHNSON: What impact, if any, do you think that would have on the parties' willingness to enter into the stipulated election agreement if simply once they start negotiating about it they might be stuck with a longer bar?

MR. TORRES: Well, again, it seems to me that if the outcome of this process is a more streamlined process where there's fewer opportunities for there to be issues contested before the election is held, it seems to me that, if you've put yourself in that process, and I think that unions are looking for fewer barriers to get to an election, so it would seem to me that they would not necessarily have less incentive to reach a stipulated election because all of this is purportedly about getting to the election sooner rather than later, and I don't think that would result in fewer stipulated elections.

MS. SCHIFFER: And what concerns does this address?

MR. TORRES: I think it addresses the question of whether or not there is greater certainty in the outcome of holding elections. I think that is certainly part of what the Board is required to ensure, that there is a finality to this process. And to the extent that we are having elections run up to the eve of an election, these are very time consuming, they're very disruptive, and they can be very emotional matters.

It seems to me that if unions are going to embark upon this process at a time of their choosing we're entitled as employers to see some certainty to that process. I don't see any fundamental reason why, especially in a shorter election period, that that certainty shouldn't co-extensive with the bars that Board has put in place for other elections.

MS. SCHIFFER: But are you suggesting that there would be more withdrawals now under the new rules, or are you suggesting that this should be a change that should be made no matter what the process is?

MR. TORRES: I think it should be made no matter what. What I suggested in my remarks, and I'm sorry if I wasn't clear about it, is that, to the extent that the time periods become compressed, it seems to me that the line that the Board elects to draw as to when perhaps it would be appropriate to impose a one year bar perhaps would be --

MS. SCHIFFER: But you're not really

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linking this with the proposed rules.

MR. TORRES: Only to the extent that I was suggesting there may be a decision that has to be made as to where the line might be drawn.

MR. PEARCE: Thank you, Mr. Torres. Mr. Hogan.

MR. HOGAN: Again, I'm Aloysius Hogan with the Competitive Enterprise Institute. I wanted to address the problem of whether a non-party should be served with Board filings in any circumstances. I posed earlier the problem of increasing the understanding of the workers in a neutrality agreement situation.

Dr. Murray earlier had phrased, "We are the union, we are the ones organizing." You've got somebody -- and this is all triggered by definition -- somebody is organizing, somebody is pushing the union agenda, and the workers normally in this situation are getting the other side of the story from the employer not getting it. In such situations I think it militates toward affording the non-parties an opportunity to be educated.

How do we get these workers educated by the company? I'm not talking about a right for these people or a need to educate these people. As

Chairman Pearce had begun to allude to, there is no duty of the Board to educate these people in the absence of the employer doing the education but, rather, allowing a notice to outside groups. And here I'm talking about the groups that would be notified would be doing the job of correcting the imbalance in information of giving the side of the story that normally the corporation does.

What you would run into quickly is the worker centers, that they'd say, "Hey, we want to join in here and we're happy to give our information, too," but that side of the story is already being handled. I'm talking about the other side of the story that's not in the scenario.

And so there's kind of a trigger if there is nobody taking care of that side of the story, of the neutrality agreement. However, it can't be limited to that scenario, because let's say that were the situation, that if there is a neutrality agreement and nobody giving that side of the story, then the union and the business that are working together would know, "Well, then you're going to get the other side of the story from somebody else, so we better not have a neutrality agreement, we'll phone it in and we'll really give you the

information," and they'll just half-hearted quarter-hearted give you the information just so that no third party could come in.

What I'm talking about is that I believe the objective can be achieved by making the opportunity known to outside groups that want to help, not a referral service, but there are outside groups, as we saw in Tennessee, in Chattanooga, that are willing to serve that role, non-profits, institutes, foundations and charities that are happy to help do the education.

In that scenario, is it right that they would be notified of that situation, of that opportunity to fill that void in the process, which is in that case kind of broken down an not served by that group of people? I'm throwing that out there as something to chew on, and I don't have all the answers on that, but I think it is a concern that the Board should consider.

MR. PEARCE: So you're talking about like a labor version of the League of Women Voters being brought in to kind of educate everybody?

MR. HOGAN: Well, it would be a voluntary thing. There would be no government expense. And there are groups out there that do this sort of

thing, charities.

MR. PEARCE: Specifically what are you talking about them doing, these charities? What would they be doing?

MR. HOGAN: For example, one of the things that is very complex that we haven't even discussed too much is labor economics. Forget the law.

MR. JOHNSON: We can't employ economists, but keep going.

MR. HOGAN: We're not talking about employing economists but trying to get people to understand a lot of complex stuff that they have to get in a quick period of time, and they need to learn this so that they can make an informed decision. In fact, I did want to make a point on the time that it would take to learn this stuff by analogy to the McCain-Feingold Bipartisan Finance Reform Act, which of course was overturned.

But the point I'm making there is that the legislators had in mind a 60 day window before the general election that would be a minimum of 60 days when you could educate the people about the issues in the election and the people involved in the election. So it's going to take some time. If

you've got nobody helping the workers learn about this other side of the story, I would say you'd need a little extra time, and that's just a window of time that you could look to.

MR. JOHNSON: A few things. One is that you know under our proposal a notice is going to go up at the time the petition is filed, so everybody's going to see that in the workplace. And there are companies that see our petitions that come in. They get them through FOIA requests and then just put them out there. Any such charity could subscribe to that list if it wanted to. You're suggesting that we regulate the entry in the neutrality agreements between unions and employers with some sort of notice?

MR. HOGAN: No, not at all. I am considering more like an opt-in situation where it would be permissible to allow these groups to serve the role of educating these people.

MR. JOHNSON: But who's doing the opting and who determines who the groups are?

MR. HOGAN: Well, that's it. The groups are essentially volunteers. They'd be opting in. It would be the groups themselves, the educators, if you will.

MR. JOHNSON: But who's going to be checking the box saying, I'D like to inform Southern Momentum of this proposed election? I don't understand that.

MR. HOGAN: Well, once they're informed of the scenario that we're talking about where there is a disserved population, that's what would trigger it. And that's what would take some discernment. It's not just, as I went through in my scenario, it's not just when there is a neutrality agreement, but it's also when there is any hint of a wink-wink shall we say.

MR. JOHNSON: But that would be impossible to monitor. I guess also that neutrality agreements, some people think of those as a social good because essentially they might secure them labor peace, and some people may say, "Well, the NLRA is built around labor peace." It just seems like, even if we wanted to regulate this, it would be incredibly difficult to do.

MR. HOGAN: Well, again, I'm not saying to regulate it but to afford the opportunity. In fact, you said you were interested in process and process breakdowns, and it seems here that there is a disserved population increasingly depending on

what happens with neutrality agreements ultimately.

MR. JOHNSON: Well, folks can get the app, and I also think if there's any organization that wants to see if there's an election coming around there are petition monitoring services.

MR. MISCIMARRA: Mr. Hogan, the one thing I do gather from your comments, and I would guess that others would agree, that there certainly are a variety of interests, not just those of the employer and those of the employees or those of unions that are involved in representation cases, that are both affected and also have an interest in what happens with respect to these types of issues and disputes. Would you agree with that?

MR. HOGAN: Very much so.

MR. PEARCE: Well, I'd like to thank the seating and the patience of all of you to wait to get your statements in and your presentations. I'd like to thank all participants in this public hearing. It was comprehensive, very educational and useful to us in our deliberations. I commend the commitment that all of you have demonstrated, your knowledge of the circumstances, the data that you've provided, and the well thought out arguments and points that are definitely worthy of reflection.

I hope that you've been comfortable with how this process went. I at least got one compliment on how it was done, and I hope everybody shares that. I thank you again for traveling from your distances to do this. We appreciate your efforts. This hearing is now closed.

(Proceedings concluded at 6:24 p.m.)

District of Columbia.

To wit:

I, Keith A. Wilkerson, a Notary Public of the District of Columbia, do hereby certify that the that these proceedings were recorded stenographically by me and that this transcript is a true record of the proceedings.

I further certify that I am not of Counsel to any of the parties, nor an employee of Counsel, nor related to any of the parties, nor in any way interested in the outcome of this action.

As witness my hand and Notarial Seal this 28th of April 2014.

Keith A. Wilkerson,
Notary Public
My commission expires:
November 12, 2014

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