

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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<p style="text-align: right;">Page 327</p> <p>1 A P P E A R A N C E S:</p> <p>2 National Labor Relations Board Members:</p> <p>3 MARK GASTON PEARCE, Chairman</p> <p>4 PHILIP A. MISCIMARRA, Board Member</p> <p>5 KENT Y. HIROZAWA, Board Member</p> <p>6 HARRY I. JOHNSON, III, Board Member</p> <p>7 NANCY SCHIFFER, Board Member</p> <p>8</p> <p style="text-align: center;">- - -</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 329</p> <p>1 then at the end of the day make sure you trade your</p> <p>2 badges in for your driver's license so that you'll</p> <p>3 be able to get on the plane. You should note that</p> <p>4 there have been adjustments to the schedule, so</p> <p>5 anybody who is working from the old schedule, you</p> <p>6 might be advised to pick up some of the new</p> <p>7 schedules that are available outside.</p> <p>8 The first seating, this is the first</p> <p>9 grouping, this is a topic area that involves five</p> <p>10 seatings, so we're going to have a lot of testimony</p> <p>11 in that regard. I strongly encourage those people</p> <p>12 following to make adjustments to their presentations</p> <p>13 once points have been made that are very similar or</p> <p>14 possibly exactly like the point that you're going to</p> <p>15 make so that we can reduce repetition. We hate to</p> <p>16 remind people of that if it gets too repetitive, but</p> <p>17 we will. We're going to have lunch at 12:30, closer</p> <p>18 to 1:00, and we're going to have a short break at</p> <p>19 approximately 11:00 or 11:30.</p> <p>20 The topic area is:</p> <p>21 Election date. Please describe the</p> <p>22 standard to be applied for scheduling an election.</p> <p>23 The proposed rules state that the regional director</p> <p>24 should select an election date which "is as soon as</p> <p>25 practicable." If you disagree with the standard,</p>
<p style="text-align: right;">Page 328</p> <p>1 P R O C E E D I N G S</p> <p>2 MR. PEARCE: Good morning, everyone.</p> <p>3 This is the second day of the meeting of the</p> <p>4 National Labor Relations Board. I'm still Mark</p> <p>5 Gaston Pearce, the chairman. To my right are board</p> <p>6 members Kent Hirozawa and Phil Miscimarra, and to my</p> <p>7 left are board members Harry Johnson and Nancy</p> <p>8 Schiffer.</p> <p>9 As we stated yesterday, the purpose of</p> <p>10 this meeting is to hear from and question individual</p> <p>11 presenters. This is not a group presentation by any</p> <p>12 means. We're grouping folks for administrative</p> <p>13 convenience. Although presenters are encouraged to</p> <p>14 reply to the extensive prior written commentary</p> <p>15 submitted to this rulemaking, this meeting is not a</p> <p>16 forum for group discussion among the presenters, so</p> <p>17 if there is a question that we ask we're going to be</p> <p>18 trying to focus it on the individual rather than the</p> <p>19 group, and speakers should address the Board and not</p> <p>20 other speakers.</p> <p>21 Housekeeping is that you keep your</p> <p>22 badges, the same story. This is a very exclusive</p> <p>23 nightclub. If you lose your badges you might not be</p> <p>24 able to get in. If you go out for lunch make sure</p> <p>25 you have your badges with you to come back in, and</p>	<p style="text-align: right;">Page 330</p> <p>1 please describe the standard you would apply.</p> <p>2 Specify whether you think the rules should include a</p> <p>3 minimum or maximum time between the filing of the</p> <p>4 petition and the election, and, if so, how long this</p> <p>5 time should be. Also address whether the proposed</p> <p>6 rules adequately protect free speech interests; if</p> <p>7 you believe they do not, please and state</p> <p>8 specifically how the proposal can be adapted to</p> <p>9 adequately address the matter.</p> <p>10 For the first seating we have Joseph</p> <p>11 Torres, Brian Petruska, Elizabeth Milito, Edgardo</p> <p>12 Villanueva and Glenn Rothner. Welcome everybody.</p> <p>13 Thank you. Mr. Torres, you can proceed.</p> <p>14 MR. TORRES: Thank you, Chairman Pearce.</p> <p>15 Again, my name is Joseph Torres. I'm a partner in</p> <p>16 the law firm of Winston & Strawn, based in their</p> <p>17 Chicago office.</p> <p>18 Chairman Pearce and members of the Board,</p> <p>19 thank you again for the opportunity to address you</p> <p>20 regarding the proposed election rule changes. As</p> <p>21 you noted, we were asked to address two specific</p> <p>22 issues concerning the timing of election and the</p> <p>23 effect of that on the free speech interest</p> <p>24 guaranteed by the National Labor Relations Act.</p> <p>25 I would submit that the "as soon as</p>

<p style="text-align: right;">Page 331</p> <p>1 practicable" standard in and of itself doesn't do 2 much to inform a practitioner as to what they should 3 expect. What matters is ultimately what that 4 standard evolves into in terms of an actual time 5 frame for conducting elections, and I submit that 6 the more appropriate measure of that time period 7 should be the existing median times that the vast 8 majority of NLRB elections are resolved. It 9 represents a benchmark that has been developed 10 through collective experience, and to that extent I 11 believe it provides a reasonable degree of certainty 12 for interested parties.</p> <p>13 You can see what has happened in the 14 past, you can apply it to your situation, and 15 develop some reasonable expectations for your 16 clients as to how this process will play out. Many 17 of these clients, as I'm sure you've heard over the 18 last day, have little or no experience with the 19 National Labor Relations Act, and so bringing 20 certainty to the process, in my opinion, promotes 21 the best policy for this Board to pursue.</p> <p>22 To the extent that the proposed "as soon 23 as practicable" standard is intended to refer to the 24 10 to 21 day time period that is contemplated by the 25 notice of proposed rules, I believe it proceeds from</p>	<p style="text-align: right;">Page 333</p> <p>1 would submit is not.</p> <p>2 I would note that the Board can more 3 precisely address any specific issues that might 4 warrant deviation from those median times by looking 5 at data that could identify the factors that may be 6 causing delay in some cases, seeking input from 7 relevant constituencies as to how such factors could 8 be addressed to reduce delay in cases where that 9 occurs, and identifying a consensus based solution 10 which I would suggest the median time period 11 represents. They balance employee Section 7 rights, 12 the need for reasonably prompt resolution of 13 election issues, and the rights of employees and 14 labor organizations to meaningfully advocate their 15 views.</p> <p>16 And I think that takes us to the next 17 point. For employers and employees in and labor 18 organizations to have a meaningful ability to 19 express their views concerning unionization and 20 organizing campaigns, I think it's important that 21 the time periods that are set for an "as soon as 22 practicable" standard allow not only for 23 communication itself but education as to what we're 24 actually talking about.</p> <p>25 I believe, again, that statutory such as</p>
<p style="text-align: right;">Page 332</p> <p>1 a faulty assumption that the current median times, 2 which are well documented, require some wholesale 3 revision. I believe that the sort of extreme or 4 isolated examples of elections that have exceeded 5 the median times by substantial amounts relative to 6 the overall number of elections that this Board 7 processes every year, its own statistics make clear 8 that the vast majority of election cases are 9 resolved in an efficient and expeditious process, 10 and any alleged need to shoehorn all election cases 11 into an unnaturally short time period lacks any 12 generally acceptable empirical support.</p> <p>13 In my experience advising clients that 14 are small, that are large, the current median times, 15 as I said, provide some reasonable reference point 16 for individuals as to the timing and expected 17 developments of an election campaign. I believe 18 that establishing guidelines to inform an "as soon 19 as practicable" standard requires you to look at the 20 timing of elections in various sizes and industries, 21 geographic locations and circumstances, and that, 22 based upon that experience, it is a sound basis for 23 policy development. In contrast, establishing 24 significantly shorter generally applicable time 25 periods based on an atypical minority election I</p>	<p style="text-align: right;">Page 334</p> <p>1 those embodied in Section 8(c) must also include 2 some reasonable opportunity for expression in order 3 for the statutory right to have any meaningful 4 benefit. And to the extent that the current median 5 time frames allow for reasonable processing of the 6 vast majority of elections, I would submit that 7 employers and employees should be able to engage 8 during those time periods in some reasonable amount 9 of education and communication regarding the 10 election.</p> <p>11 It is a balance to be struck. 12 Recognizing that we're not dealing with absolutes in 13 terms of what is the only time period for holding an 14 election, I think that the circumstances in which 15 various elections present themselves should allow 16 for variation and that the median time frames show 17 that that generally happens in a fairly efficient 18 and effective process. And when there are 19 circumstances that the Board in its experience 20 identifies require some adjustment, a solution would 21 benefit from a more precise assessment of the 22 factors that may be causing delays or issues. Thank 23 you very much.</p> <p>24 MS. SCHIFFER: I wanted to ask about one 25 of the statements you made about having guidelines</p>

<p style="text-align: right;">Page 335</p> <p>1 to inform the standards. You mentioned geography, 2 industry and some other factors. I wondered if you 3 were suggesting that there would be different 4 guidelines for different areas of the country and 5 for different industries.</p> <p>6 MR. TORRES: No. I'm merely pointing out 7 that there is no atypical election, that they come 8 in a vast majority of circumstances, and that the 9 collective experience of all of those large 10 employers, small employers, geographic areas, that 11 the unique circumstances of whatever their proposed 12 unit is all accumulate to provide a body of 13 experience, that that is embodied in the median time 14 periods that have been reported, in my view, and 15 that we should not be slicing it into sort of 16 compartmentalized time periods.</p> <p>17 MS. SCHIFFER: I appreciate that. I was 18 confused about that. Are you suggesting that in 19 this rulemaking we provide the time periods?</p> <p>20 MR. TORRES: Yes. I believe that to the 21 extent that you have existing time periods your work 22 is done. There is no need to further -- the time 23 periods that show the collective experience, in my 24 opinion, is the standard by which you should be 25 implementing an "as soon as practicable" time</p>	<p style="text-align: right;">Page 337</p> <p>1 benchmarks to be using as guides to try and work 2 through some agreement with the parties, that that 3 is a workable solution, rather than, as you suggest, 4 trying to statically say that in every instance you 5 shall conduct the election no later than X date. 6 Again, I think there's just too many variables for 7 you to try and establish minimums and maximums for 8 these sorts of circumstances.</p> <p>9 MR. JOHNSON: Just to jump in, then, 10 would you be fine with us in defining "practicable" 11 by throwing out a few things to look at, for the 12 regional directors to look at? I'm not quite sure 13 whether you're approving that approach or 14 disapproving that approach.</p> <p>15 MR. TORRES: Well, I think that to the 16 extent that there are factors that lead to -- in 17 looking at the median time periods that already 18 exist, if it's three to four weeks that we're saying 19 is sort of the normal time period, it seems to me 20 that, subject to whatever unique circumstances might 21 apply in a particular case, setting that as sort of 22 the timeline or the benchmark that they should be 23 shooting for is not an unreasonable standard for 24 them to employ.</p> <p>25 MR. JOHNSON: Okay. So your premise is</p>
<p style="text-align: right;">Page 336</p> <p>1 period. I don't think anyone agrees that that is 2 not optimal, all things being equal, that we get to 3 an election as soon as practicable, but the question 4 or the devil in the details is how much in fact will 5 that time period be, and I would suggest that you 6 already have some standard that you can use to 7 inform that standard for practitioners and 8 employees.</p> <p>9 MR. PEARCE: But wouldn't you imagine 10 that there would be some challenges to creating 11 static time periods even if it varies from industry 12 to industry just because of the fluid nature of the 13 circumstances that present themselves?</p> <p>14 MR. TORRES: I think if you defined a 15 rigid time period as the embodiment of "as soon as 16 practicable," I would completely agree with that, 17 Chairman Pearce. But what I'm suggesting is that a 18 median is just that: it is a guideline, it is a 19 frame of reference, it is a time or period that the 20 regional offices can take into account when they're 21 trying determine what works best in a particular 22 circumstance.</p> <p>23 Recognizing that there's a vast number of 24 variables that come into play in any election 25 proceeding, it seems to me that by giving them some</p>	<p style="text-align: right;">Page 338</p> <p>1 basically that what's going on now in terms of 2 experience is in the field is the baseline we should 3 use.</p> <p>4 MR. TORRES: Yes.</p> <p>5 MS. SCHIFFER: And the median you're 6 using is for non-litigated --</p> <p>7 MR. TORRES: Again, I think there's a lot 8 of moving pieces here. If we're talking about 9 elections that ultimately have some contested 10 issues, I think that the median time periods are 11 slightly longer. Whether there is a middle ground 12 there or whether there are going to be other changes 13 to the rules that would require there to be some 14 adjustment I think depends on other things the 15 Board's considering adopting here.</p> <p>16 MR. PEARCE: Thank you, Mr. Torres. Mr. 17 Petruska.</p> <p>18 MR. PETRUSKA: Thank you, Chairman 19 Pearce, Member Hirozawa, Member Miscimarra, Member 20 Schiffer, Member Johnson. I spoke with you 21 yesterday. I'm counsel to the LIUNA Mid-Atlantic 22 regional organizing coalition.</p> <p>23 I'm speaking today in support of the 24 current standard that directs elections to be held 25 as soon as practicable. It's important for the</p>

<p style="text-align: right;">Page 339</p> <p>1 standard for scheduling elections to be flexible 2 because there is a lot of fluidity in bargaining 3 units. They vary in size, geography and complexity 4 in just about every way imaginable. However, 5 straightforward elections of relatively smaller 6 units in single locations should be able to be 7 conducted expeditiously, and if you have a large 8 unit with multiple locations, as can happen 9 sometimes in construction, it may take longer to 10 prepare. Mail balloting is going to have its own 11 schedule. It's going to be different. What is 12 important is the principle that should drive the 13 scheduling. In general, expeditious elections 14 should be preferred to those with prolonged delay. 15 I think it is important to maintain the 16 Board's neutrality in the process. Delay can create 17 a sense of futility among workers who are 18 organizing. It can negatively influence employee 19 views on working collectively and on the collective 20 bargaining process. I think it is important to 21 maintain the Board's neutrality in the process, and 22 so the schedule should really be based on neutral 23 factors such as how long does it practically take to 24 run the election and not on artificial timetables. 25 There has been great concern in the</p>	<p style="text-align: right;">Page 341</p> <p>1 will necessarily, I think, make the ten day election 2 in a contested case impossible. 3 Even if the pre-election decision is 4 deferred until after the direction of election 5 issues, the director nevertheless has to put in time 6 to write the decision before the election and tally 7 ballots, and so that has to be taken into 8 consideration. The ballots have to be printed. 9 These days, in my area it's often in multiple 10 languages. Each additional step requires more time, 11 and the regional staff must be available to hold the 12 elections on the days and times directed. This 13 requires scheduling far enough in advance so that 14 staff can be available. 15 Lastly, there's the Excelsior list. Even 16 if it's issued in two days, most unions are going to 17 want to have that before they proceed, and they're 18 want to going to have time to assess it, because 19 that's going to be one of their first opportunities 20 to assess what they know about the unit with what's 21 on the list. 22 Fifth, there is the Board's traditional 23 convention of holding elections on paydays. These 24 aren't necessary in every unit, but in units with 25 substantial part-time employees there is efficacy to</p>
<p style="text-align: right;">Page 340</p> <p>1 business community in the comments that the proposed 2 rulemaking would result in elections that are 3 aggressively fast. I read at least two 4 commentators, and I believe this comes from former 5 Member Flynn's estimate, of elections possibly 6 within ten days. And those who cite the ten day 7 election also allege that the abbreviated schedule 8 threatens the employer's ability to participate in 9 debate and education with employees over the 10 election. 11 I would suggest that these concerns are 12 overblown. To begin, elections in ten days from the 13 filing of a petition, as I see it, could only occur 14 in a stipulated situation, a stipulation or consent, 15 and in that instance all parties are going to have 16 to agree on the date to begin with so no one's 17 rights are being trampled. 18 In contested cases, by contrast, there 19 are several practical considerations that make an 20 election within ten days extremely unlikely. First, 21 when a election is directed, the direction of 22 election cannot issue until after the record's been 23 produced, and it takes a couple of days just to 24 produce the record because the regional director has 25 to read it in order to direct the election. That</p>	<p style="text-align: right;">Page 342</p> <p>1 holding it on that day so that employees would be 2 present, and that will also drive scheduling 3 considerations. 4 Consequently, even under swift 5 proceedings in contested cases, I would anticipate a 6 minimum of two weeks after the hearing to conduct an 7 election. I think elections in contested cases will 8 range between 21 and 35 days from the petition, but 9 21 days probably acting as the earliest. In 10 stipulated consent cases, which are the vast 11 majority, I think you can have a shorter timeline, 12 and I think that's appropriate, but since those are 13 stipulated cases everyone's agreed to that 14 voluntarily. 15 So let me say that I do not think the 16 schedule can be fairly called an ambush election. I 17 do not think a three to four week election restricts 18 free speech rights. Employers maintain their rights 19 under Peerless Plywood to conduct mandatory 20 meetings, under Shopping Kart to disseminate 21 propaganda regardless of its accuracy or inaccuracy, 22 and under 10(c) to express any opinion so long as it 23 contains no threat and promises no benefits. 24 In all, I think the employer's right to 25 these modes of expression are not abridged by the</p>

<p style="text-align: right;">Page 343</p> <p>1 rule and that the concerns for restrictions on free 2 speech are substantially overblown. Thank you. 3 MR. PEARCE: Would you advocate setting a 4 particular number of days minimum and maximum number 5 of days to set an election date? 6 MR. PETRUSKA: I wouldn't advocate for 7 that because I think it's unnecessary. I will say 8 that currently we have a Supreme Court who is more 9 solicitous to corporate free speech rights than any 10 court in history, and I do think that's a 11 consideration at least with respect to this being an 12 issue that is driving a lot of the comments. 13 I do think that it's important to make 14 clear that the practicable standard is not one that 15 restricts or that precludes participation in the 16 process. So I don't think there needs to be a 17 minimum, but I do think it needs to be made clear 18 that some of the "parade of horrors" that have 19 been in the comments are not a likely outcome of the 20 standard. 21 MR. MISCIMARRA: Mr. Petruska, your 22 comments are very helpful because there are a 23 significant number of steps -- and I'm 24 summarizing -- that kind of dictate when elections 25 become practicable because there are a lot of</p>	<p style="text-align: right;">Page 345</p> <p>1 would expect in cases where, depending on the 2 circumstances -- and I'm looking mostly at, you 3 know, the practical considerations -- they're going 4 to need more time. I think they're the ones to make 5 that determination. 6 I suppose if there is a small unit, but 7 it's a contested case and the regional director 8 thinks, "I could knock this out in, you know, four 9 days," he might say, you know, "I'll push it back a 10 week to have more time" maybe just to give them a 11 buffer, that is I think a consideration that the 12 regional director should make on a case by case 13 basis, and I think the practical guidance gives him 14 the appropriate guidance that he should be using. 15 MR. JOHNSON: A quick follow-up to Phil's 16 question. If the Supreme Court in Chamber of 17 Commerce versus Brown has recognized that employees 18 have an implicit right, an underlying right, to 19 receive information opposing unionization, and if 20 the Supreme Court, also ensconced in that decision, 21 is referring to some earlier decisions that 22 essentially the NLRA is favoring uninhibited, robust 23 and wide-open debate in labor disputes, shouldn't we 24 take into account of those policies when we set 25 whatever standard we're going to set here?</p>
<p style="text-align: right;">Page 344</p> <p>1 mechanics associated with it. 2 Do you interpret the word "practicable" 3 to mean the mere mechanics associated with getting 4 an election done and kind of the statutory minimums 5 that affect timing, and do you think the Board 6 should take into account how much time the employees 7 actually would benefit from having and making a 8 decision on whether or not to be union represented? 9 MR. PETRUSKA: I would say the first set 10 of criteria is what the Board should focus on. I'm 11 not aware of any way that the Board would be able to 12 determine how much time would be helpful to 13 employees. I'm not sure that that's necessarily 14 something that a person could say as a general 15 matter in setting rulemaking for all bargaining 16 units across the country, so I do think it's 17 appropriate to focus in on the practical steps. 18 MR. MISCIMARRA: But aren't we the only 19 entity that's in a position to actually 20 evaluate how much time employees need? 21 MR. PETRUSKA: Well, the regional 22 directors are going to be making many of these 23 decisions. In contested cases they're going to be 24 the ones making this decision, and they're in a 25 position to make it on a case by case basis. I</p>	<p style="text-align: right;">Page 346</p> <p>1 MR. PETRUSKA: I guess I would say yes, 2 but I think the standard does, because I think the 3 standard is allowing an ample period. And I just 4 don't see, you know, with the timeline that I think 5 the standard is going to produce, I don't see any 6 way that those considerations that a free and robust 7 discussion wouldn't be possible in let's say, a two 8 week period. In my experience, that is a lot of 9 time for employers to have communications with their 10 employees about a union election, and so I think 11 that the current standard does take those facts into 12 consideration. I don't think there needs to be 13 add-on, you know, timetables to accommodate those 14 principles. 15 MR. JOHNSON: Okay. You think that's 16 enough. And I do want to compliment you on your 17 2014 written comment, because you rely on a lot of 18 sort of empirical analysis to get where you're 19 doing. Wouldn't it be helpful, though, if we had 20 some empirical analysis of employer free speech 21 opportunities as they're actually exercised during a 22 campaign before we start regulating the amount of 23 time employers have to engage in free speech? 24 MR. PETRUSKA: Well, you know, we got 25 this far, and as I understand it the schedule has</p>

<p style="text-align: right;">Page 347</p> <p>1 mostly been driven by the procedural mechanics, and 2 so I think that's still the course to maintain. 3 Rulemaking can be done and it can be redone, but I 4 think that we do have, not empirical, but we do have 5 a lot of experience, and I'm giving you my 6 experience as it stands, but I do think the time 7 periods are sufficient. 8 In the commenting I really haven't seen a 9 lot in the way from business communities to describe 10 the meaningful differences between three weeks 11 versus two weeks or four weeks versus two weeks. 12 But what is the message, what is the mode of 13 communication that has been precluded by that 14 additional time, whether it's just something that 15 they want for captive audience meeting and want it 16 spaced weekly as opposed to three? It seems to me 17 that there hasn't been or that I haven't seen a 18 suggestion that we need to use a different way of 19 scheduling this other than looking at the mechanics. 20 MR. JOHNSON: Right. But if we don't 21 have the data, would it make sense for us to start 22 regulating free speech if we don't have the data? I 23 mean, which way should the presumption go? 24 MR. PETRUSKA: I'm going to disagree that 25 we're regulating the speech. I think what we are</p>	<p style="text-align: right;">Page 349</p> <p>1 MR. PETRUSKA: Well, I guess what I would 2 say is that I don't see a minimum as being 3 necessary. 4 MR. PEARCE: Which is what you said to me 5 in my questions. We have to move on. Ms. Milito. 6 MS. MILITO: Chairman Pearce and Board 7 members. I spoke yesterday, so I will just keep my 8 remarks today brief this morning. 9 While changes to the Board's current 10 rules on election procedures would affect businesses 11 of all sizes, NFIB, the National Federation of 12 Independent Business, for whom I'm appearing this 13 morning, is primarily concerned about impact on the 14 country's smallest employers. 15 When it comes to labor issues, NFIB's 16 constituency is very unique as compared to most 17 businesses represented by other trade and business 18 associations. Very few NFIB members have a 19 dedicated human resources professional. Even fewer 20 if any NFIB members have a dedicated labor relations 21 expert or in-house counsel, and typically all 22 employment and labor matters are the direct 23 responsibility of the small business owner. 24 The proposed time frame under which 25 elections will be held in potentially 10 to 21 days</p>
<p style="text-align: right;">Page 348</p> <p>1 doing is we are setting a schedule based upon 2 procedural mechanics, and I don't think there is a 3 substantial regulation of speech in doing that. 4 MR. JOHNSON: Okay. Just one more 5 question. Let's say I totally agree with you that 6 we need to set the standard according to the 7 practicalities of how elections actually are set and 8 what makes sense. Why wouldn't it make sense at 9 least to bracket that off so that all parties would 10 agree that they're dealing with something other than 11 what's going on in the regional office that week? 12 MR. PETRUSKA: Well, without knowing what 13 you mean precisely by -- 14 MR. JOHNSON: Just the minimum/maximum, 15 minimum bracket and maximum bracket. 16 MR. PETRUSKA: Well, again, the worry 17 with minimum brackets is that you do have most of 18 these cases occurring by stipulation, and I think in 19 stipulated cases those elections should be free to 20 proceed as quickly as the parties determine, and all 21 of this does factor into how decisions are made. 22 MR. JOHNSON: Let's say the minimum 23 doesn't apply to stipulated election agreements. 24 Would you support a minimum/maximum bracket if there 25 is no agreement to be had?</p>	<p style="text-align: right;">Page 350</p> <p>1 from the filing of a petition will be particularly 2 problematic for small business owners who have few 3 administrative employees and few, if any, in-house 4 labor experts or in-house counsel to comply with the 5 expedited procedures. The proposed rule does not 6 properly balance the rights of employees, employers 7 and labor units in the pre-election period, and the 8 shortened time frames deprive employers of their due 9 process rights under the Act. 10 The collective goal of an election is to 11 have an informed constituency, and to do so you need 12 to have both candidates show up and express their 13 views, and 10 to 21 days is just not enough time for 14 a small employer to find someone to prepare a 15 message and deliver a message to the employees. 16 Communication with employees is a protected right of 17 employers, and we are very concerned that the 18 proposed rule would prevent employers from 19 effectively communicating with employees about the 20 unionization process. 21 As crafted, the proposed rule deprives 22 employees of making an informed choice, strips small 23 businesses of due process, and compromises employee 24 rights. In contrast, NFIB believes the current 25 union election process, which takes a median of 38</p>

<p style="text-align: right;">Page 351</p> <p>1 days, generally provides enough time for unions to 2 make their case, and, importantly, for employers to 3 make theirs, and for employees to have the 4 information they need to make a fully informed 5 choice. Thank you. 6 MR. PEARCE: Where do you get 10 to 21 7 days from? 8 MS. MILITO: The proposed, potentially. 9 I mean, we just heard Mr. Petruska say potentially 10 it could be ten days. 11 MR. PEARCE: Okay. So if it's ten days 12 by virtue of stipulations of the parties, is there 13 an injustice going on? 14 MS. MILITO: I believe potentially there 15 still could be, yes, you know, or you have a small 16 business owner who has agreed to a stipulation 17 because he feels cornered in a box. He found 18 counsel, it took him several days to find counsel 19 and he's not sure what to do, so he signs something 20 because he's not sure what else -- you know, he's 21 acting kind of under pressure, if you will. 22 MR. PEARCE: So currently parties can 23 stipulate. 24 MS. MILITO: Yes. And in most elections 25 they are stipulated. I understand that. Yes,</p>	<p style="text-align: right;">Page 353</p> <p>1 into a stipulation because of pressures or what have 2 you or which employers find it expedient to just do 3 that because they think they can communicate 4 effectively with their employees. We don't really 5 have data that distinguishes between them. 6 Is it your suggestion that the proposed 7 rule compensate for the possibility anyway that 8 employers may be entering into these stipulations 9 under duress? 10 MS. MILITO: Right now the median of, you 11 know, 30 to 47 days I think is working well. I 12 think that was Mr. Torres's testimony, and I agree 13 wholeheartedly with that. I think flexibility is 14 needed. And I'm not saying that all small employers 15 who enter into a stipulated agreement -- that's not 16 what I'm saying -- are doing so under duress. 17 I just think, you know, accelerating it 18 is only going to hurt small employers. They don't 19 know what to say, so they don't say anything. They 20 know that there is a lot that they can't say, and so 21 I think what I hear from my members is, "It's better 22 just not to say anything until I find a lawyer who 23 tells me what I can say or what I can or cannot do." 24 MR. PEARCE: But in light of that, would 25 you suggest that parties be prohibited from entering</p>
<p style="text-align: right;">Page 352</p> <p>1 absolutely. I would agree with that. 2 MR. PEARCE: And currently parties can 3 waive the time period for the Excelsior list and can 4 waive other things and have an election in less than 5 the 38 day period. 6 MS. MILITO: Right. 7 MR. PEARCE: In 21 days, possibly. That 8 can happen now. 9 MS. MILITO: Yes. 10 MR. PEARCE: Do you think that that is 11 depriving an employer of an opportunity to educate 12 its employees? 13 MS. MILITO: In some situations I do 14 think the employer is deprived of their right 15 because, again, I think they're acting under 16 pressure. And I think ultimately, again, as I said 17 before, the goal is to have an informed 18 constituency. So we want to make sure the employees 19 are informed and hear both sides, too. So I think 20 in some situations you're shortchanging the 21 employees, you're boxing the employer in a corner, 22 everything's condensed, accelerated if you will, so 23 the employees ultimately don't hear both sides. 24 MR. PEARCE: Now, of course we don't know 25 what employers feel boxed into a corner to enter</p>	<p style="text-align: right;">Page 354</p> <p>1 into stipulations if it results in an election that 2 is shorter than 30 to 31 days? 3 MS. MILITO: Not at all. No, not at all. 4 That's not my testimony. No, not at all, no. 5 Again, I'm not saying that stipulated agreements 6 with small employers are all done under duress. Not 7 at all. I'm just saying that, you know, the Board 8 needs to be careful in, I think, accelerating and 9 taking it into consideration kind of the 10 disadvantages that small employers have, you know, 11 when they don't have in-house expertise. 12 MR. MISCIMARRA: Ms. Milito, part of the 13 focus of the Act is not just on having elections, 14 but it's to produce stable bargaining relationships 15 that benefit all sides if a majority of employees 16 support union representation. Just because your 17 organization is associated with small businesses, 18 what's the level of familiarity that most small 19 businesses have if they're presently non-union with 20 the rules that govern how bargaining takes place if 21 a union prevails in an election, and how much time 22 do you think is needed for people to become familiar 23 with those rules? 24 MS. MILITO: I think their familiarity 25 with labor issues and with employment issues in</p>

<p style="text-align: right;">Page 355</p> <p>1 general is small. I mean, they don't know much. 2 They opened a restaurant or they opened a small 3 manufacturing plant not because they knew anything 4 about union or employment matters. So there is a 5 steep, steep learning curve. And again, that's why 6 they're dependent on finding outside help. 7 But I do think it depends. I mean, I 8 certainly have some members that are better educated 9 on this just because of the industry they're in, so 10 I think there is some variation, but by and large 11 most don't know much about employment or labor 12 matters in general. 13 MR. MISCIMARRA: Thank you. 14 MR. PEARCE: Thank you very much. Mr. 15 Villanueva. 16 MR. VILLANUEVA: Thank you. Good 17 morning, Mr. Chairman, and distinguished members of 18 the Board. I am Edgardo Villanueva, president of 19 EMSI Consulting, a management consulting labor 20 relations firm based in Chicago. In your 21 terminology, I am a persuader. Of course, unions 22 come up with other, more creative names for my 23 profession. 24 Given the limited time I have, let me 25 establish up front that I feel that reducing the</p>	<p style="text-align: right;">Page 357</p> <p>1 even worse, a sin of omission by failing to inform 2 the workers of the whole story. 3 Mr. Chairman, after meeting with 4 countless employee groups in many diverse industries 5 across the country and even in Puerto Rico where the 6 Act applies, I have personally experienced and seen 7 the total lack of understanding or a profound 8 misunderstanding about the National Labor Relations 9 Act that these employees have as they prepare to go 10 to the voting booth in an election conducted by your 11 agency. I could relate many anecdotal situations of 12 employees reciting a totally inaccurate 13 understanding about the collective bargaining 14 process in this country or about the devastating 15 potential of permanent replacement in economic 16 strikes or even having knowledge of what a union 17 security clause is, et cetera. 18 Given this reality, Mr. Chairman and 19 members of the Board, I urge you to not take away 20 the right of these workers to have ample time to get 21 the facts and hear both sides of the issue, just as 22 you are doing here today in this hearing, and simply 23 be fair to them, the voters, by allowing them enough 24 time to become informed on all aspects of their 25 decision in the relatively short time frame they</p>
<p style="text-align: right;">Page 356</p> <p>1 time frame from the filing of a petition to election 2 day is simply unfair to the employees, the voters 3 who are faced with making a very important decision 4 of significant long term impact to their working 5 lives and pocketbooks. 6 I'm sure you've heard that in the circles 7 that I represent, that is, management, this 8 potential change is referred to as ambush elections. 9 Based on my 32 years of hands-on face-to-face 10 contact with thousands of eventual voters in NLRB 11 elections, I feel that the term "ambush" would apply 12 to the voters more so than to the employers. 13 Of particular concern to me, and the 14 focus of my presentation here before you, is the 15 multitude of situations I have faced where the 16 employees in the voting group are predominantly 17 Spanish speaking immigrants from various countries 18 in Latin America who have never had exposure to the 19 nuances of the National Labor Relations Act that you 20 oversee and whose only point of reference about 21 unionization are the labor laws of their own country 22 or the appealing promises of a trade union organizer 23 whose job it is, ironically, to persuade them to 24 vote for the union, and who may either be guilty of 25 a sin of commission by not stating the truth, or,</p>	<p style="text-align: right;">Page 358</p> <p>1 have while juggling work and family obligations. 2 I'm not asking for more. 3 I'm simply asking you to let them keep 4 the standard plus or minus 42 days that the NLRB has 5 historically established is a workable and fair time 6 frame for these employee voters to become educated 7 on what is a complex and important law. Taking away 8 this educational period would not be favoring unions 9 nor giving management a disadvantage or the other 10 way around, but it simply would be unfair to take 11 away the rights of employee voters to make a truly 12 informed choice. 13 You've heard elegant legal arguments from 14 what was referred to yesterday as the creme de la 15 creme of legal minds for and against streamlining 16 the election process, and in some ways I think there 17 is a need for some of that. You've heard from union 18 organizers and now a management consultant; however, 19 not from a single worker, the average voter who is 20 no expert in U.S. legal law, especially those that 21 immigrated to this country. I wish you had. 22 Therefore, on this one key factor, that is, the time 23 frame employees need to educate themselves, I 24 strongly suggest that you be fair with them and give 25 them the realistic time they need to understand a</p>

<p style="text-align: right;">Page 359</p> <p>1 very complex subject.</p> <p>2 Mr. Chairman and member of the Board, I</p> <p>3 sincerely thank you for the opportunity to speak</p> <p>4 before you today, and I hope that you will take my</p> <p>5 observations into account as you make your eventual</p> <p>6 decisions. Thank you.</p> <p>7 MR. PEARCE: Thank you.</p> <p>8 MR. JOHNSON: I think we did hear from</p> <p>9 some workers yesterday.</p> <p>10 MR. VILLANUEVA: My apologies.</p> <p>11 MS. SCHIFFER: You may not have been</p> <p>12 here.</p> <p>13 MR. VILLANUEVA: I may not have. I</p> <p>14 apologize.</p> <p>15 MR. JOHNSON: Let me just get more</p> <p>16 directly to your point. It sounds like your point</p> <p>17 is that employees don't have enough information</p> <p>18 about the law. Am I correct?</p> <p>19 MR. VILLANUEVA: Yes. But specifically,</p> <p>20 my experience, as I mentioned in my presentation, is</p> <p>21 that employees who have immigrated to this country,</p> <p>22 their understanding about the law is mainly, if any,</p> <p>23 based on what they know of, let's say, labor laws in</p> <p>24 Mexico or Guatemala.</p> <p>25 MR. JOHNSON: So let's say that we</p>	<p style="text-align: right;">Page 361</p> <p>1 businesses -- and Ms. Milito also made the point --</p> <p>2 they're busy, they're working, so like in a span of</p> <p>3 ten days we wouldn't meet with them ten days. We</p> <p>4 might meet with the employees once a week, let's</p> <p>5 say. So three or four sessions with them to explain</p> <p>6 what is a complex law I think is fair to them, and</p> <p>7 so I'm simply asking you not the change it or reduce</p> <p>8 it, if I've answered your question.</p> <p>9 MS. SCHIFFER: You used the term</p> <p>10 "persuader," and actually that's not a National</p> <p>11 Labor Relations Act term. But when you called</p> <p>12 yourself a persuader, as I understand it, and I'm</p> <p>13 not sure it was entirely clear, you work for</p> <p>14 companies?</p> <p>15 MR. VILLANUEVA: I do, yes.</p> <p>16 MS. SCHIFFER: So you're persuading on</p> <p>17 behalf of the company?</p> <p>18 MR. VILLANUEVA: That's right, yes.</p> <p>19 MS. SCHIFFER: And to follow up on what</p> <p>20 Member Johnson asked, in the proposal a notice to</p> <p>21 employees that normally now goes out when a petition</p> <p>22 is filed would be required to be posted in the</p> <p>23 workplace. In your experience, do employers now</p> <p>24 post that notice?</p> <p>25 MR. VILLANUEVA: Many do. Although if I</p>
<p style="text-align: right;">Page 360</p> <p>1 improve our bilingual outreach efforts. Let's</p> <p>2 assume that we can do something internally to help</p> <p>3 educate people more quickly. Does that take away</p> <p>4 your concern and then allow us to have an election</p> <p>5 timetable that doesn't rely on that as a source of</p> <p>6 delay?</p> <p>7 MR. VILLANUEVA: Well, the Board, of</p> <p>8 course, already provides much of its material in</p> <p>9 many languages. In fact, in the course of th</p> <p>10 meetings, the captive audience meetings that we</p> <p>11 referred to earlier, we present that, the National</p> <p>12 Labor Relations Act in Spanish, based on the</p> <p>13 literature the Board provides.</p> <p>14 So I think the Board gives enough</p> <p>15 information. My point is that it just takes that</p> <p>16 much time. As I said, I think that the standard</p> <p>17 that is currently in place is enough, frankly. I'm</p> <p>18 not saying that we need ten weeks or six or</p> <p>19 whatever, but four to five weeks or thereabouts.</p> <p>20 And was mentioned also by Mr. Petruska, a lot of</p> <p>21 times these elections are going to be scheduled on a</p> <p>22 particular payday so that we encourage</p> <p>23 participation, so it's a question of giving enough</p> <p>24 time.</p> <p>25 And also remember, Mr. Johnson, these</p>	<p style="text-align: right;">Page 362</p> <p>1 recall, and I don't have it in front of me, the</p> <p>2 indication typically is that the notice -- are you</p> <p>3 referring to the notice of election, that it should</p> <p>4 be posted 72 hours before the election?</p> <p>5 MS. SCHIFFER: No. The notice to</p> <p>6 employees that goes out when the petition is filed.</p> <p>7 MR. VILLANUEVA: Some do and some don't,</p> <p>8 because it's my understanding --</p> <p>9 MS. SCHIFFER: Some do and some don't.</p> <p>10 And don't you think it would be useful to employees</p> <p>11 to have that information as soon as the petition is</p> <p>12 filed and that that would help with some of the</p> <p>13 concerns that you have outlined?</p> <p>14 MR. VILLANUEVA: That would be fine. The</p> <p>15 notice that you're referring to that comes with the</p> <p>16 initial package, if you will, including the petition</p> <p>17 and so forth, it outlines the law or some aspects of</p> <p>18 it. But the further explanation of what that means</p> <p>19 and the implications to them, should they decide to</p> <p>20 unionize et cetera, is what we try to educate people</p> <p>21 about during the course of these meetings.</p> <p>22 Businesses have to run their business,</p> <p>23 and we typically, as I said, have an opportunity to</p> <p>24 meet with employees perhaps once a week for 45</p> <p>25 minutes to an hour, and three or four of those 45</p>

<p style="text-align: right;">Page 363</p> <p>1 minute sessions is just barely enough to be able to 2 actually educate them on, let's say, the collective 3 bargaining process or other aspects of what 4 unionization entails for them. 5 MR. PEARCE: Well, you're a contractor 6 for the employer, aren't you? 7 MR. VILLANUEVA: Yes, sir. 8 MR. PEARCE: So the employer can kind of 9 dictate how much time you have with the employees. 10 And you certainly are able to go right into the 11 workplace and speak directly with the employees 12 during their work time or during what has been 13 referred to as captive audience meetings. 14 MR. VILLANUEVA: That's the common 15 terminology, yes. 16 MR. PEARCE: And some of these employers, 17 I understand, might have an intranet where they 18 communicate electronically with the employees. 19 MR. VILLANUEVA: It certainly is becoming 20 more and more popular, yes. 21 MR. PEARCE: And then they can deliver 22 messages on that intranet as well. 23 MR. VILLANUEVA: Mr. Chairman, they 24 certainly can. It's not my general experience, 25 again, being on the ground, that that is the</p>	<p style="text-align: right;">Page 365</p> <p>1 educate them about a complex issue. 2 MR. PEARCE: But that time period is 3 dictated by the employer's determination as to how 4 much time it wants to give you. 5 MR. VILLANUEVA: The answer is yes. The 6 employer determines when it is convenient or 7 possible to keep the business running while allowing 8 these individuals to get the information that we 9 want to make sure that they understand. 10 MR. PEARCE: Thank you. Mr. Rothner. 11 MR. ROTHNER: Thank you. I began my 12 career as a union side labor lawyer not under the 13 National Labor Relations Act but under the 14 California Agricultural Labor Relations Act. I was 15 on the staff of the United Farm Workers Union 16 between 1975 and 1978. 17 My comments this morning concern the 18 question of whether this Board should remove 19 obstacles to the expeditious conduct of 20 representation elections. And I'd like to describe 21 my experience under the Agricultural Labor Relations 22 Act, a statute that includes a maximum period of 23 seven days between filing of the petition and the 24 conduct of the election. 25 I'll start by clarifying that I'm not</p>
<p style="text-align: right;">Page 364</p> <p>1 favorable way of communicating with them. 2 Face-to-face talking and answering their questions, 3 that's what I'm asked to do on behalf of the 4 employer. Also, Mr. Chairman, although the internet 5 and computers and social media is becoming more and 6 more popular, I meet with a lot of people who don't 7 have computer skills, who may not have a computer at 8 home, so it's not the standard way of communicating. 9 The internet is not the standard. Face-to-face -- 10 MR. PEARCE: But the point that I'm 11 making is that face-to-face is an option that you 12 have, and you have as much of an opportunity to 13 communicate with the employees as the employer will 14 permit. Wouldn't you say that? 15 MR. VILLANUEVA: Right, the employer. 16 But when you say the employer, Mr. Chairman, just to 17 clarify, it is as their business will permit. They 18 have a business to run, whatever type of business it 19 is. As I said, a standard situation is that we get 20 a chance to meet with employees in small group 21 settings or whatever and to present information and 22 answer their questions probably, as I said, 45 23 minutes to an hour per week, if you will, so if we 24 have a three week or four week period before the 25 election you might have four opportunities to</p>	<p style="text-align: right;">Page 366</p> <p>1 advocating a maximum seven day period under the 2 National Labor Relations Act. I simply want to 3 describe an example of a speedy approach that worked 4 well in the hope that the Board will adopt rules 5 that will remove impediments to the expeditious 6 conduct of elections and adopt standards and 7 guidelines that direct regional directors to hasten 8 the process. 9 Under the Agricultural Labor Relations 10 Act, the seven day provision was necessary in order 11 to ensure that the election take place during a peak 12 employment season while the migratory workforce 13 remained in the vicinity. And to test that 14 question, that is, peak season, the ALRB's 15 regulations required that the employer supply 16 relevant payroll records from past growing seasons 17 within 48 hours from the filing of the petition. 18 While there were no statutorily required 19 pre-election hearings or pre-election hearings of 20 any kind, there were issues; the peak season 21 question being one of them. There were unit 22 exclusion issues, agricultural employee issues, 23 whether certain employees who worked in, say, 24 packing sheds and doing field to shed trucking were 25 covered under the National Labor Relations Act</p>

<p style="text-align: right;">Page 367</p> <p>1 rather than the Agricultural Labor Relations Act, 2 and geographic community of interest questions 3 having to do with whether non-contiguous growing 4 regions of the same employer should be included in 5 the same bargaining unit.</p> <p>6 In our experience, putting issues such as 7 supervisory inclusions and exclusions and other 8 individual inclusion and exclusion issues off until 9 after the election promoted not only speed but the 10 conservation of resources all around for the 11 agencies and the parties. The outcome of course 12 sometimes renders these unit inclusion and exclusion 13 issues moot if the union loses the election. And in 14 many cases, if the unit wins the election the 15 parties find a way, often quite easily, to resolve 16 those issues without the need to invoke the Board's 17 processes.</p> <p>18 As for the impact of speed on the 19 opportunity to wage persuasion campaigns, the 20 experience under the Agricultural Labor Relations 21 Act was that there was no shortage of consultants 22 and lawyers to advise employers, and that was true 23 even for the smallest of farms commencing with the 24 first citing, not with the filing of petition but 25 with the first citing of any union activity in the</p>	<p style="text-align: right;">Page 369</p> <p>1 in any language. I never heard a complaint from an 2 employee that they needed more than seven days to 3 figure out what unionization was about or how to 4 vote in an election.</p> <p>5 In fact, I would argue, anecdotally 6 again, that too long a period between the filing of 7 the petition and the election leads to campaign 8 fatigue on the part of the employees. I have 9 experienced that under the National Labor Relations 10 Act, particularly in cases where there is a 11 protracted period where people get fed up with both 12 sides receiving far too much information, in my 13 experience voter participation tends to fall. We 14 had extraordinarily high levels of participation in 15 those very speedy ALRA elections, much higher levels 16 than in many NLRB elections that I've been involved 17 with since.</p> <p>18 And the proof regarding participation and 19 opportunities for persuasion is in the pudding. In 20 its first three months of operation, the ALRB, and 21 this was back in 1975, conducted 329 elections. 22 There were two unions involved in many of those 23 elections, certainly not all of them, the United 24 Farm Workers Union and the Teamsters, and victories 25 went to each as well as to the non-union choice.</p>
<p style="text-align: right;">Page 368</p> <p>1 field of the particular employer.</p> <p>2 In fact, there are many firms that grew 3 exponentially in California, law firms and 4 consulting firms, with the adoption of the 5 Agricultural Labor Relations Act. The campaigns 6 were robust all around, including not only activity 7 at the sites but visits to labor camps, use of radio 8 spots and many types of paraphernalia on all sides. 9 This was before the day when one could use intranet 10 or internet or even effectively use video in a 11 campaign, but certainly we have all those advantages 12 today for people who want to get their message out.</p> <p>13 At bottom, I just don't understand the 14 complaint that there might be insufficient time to 15 campaign. After all, the employer has the workers 16 within its domain every day, including payday, with 17 an enormous advantage in disseminating its message 18 orally, in writing, in a variety of visual and 19 electronic media, in groups and one-on-one.</p> <p>20 By the way, under the Agricultural Labor 21 Relations Act, in the '70s the vast majority of 22 employees being organized were immigrants, and the 23 vast majority of those employees were monolingual in 24 languages other than English, and some in fact were 25 illiterate. A significant portion were illiterate</p>	<p style="text-align: right;">Page 370</p> <p>1 As for the ability of employers to wage 2 campaigns during my three year tenure with the Farm 3 Workers Union, much to my unhappiness, there were 4 two elections involving the largest table grape and 5 tree fruit employer in the industry, Giumarra 6 Vineyards Corporation, and both times the campaigns 7 were hard fought and the winner was no union. So 8 they certainly had an opportunity in a very large 9 election conducted in a very short amount of time to 10 get their message out.</p> <p>11 In sum, the experience under the 12 Agricultural Labor Relations Act demonstrates that 13 it's possible speed up the process as I've seen the 14 past, and it works. I'd also like to add that I 15 don't think that this is a very complicated 16 undertaking that you're engaged in, with all due 17 respect, and I'd like to make the point that --</p> <p>18 MR. PEARCE: You're out of time, so if 19 you can wrap it up.</p> <p>20 MR. ROTHNER: It will be really quick.</p> <p>21 MR. PEARCE: Okay.</p> <p>22 MR. ROTHNER: In 1966 one of the earliest 23 strikes was going on in the table grape industry, 24 and the United States Senate decided to hold 25 subcommittee hearings on whether to amend the</p>

<p style="text-align: right;">Page 371</p> <p>1 National Labor Relations Act to include agricultural 2 employees as a means to provide a vote to the 3 workers on strike. Only one employer came forward 4 to testify at those subcommittee meetings held in 5 Delano, California. His name was Martin Zaninovich. 6 His point was that "There's no strike, 7 it's a myth, our workers don't want a union." 8 Senator Robert Kennedy asked Mr. Zaninovich if he 9 would honor an election if his employees chose to be 10 unionized, and Mr. Zaninovich said that he would if 11 an acceptable set of rules could be established. 12 Senator Kennedy responded as follows: "We have the 13 ability to get to the moon, so I think we can 14 establish machinery so people can vote." I think 15 you can do this, I think it's not that difficult, 16 and I wish you will. 17 MR. PEARCE: Thank you. We are well 18 beyond our schedule, so I'd ask my colleagues to 19 refrain from questioning Mr. Rothner. Thank you for 20 your presentation. Thank you all very much. 21 Our next seating is Ole Hermanson, J. 22 Aloysius Hogan -- and Mr. Perl, you're with us 23 again, good to see you -- Donna Miller, Darrin 24 Murray, and Steve Maritas. Why don't we start? 25 MR. HERMANSON: My name is Ole Kushner</p>	<p style="text-align: right;">Page 373</p> <p>1 anti-union literature before the workers filed the 2 petition. In each campaign the employer was aware 3 workers were signing union cards and released 4 literature specifically aimed at discouraging 5 workers from signing. In each campaign the workers 6 informed management when they achieved majority 7 status and asked the employer to recognize their 8 union without a lengthy process. In each campaign 9 the employer sought to delay the election as much as 10 possible, always pushing for a date beyond the 11 recommended 42 days from filing. In each campaign 12 the employer withheld information about the eligible 13 voters until the last possible minute. In each 14 campaign the employer ramped up their anti-union 15 campaign after the petition was filed, and in each 16 campaign the employer violated the law in the time 17 between filing and election. 18 When we organized the nurses at Rockville 19 Hospital in 2009, before the union even petitioned 20 for an election management put anti-union letters in 21 employees' paychecks, posted on bulletin boards, and 22 handed out literature to workers in the workplace. 23 The employer sought to delay the hearing 24 twice. On the day of the hearing, in an effort to 25 reach a stipulated agreement, the employer allowed</p>
<p style="text-align: right;">Page 372</p> <p>1 Hermanson. I'm an organizer for AFT Connecticut, an 2 affiliate of the American Federation of Teachers, 3 and I'm here with my colleague, Donna Miller, who is 4 a home health aide from VNA of southeastern 5 Connecticut. 6 I've been organizing for ten years. 7 During this time I've worked on more than a dozen 8 campaigns. I've worked with workers in food 9 service, hotels, museums, private sector education, 10 and most recently with all classifications in acute 11 care hospitals. I've been the lead organizer on six 12 campaigns during which we petitioned with the NLRB. 13 I've become very familiar with the Board's election 14 process. 15 In every one of these elections the time 16 between filing to the date of election was the most 17 hostile and tense and the time when the workers were 18 subjected to the most scrutiny and surveillance. In 19 each campaign the employer knew about the organizing 20 efforts long before we filed for election, and in 21 each campaign the employer ran a coordinated 22 anti-union campaign on work time in the workplace 23 before the petition was filed. 24 In each campaign the employer retained 25 anti-union consultants and produced reams of</p>	<p style="text-align: right;">Page 374</p> <p>1 the Board agent and me to view the list of eligible 2 workers on his laptop. It was in Excel. It was 3 neatly formatted with names, addresses, departments, 4 average hours worked and hire dates. Yet the 5 Excelsior list was given to the union at the last 6 possible moment in a fax copy, five point font, no 7 grid lines, no column headings, and skewed to the 8 side on the paper. 9 They actually worked to cause delay and 10 confusion rather than provide the information 11 promptly. The employer used the delay to try to 12 convince the nurses they should not join the union. 13 Between filing and the election, management produced 14 30 unique anti-union documents totaling over 60 15 pages of material for a unit of 100 nurses. They 16 held meetings on every floor and in every department 17 and on every shift. 18 In 2013 an overwhelming majority of the 19 home health aides at the VNA of southeaster 20 Connecticut signed union cards and a public 21 petition. Out of 26 aides, 20 signed a public 22 petition and 16 appeared in photos. These aides 23 made their desire to collectively bargain very 24 clear. They filed for an election on September 25 16th, and, despite a stipulated agreement, the</p>

<p style="text-align: right;">Page 375</p> <p>1 employer insisted on October 24th.</p> <p>2 During the federal government shutdown</p> <p>3 the election was put into limbo, but management did</p> <p>4 not stop campaigning. They sent out leaflets, held</p> <p>5 mandatory anti-union meetings on work time, and even</p> <p>6 sent handwritten letters to each aide. When the</p> <p>7 government reopened on October 17th the election</p> <p>8 could have gone forward as scheduled, but the</p> <p>9 employer demanded another delay for no reason at</p> <p>10 all.</p> <p>11 The Board was available, the employees</p> <p>12 were ready, but the employer was able to push the</p> <p>13 election all the way back to November 8th. Despite</p> <p>14 54 days of anti-union harassment from their</p> <p>15 employer, all but one aide voted to join the union.</p> <p>16 In each of these elections the employer was entirely</p> <p>17 in the driver's seat, determining the day of the</p> <p>18 election and able to delay the will of the employees</p> <p>19 for months. It seems the employer has endless</p> <p>20 opportunities to forestall the rights of the</p> <p>21 workers. I'll pass it over to Donna.</p> <p>22 MS. MILLER: I have worked for the</p> <p>23 company for ten years. Last summer I decided it was</p> <p>24 time for a change. I saw how much better the nurses</p> <p>25 were treated, and I realized it was because they had</p>	<p style="text-align: right;">Page 377</p> <p>1 It is very hard for workers to stand up</p> <p>2 to their bosses and ask for a voice. We need our</p> <p>3 government to be there for our workers to facilitate</p> <p>4 the process of forming a union. It did not need to</p> <p>5 be this difficult. Thank you forgiving me the</p> <p>6 opportunity to present our story.</p> <p>7 MR. PEARCE: Thank you, Ms. Miller.</p> <p>8 MR. MISCIMARRA: I want to thank both of</p> <p>9 you for your comments. The one question that I have</p> <p>10 is, you know, that we have many cases. In your case</p> <p>11 it sounds like the employees were unanimous in their</p> <p>12 support for representation except for one. We have</p> <p>13 many cases where the entire election turns on a</p> <p>14 margin of one vote, which would suggest that the</p> <p>15 employees had different sentiments about union</p> <p>16 representation. This is an issue where there are</p> <p>17 many strong feelings on all sides, and that's</p> <p>18 evident in many of the comments everybody has given</p> <p>19 to us.</p> <p>20 What do you think is the right amount of</p> <p>21 time in terms of those instances where people are</p> <p>22 really trying to figure out what is the right thing</p> <p>23 for them? What do you think is the right amount of</p> <p>24 time?</p> <p>25 MR. HERMANSON: I think that in her</p>
<p style="text-align: right;">Page 376</p> <p>1 a union, they had a voice. This made me realize</p> <p>2 that we needed a union and we needed a voice.</p> <p>3 I spoke with my co-workers, and we were</p> <p>4 all on the same page. We called the union. A</p> <p>5 majority of us decided we wanted to join. We signed</p> <p>6 union cards and petitions. We asked management to</p> <p>7 recognize our union and begin the bargaining</p> <p>8 process. It was a clear majority. Management</p> <p>9 refused. We wore buttons declaring our solidarity</p> <p>10 in staff meetings, but the answer was still no.</p> <p>11 In the parking lot, in full view of</p> <p>12 management, we all took pictures and signed a</p> <p>13 petition. The answer was still no. The president</p> <p>14 of the company wrote handwritten cards and mailed</p> <p>15 them to our homes, encouraging us to vote no.</p> <p>16 Management delayed the election as long as they</p> <p>17 could. Many of us became anxious that our jobs were</p> <p>18 in jeopardy during this delay.</p> <p>19 Why is management allowed to hold us</p> <p>20 back? It is supposed to be our right to bargain</p> <p>21 collectively. They delayed the vote for the sake of</p> <p>22 delaying. We felt our rights were being violated</p> <p>23 because our company continued to stall the vote. I</p> <p>24 want to know why my company or any company has the</p> <p>25 right to delay our votes not once but many times.</p>	<p style="text-align: right;">Page 378</p> <p>1 election it was near unanimous. In the example I</p> <p>2 explained at Rockville General Hospital, it did turn</p> <p>3 on one vote. I think the employer's position is to</p> <p>4 always delay. I think that if there is an</p> <p>5 opportunity to delay the election the employer will</p> <p>6 delay the election. I think that there is ample</p> <p>7 opportunity for people to get information on both</p> <p>8 sides, that the employer has endless opportunities</p> <p>9 to communicate with their workers during working</p> <p>10 hours, but if they have an opportunity to delay they</p> <p>11 will.</p> <p>12 When I worked with the Backus nurses just</p> <p>13 a few years ago the employer was represented by Tom</p> <p>14 Gibbons from Jackson Lewis, who is a former Board</p> <p>15 attorney. When we stipulated the election he would</p> <p>16 not provide the classifications that would be</p> <p>17 represented, and when asked why he wouldn't provide</p> <p>18 the classifications he said because he doesn't have</p> <p>19 to provide them to the Board agent. That's what he</p> <p>20 said: "I don't have to provide them." When we asked</p> <p>21 him why the date should be on the date that he</p> <p>22 selected, which was as far out as possible, he said,</p> <p>23 "Because I can, and that's when I want it to</p> <p>24 happen." They were very frank, and I appreciate</p> <p>25 their candor in some ways. But honestly, the</p>

<p style="text-align: right;">Page 379</p> <p>1 employer has endless opportunities to communicate 2 with their workforce, and if you create an 3 opportunity for them to delay, they'll delay. 4 MR. MISCIMARRA: We have to anticipate 5 that both sides will try to make reasonable 6 decisions that will support their particular view. 7 With your experience, what do you think is the right 8 amount of time? 9 MR. HERMANSON: I think that -- it's not 10 conceivable to me that there would be the ability 11 for the Board to conduct elections the day that 12 workers decided that they wanted to join a union and 13 bargain collectively, as is their right. But if it 14 was possible, then that's appropriate, because it's 15 really the workers' decision. The employer has 16 communicated with employees since the day of hire. 17 Most of the people in this room have probably seen 18 the 20 minute Target advertisement that they show 19 every single worker upon hiring on why they don't 20 think a union is necessary. The employer has 21 communicated with the workers on what they think. 22 MR. MISCIMARRA: So you would embrace the 23 "as soon as practicable" standard. 24 MR. HERMANSON: Yes. 25 MS. SCHIFFER: Ms. Miller, I want to</p>	<p style="text-align: right;">Page 381</p> <p>1 I agree with the proposed rule's stated 2 goal to increase understanding of and participation 3 in the unionization process. Regretfully, though, I 4 have to agree with the conclusion of the 18 U.S. 5 Senators who recently commented to you in writing 6 that the proposed rule will impact the ability of 7 employees to make a well informed choice because the 8 obvious effect of the rule is to limit the ability 9 of an employer to communicate with its employees 10 regarding an upcoming election. 11 I go further than they do, though, 12 because in this day and age of neutrality 13 agreements, and separate from neutrality agreements, 14 in Hohfeldian terms, legal terms, rights and duties, 15 there is no duty for the employer to educate. We're 16 treating it here as though the employers have a duty 17 practically speaking to educate the workers, but 18 they don't, and especially in the era of neutrality 19 agreements I think of it as a course. 20 I have children, and I think of the 21 workers as learning about labor unions. It's a very 22 arcane and very intricate area of the law, and you 23 all are experts, but it's taken you years to become 24 experts. Many of the people in this room are 25 attorneys, and for people to learn, for students to</p>
<p style="text-align: right;">Page 380</p> <p>1 thank you for coming to testify today and for your 2 courage to do that. I think it is very important 3 for the Board to hear from the workers who are the 4 ones who vote in the election. I wanted to ask you 5 if you thought that the delays served a purpose in 6 helping you and your co-workers become more informed 7 about the law and the issues involved in the 8 election. 9 MS. MILLER: No. We knew about it. I 10 mean, we had questions. We asked, you know, the 11 president or even Ole. We knew what we wanted. We 12 knew all about it. There are a lot of minority 13 aides, they all called me with questions, and if I 14 didn't know the answers I would call Ole, or even 15 ask the CEO, and she would answer them. 16 MS. SCHIFFER: So you had the information 17 you needed. 18 MS. MILLER: We did, yes. 19 MR. PEARCE: Thank you very much. Mr. 20 Hogan. 21 MR. HOGAN: Board members, thank you for 22 the opportunity. I'm an attorney and a senior 23 fellow at the Competitive Enterprise Institute, a 24 free market think tank here in D.C. just down the 25 street on L.</p>	<p style="text-align: right;">Page 382</p> <p>1 learn a course essentially on labor unions and the 2 effect and impacts and the rights and duties that 3 would then accrue, you really need to take into 4 account how long it would take somebody to learn 5 that stuff. It's a long time. You have to think 6 about what a student would want. Curtailing 7 workers' time to study for their huge life changing 8 test of whether to unionize would diminish the 9 understanding of and participation in the 10 unionization process. 11 Under the proposal workers could have 12 only about a quarter of the time to study the 13 unionization material, given the current average 38 14 days. Any school student in America would tell you 15 that cutting study time by 75 percent, which could 16 be the case in an agreement between the employer, 17 would adversely impact their grade in a big way, 18 their understanding of the material, and so, too, 19 cutting workers' educational opportunity by 75 20 percent would be terrible for their learning. 21 I do agree also with the 18 senators' 22 quote of Senator John F. Kennedy when he said that 23 it was essential to allow at least a 30 day interval 24 between the request for an election and the hold of 25 an election in order to, quote, safeguard against</p>

<p style="text-align: right;">Page 383</p> <p>1 rushing employees into an election where they are 2 unfamiliar with the issues. That's really 3 insightful, because he focuses on the learning of 4 the employees, and that really needs to be the 5 standard, how long it takes them to understand the 6 material. 7 We heard previously from a persuader that 8 it could work out that there is essentially one 9 class of 45 minutes to an hour once a week. And 10 people are working full time, many of them have 11 families, and maybe they do some homework, but 12 essentially three classes of about 45 or 50 minutes 13 is not going to be enough for them to be educated 14 about the fullness of the implications of 15 unionizing. So really, 30 days would be an absolute 16 minimum to some of the questions of whether there 17 should be a minimum. I do agree with Senator John 18 F. Kennedy. 19 One of the effects is, too, that when you 20 jump these types of pressures onto employers, they 21 are not going to be able to do other things. This 22 is an all-consuming kind of a thing. And to the 23 extent that the employers do take on the duty of 24 educating, they are pulled away from other things 25 like hiring other people, and that's not what our</p>	<p style="text-align: right;">Page 385</p> <p>1 the fullness of the implications that might not 2 accrue to their benefit. There's no duty for them. 3 That omission that was talked about earlier, the sin 4 of omission, they're not held liable in that 5 circumstance. 6 Right now there is none. And it may be 7 in this neutrality agreement era that if there is no 8 big sort of claiming time in opposition, which is a 9 phenomenon that occurs on Capitol Hill, if there is 10 nobody claiming time in opposition, maybe you need 11 to give in that circumstance a longer period of 12 time. It would be a factor that I would propose 13 that you look at for extending the educational 14 opportunities for the workers. 15 MR. PEARCE: And the educational 16 opportunities would be provided by whom? 17 MR. HOGAN: Well, the Volkswagen case is 18 one. There have been outside groups not employed as 19 persuaders who have been interested in the outcome 20 and who have provided materials in the form of 21 billboards or the internet. But again, that's 22 not -- 23 MR. PEARCE: But that's not what you're 24 suggesting, that we extend the time so that people 25 can put up billboards. Is that what you're saying?</p>
<p style="text-align: right;">Page 384</p> <p>1 economy needs with a rush of this kind of a thing. 2 A longer period of time would help with that. 3 Another analogy. The LMRDA for union 4 officers elections in the guide for election 5 officials regarding the conduct of local union 6 officer elections, they have a handy election 7 planner in figure one, and if you do the math on it 8 it works out to well over a 30 day election schedule 9 in that different election scenario for union 10 officers which could be used as an analogy. 11 And the last point I'll make, given the 12 time, is that I would recommend that you avoid raw 13 partisanship and do at least have the agreement of 14 one minority board member so that we do not run into 15 a purely partisan thing and then the pressure to 16 undo it at a later time. 17 MR. PEARCE: Whose responsibility do you 18 believe it is to educate employees about their 19 unionization? 20 MR. HOGAN: Well, really, I don't think 21 there is a duty. The employer can't be given the 22 duty and can't right now be held liable if they do 23 not do the educating if they're in a neutrality 24 agreement. So they don't have the duty. The union 25 doesn't have the duty to educate them certainly on</p>	<p style="text-align: right;">Page 386</p> <p>1 MR. HOGAN: No. You're exactly right. 2 Right now there's no duty to educate the workers. 3 So to the extent in a neutrality agreement era -- 4 MR. PEARCE: But you still maintain that 5 the time should be extended for education. 6 MR. HOGAN: Right, because they have to 7 show some initiative then and take some initiative 8 to develop your own curriculum, to go to the library 9 if the case may be, to go to the internet, to talk 10 to people. They have to go out and do research 11 rather than being spoon fed the material. 12 MR. PEARCE: Well, what do you think the 13 Board's role is? Do you think we should provide the 14 education? 15 MR. HOGAN: Well, I'm not going to 16 recommend more government intervention and rules and 17 regulations, but you've got to be mindful of the 18 workers. That should be your key consideration. 19 MR. JOHNSON: I have just one quick 20 follow-up. There's been a lot of folks talking 21 about their various anecdotal experiences one way or 22 another. If we assume that employees have a right 23 to receive information on the one side or the other, 24 has there been any empirical study on the amount of 25 time it takes a group of people to understand a</p>

<p style="text-align: right;">Page 387</p> <p>1 given body of information?</p> <p>2 MR. HOGAN: I think that a lot of people</p> <p>3 in here have taken labor law courses, and to even</p> <p>4 study for your first test takes more time than the</p> <p>5 amount of time that people are talking about here</p> <p>6 for educating the workers. I haven't seen the</p> <p>7 empirical studies that you're suggesting perhaps</p> <p>8 should be done.</p> <p>9 MS. SCHIFFER: You're not suggesting that</p> <p>10 workers take labor law courses before they vote, are</p> <p>11 you?</p> <p>12 MR. HOGAN: Well, essentially that's --</p> <p>13 MS. SCHIFFER: You are.</p> <p>14 MR. HOGAN: They're giving -- in</p> <p>15 condensed layman's terms the union's giving their</p> <p>16 view, and in many cases, although not all cases, the</p> <p>17 business is giving their view, which many times, as</p> <p>18 we've heard before in the NFIB circumstance, the</p> <p>19 small businesses are not really equipped to provide</p> <p>20 that education. But that's essentially what they're</p> <p>21 trying to do. Both sides are trying to provide some</p> <p>22 education, if indeed there are two sides.</p> <p>23 MR. PEARCE: Thank you, Mr. Hogan. Mr.</p> <p>24 Perl.</p> <p>25 MR. PERL: Thank you, Chairman Pearce and</p>	<p style="text-align: right;">Page 389</p> <p>1 them to make informed decisions.</p> <p>2 As far back as 1962, this Board in Sewell</p> <p>3 Manufacturing Company explained that it seeks to</p> <p>4 remove all obstacles which said prevent or impede</p> <p>5 reasoned and informed choice by employees. Here the</p> <p>6 Board does just the opposite. It doesn't just</p> <p>7 remove obstacles; it imposes them by steamrolling</p> <p>8 elections in the name of streamlining the process.</p> <p>9 The period of time between the filing of</p> <p>10 the petition and the holding of the election is</p> <p>11 critical. It's in this critical period that</p> <p>12 management has the opportunity to communicate its</p> <p>13 position on unionization to employees, many of whom</p> <p>14 would have already signed union authorization cards</p> <p>15 that secure the election.</p> <p>16 A quick accelerated election can leave an</p> <p>17 information void, heightening the risk that</p> <p>18 employees may vote without having the benefit of the</p> <p>19 employer's alternative viewpoints. Moreover, after</p> <p>20 employees receive information from their employers</p> <p>21 they need sufficient time to develop understanding,</p> <p>22 ask questions if necessary, and consider each</p> <p>23 alternative before they're asked to vote.</p> <p>24 The drastic rule changes proposed here</p> <p>25 minimize rather than maximize the likelihood that</p>
<p style="text-align: right;">Page 388</p> <p>1 members of the Board. I appear here today once</p> <p>2 again on behalf of the Tennessee Chamber of Commerce</p> <p>3 and Industry, which, as I said previously,</p> <p>4 represents both large employers and small business</p> <p>5 owners throughout the state.</p> <p>6 I begin, Mr. Chairman, with your</p> <p>7 statement quoted in the notice of proposed</p> <p>8 rulemaking that the purpose of this rulemaking</p> <p>9 process is to improve the process for all parties in</p> <p>10 all cases, and I would submit that the proposal here</p> <p>11 falls far short of that.</p> <p>12 Here the Board majority's proposed</p> <p>13 election rule overhaul dramatically curtails the</p> <p>14 time allowed between the filing of a petition and</p> <p>15 the actual election, just as it did in 2011. In</p> <p>16 doing so, it conflicts with the statutory policy in</p> <p>17 favor of free debate guaranteed under the First</p> <p>18 Amendment and Section 8(c). The Second Circuit so</p> <p>19 aptly stated in Healthcare Association of New York</p> <p>20 State against Pataki, 417 F3d 87 in 2006 that</p> <p>21 Section 8(c) not only protects constitutional free</p> <p>22 speech rights, but it also serves a vital function</p> <p>23 within labor law by allowing employers to present an</p> <p>24 alternative view and information that a union would</p> <p>25 not present, thus aiding the workers by allowing</p>	<p style="text-align: right;">Page 390</p> <p>1 all voters will be exposed to the arguments against</p> <p>2 as well as for union representation. The Board's</p> <p>3 reformulation, instead, reduces the election</p> <p>4 process, as stated by Members Miscimarra and Johnson</p> <p>5 to vote now and understand later.</p> <p>6 In seeking to balance the apparent</p> <p>7 diametrically opposed views of the Board majority</p> <p>8 and employers, we should look to the election</p> <p>9 results of recent times to see whether unions are</p> <p>10 being disadvantaged under the current framework for</p> <p>11 representation elections. NLRB elections</p> <p>12 demonstrate that unions win more than 60 percent of</p> <p>13 all RC elections. This is strong evidence that the</p> <p>14 present system works fairly for all parties. As a</p> <p>15 prior speaker said, the proof is in the pudding.</p> <p>16 That the Board dismisses this evidence as</p> <p>17 irrelevant, as it did when it issued its final rule</p> <p>18 in 2011, tends to create the perception that the</p> <p>19 Board is committed to creating as short an election</p> <p>20 cycle as administratively possible, even at the</p> <p>21 expense of shortchanging procedural safeguards and</p> <p>22 statutory protections. Assuming arguendo that the</p> <p>23 Board adopts its quickie election model in violation</p> <p>24 of its own self-professed standard to improve the</p> <p>25 process for all parties in all cases, we propose</p>

<p style="text-align: right;">Page 391</p> <p>1 that the Board at least adopt a notice requirement 2 requiring unions to formally notify any and all 3 employers at the outset of any organizing activity 4 directed against them.</p> <p>5 The Board is acting under the assumption 6 that employers generally become aware of union 7 organizational activity prior to the filing of a 8 petition. This generalization is not true in very 9 many cases, and the Board is therefore 10 underestimating the detrimental impact of a quickie 11 election process on both employers and employees.</p> <p>12 Indeed, the Board acknowledged when it 13 published its final rules in December 2011 that at 14 least in some cases employers may in fact be unaware 15 of an organizing campaign. A notice requirement 16 would institutionalize the process and be consistent 17 with the Chairman's declaration that the rule 18 changes are intended to improve the process not just 19 for some parties but all parties in all cases. At a 20 minimum, the notice requirement is an essential 21 safeguard for fundamental fairness and more clearly 22 achieves the statutory process, the statutory policy 23 of guaranteeing employers free speech and employees 24 free choice.</p> <p>25 In conclusion, resolving representation</p>	<p style="text-align: right;">Page 393</p> <p>1 an employee handbook?</p> <p>2 MR. PERL: That's correct.</p> <p>3 MR. MISCIMARRA: Mr. Perl, thanks for 4 being with us today in addition to your comments 5 yesterday. Do you have any problem with the 6 efforts, and I don't want to speak with the other 7 Board members, but I think that there is support 8 across the board -- no pun intended -- for trying to 9 address the issues associated with those cases where 10 elections are delayed beyond 56 days or more than 11 two months, and in some cases much longer than that.</p> <p>12 Do you have any problem with our focus in 13 part on trying to identify and eliminate, to the 14 extent that we reasonably can, the causes for delays 15 in those cases?</p> <p>16 MR. PERL: No, I don't. In fact, I think 17 the Board contributes to the delays in many cases. 18 For example, in your dealing with it in the NPRM the 19 Board's present policy is on a request for review, 20 and the Board will not schedule an election within 21 the next 25 days to give the Board ample time to 22 consider and rule on the request for review. That 23 25 day period could be shortened if the Board steps 24 up and deals with it in a much more timely fashion. 25 That's one of the kinds of incremental improvements</p>
<p style="text-align: right;">Page 392</p> <p>1 questions fairly trumps resolving elections more 2 speedily.</p> <p>3 MR. PEARCE: So if an employer has a 4 policy, and I understand many employers do, a policy 5 in their handbooks that says, "We believe in a 6 union-free work environment," would by your proposal 7 there be an obligation on the part of the employer 8 to notify the unions that that's what their policy 9 is?</p> <p>10 MR. PERL: No. I don't believe there is 11 a representation process engaged at that point, 12 Mr. Chairman. Some employers have such a statement 13 in the handbook. I would suspect that the vast 14 majority of small business owners which are included 15 in the Tennessee Chamber's membership do not have 16 such policies, and many of them don't even have 17 handbooks.</p> <p>18 MR. PEARCE: But if such a policy does 19 exist, wouldn't you consider that to be campaigning?</p> <p>20 MR. PERL: No, not necessarily. I think 21 that's a statement of the company's position. 22 That's not a part of a representation campaign.</p> <p>23 MR. PEARCE: Well, I guess we can get 24 into semantics about that, but you would not think 25 that that is campaigning even if it was contained in</p>	<p style="text-align: right;">Page 394</p> <p>1 that could take place outside of this notice of this 2 proposed rulemaking process. I think the Board can do 3 some things internally to help itself.</p> <p>4 But when you look at the questions and 5 the responses before about, "Well, how many days 6 should there be between petition and election, 7 should there be a minimum, should there be a 8 maximum," I think in a sense we need to look at what 9 needs to take place to ensure a fair and free 10 election here.</p> <p>11 In yesterday's panels we looked at a 12 number of the key components, including the 13 pre-election hearing, to deal with vital issues like 14 supervisory status. You cannot shortchange the 15 election process by having a bright line 20 percent 16 rule that no issues can be heard during the 17 representation process hearing, the pre-election 18 hearing, unless they constitute more than 20 percent 19 of the unit, even vital supervisory issues.</p> <p>20 If you eliminate that, yes, you can get 21 to the election much quicker, but then you have a 22 much more extended prolonged election representation 23 process because now you're going to deal with issues 24 such as the case I mentioned yesterday, the ITT 25 Lighting case, that went over four years because the</p>

<p style="text-align: right;">Page 395</p> <p>1 vital issue of supervisory status was not dealt with 2 by the regional director of the Board pre-election. 3 MR. MISCIMARRA: Thank you. 4 MR. JOHNSON: Just really quick. I just 5 want to get some more information about sort of your 6 pre-notice model to the extent that you've thought 7 it through. How much pre-notice would there be 8 before the petition, and then what would the 9 deadline be before the election in the case that 10 there was pre-notice? 11 MR. PERL: Well, Member Johnson, the 12 notice requirement proposal that I submit 13 respectfully to this Board is the quid pro quo if 14 you proceed with your quickie election approach 15 here. There has to be some opportunity, some ample 16 opportunity for the employees to hear from both 17 sides, and I would submit that that notice 18 requirement should be triggered before the union 19 seeks to have any solicitation of -- 20 MR. JOHNSON: Right. I understand that. 21 I was just trying to get your concept of how long 22 that's going to be. 23 MR. PERL: And if the union gets the card 24 signed, and it's going to depend on the size of the 25 unit, but I think there has to be a notice</p>	<p style="text-align: right;">Page 397</p> <p>1 MR. MURRAY: Chairman Pearce and Board 2 members, thank you for the opportunity to speak. 3 I'm Dr. Darrin Murray. I'm an adjunct or part-time 4 professor at Loyola Marymount University in Los 5 Angeles. I'm here on behalf of SEIU to provide the 6 perspective of an employee who has recently 7 experienced an organizing campaign at our 8 university. 9 In December of 2013 the union filed a 10 petition on behalf of part-time faculty like myself. 11 There were approximately 450 people in our unit. 12 There was not a stipulation as to exactly what the 13 bargaining unit would be and some confusion about 14 that. There was a hearing on December 27th where 15 the university proposed including what are called 16 fieldwork supervisors into our bargaining unit, a 17 number of people that may have been upwards of 200 18 folks. 19 Up to that point I had never heard of 20 these employees. I had never met one of them. I 21 didn't know who or what they were. Later on I 22 learned that they supervised student teachers. As 23 part of their credentialing process they're 24 professionals working primarily in secondary school 25 settings. They are not actually located on our</p>
<p style="text-align: right;">Page 396</p> <p>1 requirement as the quid pro quo for the quickie 2 election model and that that should be triggered 3 before any authorization cards get signed to put the 4 employer on notice that this organizing campaign is 5 going to commence. 6 Now, even the notice requirement is not a 7 perfect solution, because for small business owners, 8 which comprise a majority of the employers in this 9 country here, they still have to go out and get 10 ample representation through the form of attorneys 11 or some advisors, and that's going to take some 12 time. 13 MR. JOHNSON: I'm sorry, because we're 14 running out of time. I don't want to be rude or 15 anything like that. But let's just assume it takes 16 the union like three or four months to get the cards 17 together because they have an ample amount of time 18 to assemble cards. Is your proposal basically that 19 before the very first card is signed, say, four 20 months out before the petition comes in that the 21 union would give the employer notice if we had a 22 more accelerated election process on the back end? 23 MR. PERL: That is correct. 24 MR. PEARCE: Thank you, Mr. Perl. Mr 25 Murray.</p>	<p style="text-align: right;">Page 398</p> <p>1 campus. Many of them are in San Francisco as part 2 of the Teach for America program. They do not 3 actually teach classes. They do not appear in the 4 schedule of classes. I didn't know who they were. 5 They're paid a per student rate for the folks that 6 they supervise. 7 In this hearing my colleague, Eric 8 Greenberg, attended that hearing. The provost and 9 the dean of the school of education argued that they 10 don't have to, according to Eric Greenberg, that 11 they don't have to hold office hours just like our 12 adjunct faculty don't have to hold office hours, 13 which surprised me because that was completely 14 inaccurate. 15 Anyhow, the Board decided that we did 16 share a community of interest. I don't think that 17 was a well informed decision, but it was the 18 decision that was made. The contested group of 19 fieldwork supervisors was more than 20 percent of 20 our bargaining unit, so we would have needed a 21 hearing either under the current rules or under the 22 proposed rules before the election. 23 Under the proposed rules Loyola Marymount 24 University would have been required to give the 25 union a list of these names of fieldwork supervisors</p>

<p style="text-align: right;">Page 399</p> <p>1 before the hearing. That would have made it much 2 easier for us to find those workers since they 3 didn't even appear in the schedule of classes. But 4 when we went to the hearing we didn't know who they 5 were or where they were, and that made it hard for 6 us to inform the attorneys and the Board about 7 whether they really were part of our community of 8 interest, and it made it awfully hard for us to find 9 them to get them to sign cards or tell them our side 10 of the story and talk about our working conditions. 11 In terms of educating people on working 12 conditions, as a professional educator it may take 13 years in order to understand some of your lawyering 14 stuff, but in terms of understanding my working 15 conditions it's pretty straightforward. I've had my 16 career to do that. And in terms of looking around 17 and seeing what other unionized faculty have, it's 18 pretty straightforward, it's pretty easy to do that, 19 and the arguments are pretty clear. 20 I'm also an employee of the California 21 State University. They've been represented by the 22 California Faculty Association for quite a few years 23 now. I've seen the direct benefits that 24 unionization has provided to my colleagues on that 25 campus. The working conditions between the</p>	<p style="text-align: right;">Page 401</p> <p>1 to their interests? And that kind of operates both 2 ways. 3 MR. MURRAY: Sure. 4 MR. MISCIMARRA: And one way that we can 5 deal with that deals with notification. We've had 6 some other interesting proposals about that. Would 7 you agree that the total time frame available -- and 8 there are competing interests all around, but one 9 part of the kind of hollow tube that has moving 10 parts is that the available time frame does affect 11 many of these issues -- would you agree or disagree 12 with the overall goal of trying to make sure there 13 is enough time for the important stuff to get done 14 but not too much time to permit too much mischief to 15 get done? I don't know if we can apply that 16 standard, but -- 17 MR. MURRAY: I'll leave the moving parts 18 to people that are in a far higher pay grade than 19 myself. All I know is that had we had that list of 20 names it wouldn't have taken long to be able to get 21 ahold of them. I know this afternoon we're talking 22 more about the voter lists and what's on those voter 23 lists, and I'll be back to talk about that a little 24 more. I don't necessarily need a long time to go to 25 folks and say, "Look, here are working my conditions</p>
<p style="text-align: right;">Page 400</p> <p>1 California State University and Loyola Marymount 2 University are, frankly, stark. 3 I wanted to speak to my employees. I 4 wanted to talk to them about those differences in 5 working conditions. The way the selection was run 6 limited my ability to share those experiences 7 because we didn't even know who was in our 8 bargaining unit. The university had complete and 9 unabated access to that group of employees. It's 10 not fair that we weren't afforded the same 11 opportunity. We should have the same access to free 12 speech as our employer does, and the current rules 13 didn't allow for that. Thank you. 14 MR. MISCIMARRA: Dr. Murray, if I may, 15 and I'll preface this by saying I don't think we 16 deal with any issues that involve absolutes, so this 17 has many moving parts. But the one thing I gather 18 from your comments is that it would have been 19 helpful to have information earlier regarding the 20 identities of people in those job classifications. 21 Is it correct that another thing that you 22 believe is that those field service employees had 23 their own right to be educated by you and by the 24 other union supporters in connection with 25 information that they didn't even know was important</p>	<p style="text-align: right;">Page 402</p> <p>1 at Loyola Marymount, here are my working conditions 2 at California State University Northridge, here are 3 the significant differences, if you'd like I can 4 give you that speech in about ten minutes." So it 5 doesn't require a protracted period to do that. I 6 just need to have the access. 7 MR. JOHNSON: But isn't communication an 8 iterative process in the sense that you actually 9 have to communicate to an audience and they may flip 10 back and forth? There may be a lot of interesting 11 things to talk about during a campaign. 12 MR. MURRAY: Sure, absolutely, and I 13 enjoy those conversations, but that doesn't 14 necessarily mean that they have to be protracted to 15 be iterative or generative or constitutive. 16 MR. JOHNSON: Or all three. 17 MR. PEARCE: Your point basically is that 18 had you had the information time would not have been 19 the factor. 20 MR. MURRAY: Not the major factor, and 21 certainly not a 30 day period or three 45 minute 22 sessions or whatever else. We're capable of getting 23 information out, reading stuff, being fairly 24 efficient about that, making our points. I don't 25 think we would have needed an exceptionally long</p>

<p style="text-align: right;">Page 403</p> <p>1 period of time in order to do that.</p> <p>2 MR. MISCIMARRA: Dr. Murray, just out of</p> <p>3 my personal curiosity, what's your area of academic</p> <p>4 expertise?</p> <p>5 MR. MURRAY: Communication studies.</p> <p>6 (Laughter.)</p> <p>7 MR. JOHNSON: Wait a second. I just want</p> <p>8 to make sure that it's clear. So you're an expert</p> <p>9 in communicating.</p> <p>10 MR. MURRAY: I purport to be</p> <p>11 occasionally.</p> <p>12 MS. SCHIFFER: And as an expert in</p> <p>13 communication studies you're saying that that length</p> <p>14 of time is not required.</p> <p>15 MR. MURRAY: I don't think it's</p> <p>16 particularly necessary for a protracted period, yes.</p> <p>17 MR. JOHNSON: Well, since you're here as</p> <p>18 an expert in communication studies, have there been</p> <p>19 any such studies on the amount of time it takes for</p> <p>20 people to absorb a let's just say not simplistic set</p> <p>21 of facts that might be going on in any sort of</p> <p>22 election campaign?</p> <p>23 MR. MURRAY: I don't think there's going</p> <p>24 to be a study that provides a "one size fits all"</p> <p>25 answer to that particular question. I think it</p>	<p style="text-align: right;">Page 405</p> <p>1 understand the issues.</p> <p>2 MR. JOHNSON: That's your personal</p> <p>3 opinion. Right?</p> <p>4 MR. MISCIMARRA: We reserve the right to</p> <p>5 recall you and continue this hearing to the extent</p> <p>6 necessary. Thank you very much.</p> <p>7 MR. PEARCE: Thank you Dr. Murray. We're</p> <p>8 in recess for ten minutes.</p> <p>9 (Recess.)</p> <p>10 MR. PEARCE: Welcome. Our next seating</p> <p>11 is Ronald Meisburg -- I won't call you by the name</p> <p>12 that your mom used to call you -- Gabrielle Semel,</p> <p>13 Peter Kirsanow, Tom Meiklejohn and Kara Maciel.</p> <p>14 Thank you all. Ron, why don't you proceed?</p> <p>15 MR. MEISBURG: Mr. Chairman and members</p> <p>16 of the Board, I am still Ronald Meisburg, and I'm</p> <p>17 still here on behalf of the United States Chamber of</p> <p>18 Commerce. The topic for this panel involves the</p> <p>19 standard to be applied in scheduling an election.</p> <p>20 The Board has asked each witness to address specific</p> <p>21 questions, which we will do, but first I want to set</p> <p>22 some context for my remarks.</p> <p>23 The Board states that its proposal is</p> <p>24 necessary so that employees' votes may be recorded</p> <p>25 accurately, efficiently and speedily and to remove</p>
<p style="text-align: right;">Page 404</p> <p>1 would be terribly contextually based on the audience</p> <p>2 and information and all sorts of factors. I'm not</p> <p>3 aware of any studies, although you've given me the</p> <p>4 idea for one that might advance my career a bit and</p> <p>5 get me out of the adjunct pool and into something</p> <p>6 that is tenured.</p> <p>7 MR. JOHNSON: If you're back in another</p> <p>8 three years on this please have that study</p> <p>9 completed. But to be more serious here just for a</p> <p>10 moment because this is interesting to me, if we</p> <p>11 don't have any data don't you think free speech is</p> <p>12 an important enough value that we shouldn't jump in</p> <p>13 and then impose a bright line that's going to cut</p> <p>14 that down?</p> <p>15 MR. MURRAY: I'm not saying we don't have</p> <p>16 any data. I'm saying I'm not necessarily familiar</p> <p>17 with what data is available. Maybe we can get a</p> <p>18 researcher on that one to see what's in that body of</p> <p>19 literature. You know, I wouldn't imagine that a</p> <p>20 reasonable time frame and the time frames that I'm</p> <p>21 hearing about, I don't think the unions are</p> <p>22 proposing that we have an instantaneous election</p> <p>23 before we've had the chance to even talk to folks.</p> <p>24 But I'm not looking at 30 and 60 and 90 days as</p> <p>25 being a time frame that is really necessary to</p>	<p style="text-align: right;">Page 406</p> <p>1 unnecessary barriers to the fair and expeditious</p> <p>2 resolution of questions concerning representation.</p> <p>3 But we do not believe the Board has articulated why</p> <p>4 the current system is not expeditiously resolving</p> <p>5 questions concerning representation.</p> <p>6 As the Chamber and many others have</p> <p>7 pointed out and as Members Miscimarra and Johnson</p> <p>8 have noted in their dissent, the NPRM advocates a</p> <p>9 cure that is not rationally related to the disease.</p> <p>10 The statistics on the efficiency of the Board's</p> <p>11 excellent representation case handling under</p> <p>12 existing procedures are well known. 92 percent</p> <p>13 roughly of all elections are held pursuant to an</p> <p>14 agreement. For all cases the median time between</p> <p>15 the filing of a petition and the election is 38</p> <p>16 days. 94 percent of all elections occur within 56</p> <p>17 days. If you focus on the cases involving</p> <p>18 pre-election hearings, as Members Miscimarra and</p> <p>19 Johnson emphasized in their dissent, in 2013 the</p> <p>20 median time between the petition and election in</p> <p>21 those cases was 59 days.</p> <p>22 Looking at the statistics, it's difficult</p> <p>23 to understand how these differences justify the</p> <p>24 Board's proposed broad rewrite of election rules.</p> <p>25 The Chamber agrees with Members Miscimarra and</p>

<p style="text-align: right;">Page 407</p> <p>1 Johnson that the data demonstrate that delay is an 2 issue confined principally to a discrete minority of 3 less than 10 percent of all representation cases. 4 The graph that was published with their dissent at 5 79 Fed. Reg. 7346 dramatically illustrates that the 6 cases in this small discrete group, the less than 10 7 percent of all election cases, creates a tail of 8 cases in which elections were conducted from 9 somewhere between 57 to over 3,000 days. Now, 10 clearly that tail is where the Board should focus 11 its attention, and, as dissenting members suggest, 12 closely exam the particular reasons that have 13 contributed to those relatively few elections that 14 have involved unacceptable delay. 15 Now, with the Board's own statistics 16 showing a lack of a need for these broad proposed 17 changes, we now turn to the specific issues posed by 18 the Board. First, we want to address whether the 19 proposed rules adequately protect free speech 20 interests. It's been indicated that the proposed 21 rules may reduce the time for the scheduling of an 22 election to roughly less than half the median time 23 of 38 days for the holding of elections under the 24 current system. 25 This threatens to seriously undermine the</p>	<p style="text-align: right;">Page 409</p> <p>1 parties than by an agreement arrived at voluntarily? 2 The same is true with respect to the 8 3 percent of cases in which a hearing is held. 4 Although not the product of an agreement, the 5 elections involved there were the product of an 6 orderly and generally expeditious hearing process, 7 as the Board's own statistics demonstrate. There is 8 no need to change the current system with respect to 9 these cases, at least for those that are near or 10 within that 59 median day time frame. 11 To the extent that any election extends 12 into the tail of cases that go beyond the median, 13 that less than 10 percent of all cases, the Board 14 should study those cases. If it does so, it can in 15 that process solicit the views of its constituencies 16 regarding whether as soon as practicable or some 17 other standard of formulation is appropriate for 18 scheduling an election in those cases. 19 Finally, we were asked to specify whether 20 the rule should include a minimum or maximum time 21 between the filing of the petition and the election 22 and how long that time should be. Because we do not 23 believe there should be any change in the current 24 system, we also do not believe there should be any 25 change in the time frames that are the product of</p>
<p style="text-align: right;">Page 408</p> <p>1 rights of employers and employees recognized under 2 the First Amendment and 8(c) by the Supreme Court to 3 engage in a free and open discussion on the issue of 4 union representation and collective bargaining. 5 As I noted yesterday, unions have months 6 or even years to organize the workforce before the 7 employer may ever be aware of it. They file 8 election petitions at the time of their choosing, 9 and many if not most employers are ill prepared to 10 immediately respond to the arguments and promises 11 made by the union in the proceeding months. Because 12 of these concerns and others, the Chamber proposes 13 no change be made in the current system employed by 14 the Board in representation cases. We believe that 15 the current system adequately protects the free 16 speech concerns of all. 17 You ask us what standard should be 18 applied for scheduling an election. We do not 19 believe there should be any change from current 20 practice. 92 percent of elections held under an 21 agreement between the parties are conducted in an 22 expeditious manner. The agreements presumably 23 reflect bargaining tradeoffs agreed to by the 24 parties in the regional offices. What better way to 25 resolve the competing interests and desires of the</p>	<p style="text-align: right;">Page 410</p> <p>1 the current system. Instead, if the Board studies 2 the outlier cases in detail, it can in that process 3 solicit the views of its constituencies regarding 4 whether there should be minimum and maximum times 5 applicable to those cases, and, if so, what those 6 times should be. Thank you. 7 MR. PEARCE: What about that 25 days for 8 a request for review? What do you think about that? 9 MR. MEISBURG: We did not take a position 10 on that in our formal comments, other than to say 11 that we don't think that the review should be 12 eliminated. If there is a time that the regional 13 directors are going to be given routinely to account 14 for that review, obviously that is up to the Board, 15 but I'm not prepared today to agree that that would 16 be the proper thing to do. 17 If we were at the beginning of this 18 process, as we had suggested might be more 19 appropriate, where I could sit down with my client 20 and others and you to discuss how that might be 21 handled, I think that would have been a good thing. 22 But at this point, I think on behalf of my client 23 we're not prepared to sort of stipulate to any sort 24 of changes or differences that the Board hasn't 25 proposed other than to say we believe that the</p>

<p style="text-align: right;">Page 411</p> <p>1 current system works appropriately, that in fact the 2 review should be maintained as it currently is, and 3 that the Board should focus its energies and a 4 considerable amount of energies in studying the 5 outlier cases, and focus on those in order to obtain 6 the reasons for the delay in those cases and what 7 the appropriate changes might be to stop the delay 8 in those cases. 9 MR. PEARCE: Now, speaking as a former 10 general counsel, wasn't it your position that the 11 Board should embrace processes that would expedite 12 or provide opportunity for free choice in a more 13 expeditious manner? 14 MR. MEISBURG: Well, first of all, with 15 all due respect, I'm not speaking on behalf of 16 myself or in any personal capacity or former 17 capacity. I'm speaking on behalf of my client, the 18 Chamber of Commerce. 19 What I recall as general counsel as being 20 the most efficient thing, and this runs a little 21 contrary to some of the testimony we've had, our 22 system of regions, it's kind of a federal system, 23 and while we work very hard to maintain consistency 24 across the regions in what constituted an unfair 25 labor practice, what was illegal, I believe we</p>	<p style="text-align: right;">Page 413</p> <p>1 (Laughter.) 2 MR. MISCIMARRA: Mr. Meisburg, you're a 3 former general counsel and a former Board member, 4 and former Member Kirsanow is with us as well. Is 5 there anything that would prevent and would you 6 oppose anything that we could do as a Board if we 7 get a request for review? One option which I assume 8 we won't go back to is just to have the Board 9 directly address all representation election issues, 10 which was the case before the early '60s. 11 But is there anything that would prevent 12 us in connection with the requests for review to 13 adopt a different way to address those cases? You 14 can take almost any kind of alternative dispute 15 resolution process that has been suggested for 16 different kinds of tribunals, and there are many 17 varieties that could result in quicker decisions by 18 the Board. Is there anything that would prevent us 19 from doing that if we get a request for review in 20 deciding that more promptly? 21 MR. MEISBURG: First, let me say that 22 what impelled the legislative enactment in the LMRDA 23 that allowed the Board to delegate some of this to 24 the regional directors at the time was a huge 25 backlog. I'm not so sure that today that would be</p>
<p style="text-align: right;">Page 412</p> <p>1 tolerate a lot more in the cases of when are we 2 going to schedule an election and how are we going 3 to deal with the parties. And the reason we do that 4 is because, and there is nothing legal or illegal 5 about it, it's much more based on in over 90 percent 6 of the cases what the parties themselves can come to 7 agree to. 8 But when that's not the case, it gives 9 the regional director some freedom to deal with it, 10 and I think we've acknowledged today there can be 11 tremendous differences in each case. And there are 12 even differences among the regions simply because of 13 local customs, because of -- I remember Region 1 14 celebrates Patriots' Day. They don't do it 15 everywhere else. In New Orleans they take off Fat 16 Tuesday, I think. So you have these kinds of 17 regional differences, and you have differences in 18 the employers in these regions. 19 So I really think the current system can 20 be accommodated very well to doing what you want to 21 do, which is to eliminate delay, but eliminate delay 22 where it is bad, not where it's really not delay. 23 MR. PEARCE: I'm thinking that a Fat 24 Tuesday proposal in the NPRM is an omission. 25 MR. JOHNSON: I second the motion.</p>	<p style="text-align: right;">Page 414</p> <p>1 seen as necessary. I do think the Board's 2 involvement in the election process is key. I 3 really don't think we can farm this out to the 4 regional directors completely, even though I think 5 for purposes of arranging the election that the 6 regional director should have a fair amount of 7 discretion that they currently exercise. 8 As to the second part of the question on 9 the issue of what other resolution processes might 10 be available or could the Board introduce a 11 resolution, I have not and will not speak on behalf 12 of my client as to that issue. 13 But let me just say on behalf of myself 14 personally that I don't see, since the Board has 15 introduced settlement judges and other processes to 16 settle unfair labor practice cases, that it doesn't 17 seem like it would be beyond the Board's authority 18 to run a test program of some sort like that, and 19 that's without commenting on the efficacy of the 20 program itself. It seems like the Board has taken 21 that power in other types of cases, so I don't know 22 that I could see a legal impediment to it. 23 I stress that this is not something that 24 I've had a chance to discuss with my client or any 25 of its members, so I can't take a disposition on</p>

<p style="text-align: right;">Page 415</p> <p>1 their behalf, but that's what I think.</p> <p>2 MR. JOHNSON: Really quickly. You're one</p> <p>3 of only five people in U.S. history who have</p> <p>4 actually served as a Board member and general</p> <p>5 counsel, and I think that makes your contribution</p> <p>6 here invaluable. Our ultimate mission is to</p> <p>7 separate out unnecessary delay from necessary delay</p> <p>8 so we can basically render justice, and I think</p> <p>9 you've covered at least making sure the Board should</p> <p>10 be directly involved in the representation</p> <p>11 procedures as part of what you would see as some</p> <p>12 necessary delay.</p> <p>13 From your perspective, what are the</p> <p>14 necessary delays in the process? Why are they</p> <p>15 necessary? I know you don't have a lot of time, so</p> <p>16 just broad brush it.</p> <p>17 MR. MEISBURG: Well, certainly there is</p> <p>18 delay necessary to provide due process and free</p> <p>19 speech rights. That's very important to the</p> <p>20 Chamber. We've made that a part of our written</p> <p>21 comments as well as part of my oral presentation</p> <p>22 today.</p> <p>23 I think the delay that accommodates</p> <p>24 legitimate interest to the parties in a given</p> <p>25 setting, and we can't possibly know what the facts</p>	<p style="text-align: right;">Page 417</p> <p>1 of cases.</p> <p>2 So I certainly think there is necessary</p> <p>3 delay, the due process and free speech concerns, and</p> <p>4 I know we heard earlier about the educational</p> <p>5 concerns which is a factor of that. There may be</p> <p>6 other necessary delays that will show up in given</p> <p>7 cases that we just can't know about, but we</p> <p>8 certainly see where the group of cases is that kind</p> <p>9 of would fit the research pattern for where the</p> <p>10 unnecessary delay may be lurking, and I think that's</p> <p>11 where I think the Board should focus its efforts.</p> <p>12 MR. PEARCE: Thank you. Ms. Semel.</p> <p>13 MS. SEMEL: Well, I also am the same</p> <p>14 person that I was yesterday. I'm Gabrielle Semel.</p> <p>15 The proposed rules state that the regional director</p> <p>16 should select an election date as soon as</p> <p>17 practicable, and I support that standard.</p> <p>18 Yesterday I testified about three</p> <p>19 representation cases in Connecticut, Long Island,</p> <p>20 New York and upstate New York involving T-Mobile USA</p> <p>21 in which the representation process was dragged out</p> <p>22 unnecessarily, in my opinion, by the employer. And</p> <p>23 today, as I promised yesterday, I want to talk about</p> <p>24 what happened during that delay.</p> <p>25 While the parties and the employer and</p>
<p style="text-align: right;">Page 416</p> <p>1 are, is subject to the regional director's ability</p> <p>2 to guide the parties and in some cases direct the</p> <p>3 parties to an election. You know, regional</p> <p>4 directors, their compensation, I don't know how it</p> <p>5 is under the current budget, but they were rated</p> <p>6 every year, and they were rated in accordance with</p> <p>7 certain standards and goals that the Board sets for</p> <p>8 conducting so many elections in so many days and</p> <p>9 handling other things.</p> <p>10 Regional directors have every incentive</p> <p>11 personally in terms of compensation to try and meet</p> <p>12 those goals in as many cases as it is possible to</p> <p>13 meet those goals, in as many cases as is not</p> <p>14 necessary to delay meeting those goals. So they're</p> <p>15 going to make that judgment in the first instance,</p> <p>16 and we believe that right now they're doing a good</p> <p>17 job.</p> <p>18 We don't know much about the delay in the</p> <p>19 tail I talked about. Maybe the delay in the case</p> <p>20 where the election was held on the 57th day was a</p> <p>21 necessary delay. Maybe the delay that was involved</p> <p>22 in the election that was held on the 3,000th day</p> <p>23 involved some necessary delay and some unnecessary</p> <p>24 delay. The fact is that we don't know, because we</p> <p>25 haven't put the lens of study on that outlier group</p>	<p style="text-align: right;">Page 418</p> <p>1 the employees awaited decisions in those cases and</p> <p>2 then waited for the actual election, all three</p> <p>3 petitions were supported -- I should have said this</p> <p>4 earlier -- all three petitions were supported by an</p> <p>5 overwhelming majority of the employees when the</p> <p>6 petitions were filed. In all three cases, while</p> <p>7 everyone was waiting for the results, the employees</p> <p>8 received regular communications from T-Mobile as to</p> <p>9 why the union was bad and not in their interest</p> <p>10 before the petitions were filed. That was before</p> <p>11 the petitions were filed. Once the petitions were</p> <p>12 filed and especially after the decision and</p> <p>13 direction of election, these messages increased,</p> <p>14 becoming a drumbeat that was somewhat overwhelming</p> <p>15 to many of the workers.</p> <p>16 In Albany, the drumbeat was sufficiently</p> <p>17 severe that CWA-TU ended up pulling the petition</p> <p>18 because we understood we had lost majority support.</p> <p>19 In Connecticut, where the process from petition to</p> <p>20 election was the quickest, the workers did elect</p> <p>21 unionization, but by one vote as opposed to an</p> <p>22 overwhelming majority.</p> <p>23 From the time of the decision until the</p> <p>24 vote the workers were spoken to daily about the ills</p> <p>25 of unionization either on conference calls, in</p>

<p style="text-align: right;">Page 419</p> <p>1 one-on-one meetings or in group meetings. According 2 to one worker, and I quote, "Managers and 3 supervisors make daily statements that we will be 4 fired or lose some of our current job benefits if we 5 choose union representation," close quote. 6 On Long Island support for the union was 7 the strongest. However, that was also the place 8 where the process took the longest. I think I 9 testified yesterday it was close to seven months. 10 During that time senior level managers were in the 11 employer's facilities every day. That had not been 12 the practice before the filing of the petitions. 13 One high level manager set up her office, she set up 14 her office in the conference room and was a constant 15 presence at the workplace. Employees were required 16 to be on daily conference calls, some lasting as 17 much as two hours while they were told of the evils 18 of unions. 19 The situation on Long Island became so 20 adversarial that a high level manager told the 21 employees on a conference call that a strong union 22 supporter could not be trusted even to do his job. 23 That resulted in quite a backlash from that personal 24 attack, and the manager was forced or caused to 25 apologize to that worker publicly. But the message</p>	<p style="text-align: right;">Page 421</p> <p>1 scheduling elections as practicable as possible 2 would deprive them of the ability to do so. 3 In my experience, that argument is false. 4 Sadly, many employers incorporate their anti-union 5 message in their basic employee orientation. The 6 first day you're on the job it's the first thing you 7 learn: "This is not a union company, we don't 8 believe in unions." And that anti-union message is 9 repeated, intensifying if there is even a whiff of 10 union sympathy. This happens with large employers 11 and it happens with small employers. 12 Many unions, including CWA, campaign 13 openly. The employer knows that there is a union 14 campaign way before the petition is ever filed. At 15 T-Mobile CWA-TU had been openly campaigning for 16 several years, and T-Mobile was fully aware of CWA's 17 efforts. CWA and Ver.Di leaders had even met with 18 T-Mobile management at various times. T-Mobile did 19 not need the extended delays allowed by current 20 Board procedures to make its position known to the 21 employees. It wanted the delays to pound that 22 message into the heads of the employees in order to 23 convince them that unionization was simply not worth 24 it. 25 Representation elections should be</p>
<p style="text-align: right;">Page 420</p> <p>1 had been sent: support the union openly and you risk 2 being personally attacked by management. 3 The Act grants employers the right to 4 campaign, and my testimony here does not seek to 5 challenge that right. However, during the T-Mobile 6 USA unionization campaigns, as with most other union 7 campaigns I've been involved with, the employer's 8 campaign against the union crosses the line from 9 messaging to harassment. 10 As stated by another of the T-Mobile 11 workers, quote: "Many of served in the U.S. 12 military. One of my co-workers did three tours of 13 duty in Iraq. We're not cowards and we don't scare 14 easily, but the way the current election rules work 15 has afforded T-Mobile USA too much time to delay, 16 and they have used that delay time to terrify us 17 about losing our jobs, our livelihood and our 18 dignity as workers all because we wanted a fair 19 chance to vote for the union." 20 Elections should be scheduled as soon as 21 practicable, as the new rules propose, so that the 22 employers don't cross the line and employees 23 attempting to unionize don't end up feeling the way 24 the T-Mobile workers felt. I know that employers 25 argue that they need campaign time and that</p>	<p style="text-align: right;">Page 422</p> <p>1 scheduled as soon as practicable so that employees, 2 who are really the most important entity in this 3 process, can vote for a union or against it without 4 harassment or intimidation. Thank you. 5 MR. MISCIMARRA: Ms. Semel, your comments 6 to me are so helpful in more than one way, but in 7 one way in particular. We're in a quandary, because 8 on the one hand you talked about employees during 9 the campaign were spoken to daily, and we're thrust 10 in a situation -- I kind of view free speech rights, 11 and this is not meant to undermine or speak against 12 the interests of either employers or unions, but in 13 terms of speaking daily during a campaign, it 14 strikes me that among other things that's an 15 employee right. It seems like we can't do very 16 much. The Act contemplates speaking daily about 17 union related issues. 18 But then you also made a comment that the 19 employer made daily statements that employees would 20 be fired or lose their job benefits if they chose 21 the union. Now, the dissenting view with respect to 22 the proposed rule advocates more vigorous 23 enforcement against unlawful activities and more 24 effective remedial measures. 25 One question I have is: Do you oppose</p>

<p style="text-align: right;">Page 423</p> <p>1 that aspect, which I think has probably the support 2 of all five Board members, but do you support 3 efforts to try to more effectively deal with 4 unlawful conduct and to have more effective remedial 5 measures during election campaigns? And if we 6 accomplished that, hypothetically would you then 7 agree that a reasonable time for people to speak 8 daily about union related issues is a reasonable 9 outcome?</p> <p>10 MS. SEMEL: Well, of course I support 11 increased efforts to deal with unlawful activity. 12 There can be no doubt about that. But when I was a 13 Board agent, and I was madly in love with what I was 14 doing and I thought we can fight, you know, that we 15 can protect workers, that was what I really believed 16 in. But having done this for 30 years, the problem 17 with remedial efforts during a campaign is that if a 18 campaign is going on filing a charge doesn't do you 19 much good. It doesn't get resolved, first of all, 20 in enough time. But you also have to file a request 21 to proceed or else you are participating in 22 extending the election process, which is never what 23 the union wants. So that's not helpful.</p> <p>24 There is very little way that the union 25 can get the agency to stop unlawful activity when</p>	<p style="text-align: right;">Page 425</p> <p>1 that the campaign is taking place, that there is a 2 campaign that's been taking place for a while. 3 There is something else that I wanted to 4 talk to, and it directly addresses your question, 5 your first question, which is that the employer has 6 daily access to employees. The employer can talk to 7 those employees as much as it can. The union 8 cannot. The union doesn't have daily access. The 9 union doesn't have access. I mean, if we're going 10 to talk about changing the world we could talk about 11 access for the unions and let's have unions have as 12 much access as employers. Unions don't have that 13 access. Employers have it, they have it every day, 14 they have it all the time. They have all sorts of 15 ways of communicating with their employees.</p> <p>16 I don't believe an extended period of 17 time is necessary for free speech rights. I think 18 free speech rights exist before a petition is filed, 19 and a shortened period between the time that the 20 petition is filed and the time of the election will 21 not in any way hamper free speech rights.</p> <p>22 MR. PEARCE: Ms. Semel, in your 23 experience has technology impacted upon employers' 24 free speech opportunities?</p> <p>25 MS. SEMEL: In order to answer the</p>
<p style="text-align: right;">Page 424</p> <p>1 it's happening.</p> <p>2 MR. MISCIMARRA: But the premise of my 3 question is we're in rulemaking. Under existing 4 law, the Board, and I don't want people to get 5 excited, but the Board in some cases under existing 6 law responds to charges by having a bargaining order 7 and dispensing with the election.</p> <p>8 So my question again is: If we devise 9 effective remedies that are more effective and more 10 effective ways to address the issue that we all 11 agree is highly objectionable and inappropriate, if 12 we do that, if we do that, would you agree that it 13 makes sense to have a reasonable period for a 14 campaign to take place?</p> <p>15 MS. SEMEL: No, and I don't because I 16 think a campaign has been taking place. In other 17 words, the campaign starts as soon as the employer 18 understands that organizing is taking place. In 19 CWA's case, and I can't speak for the unions, but we 20 do meet and we do talk amongst ourselves. And my 21 understanding is that most unions do the same thing. 22 The days of secret organizing are gone. I mean, 23 unions organize in a public way, so the employer 24 knows as soon as the campaign goes public, and 25 that's usually way before the petition is filed,</p>	<p style="text-align: right;">Page 426</p> <p>1 questionnaire that the AFL sent out to union side 2 lawyers I spoke with CWA lead organizers, and I 3 think our answer was that employers communicate with 4 using e-mails at least 50 percent of the time, a 5 little bit less for texts. But yes, the employers 6 are using technology, and they're using it more and 7 more.</p> <p>8 MR. PEARCE: And do you believe that in 9 deciding what we want to do we should take those 10 kinds of things into consideration?</p> <p>11 MS. SEMEL: Absolutely.</p> <p>12 MR. JOHNSON: Really quickly. This has 13 been very, very helpful. I want to get your views 14 on two things. One, under the practicability 15 standard or any standard that we might devise should 16 employer recidivist conduct in election situations 17 be taken into account? And by that I mean unfair 18 labor practice findings and objections, for example. 19 Because it seems like one of your concerns is 20 basically that, and I don't want to express a view 21 here or there on this, but I understand that for 22 many of the labor commenters there is a feeling that 23 employers across the board simply engage in this 24 conduct at the moment.</p> <p>25 Now, whether or not I agree with that,</p>

<p style="text-align: right;">Page 427</p> <p>1 let's concede that there would be some employers who 2 engage in objectionable conduct and unfair labor 3 practices during an election environment. If there 4 is a re-run election, for example, or if there is an 5 election in some other nearby jurisdiction, in the 6 same region or whatever involving the same employer, 7 in scheduling, in the practicability standard should 8 we address recidivism by that employer in other 9 election situations?</p> <p>10 MS. SEMEL: I can't really comment on 11 that without understanding what the proposal would 12 be, but I cannot imagine -- I'm not creative enough 13 or imaginative enough to figure out something that 14 the Board could do that would change the atmosphere 15 once workers had been intimidated or given up. The 16 statistics, although I haven't looked at them in a 17 long time for second elections, is very bad. So 18 that was another thing I used to think: "Well, you 19 know, if there is enough objectionable conduct we'll 20 just have another election."</p> <p>21 But you really lose much more because 22 people are demoralized by the process. It's not 23 worth it. I think somebody talked about campaign 24 fatigue. That's a real thing. I mean, people are 25 energized, they want a union, and it's just not</p>	<p style="text-align: right;">Page 429</p> <p>1 MR. JOHNSON: We do do that in terms of 2 Section 8(g), but I just wanted to see if you had 3 any thoughts.</p> <p>4 MR. PEARCE: Thank you. Mr. Kirsanow.</p> <p>5 MR. KIRSANOW: Good afternoon, Chairman 6 Pearce and members of the Board. I'm Peter 7 Kirsanow, a partner in the labor employment practice 8 group of Benesch Friedlander. As opposed to my 9 previous two colleagues, I'm not the same person I 10 was yesterday. I was Denzel Washington. I have a 11 very aggressive barber.</p> <p>12 (Laughter.)</p> <p>13 MR. KIRSANOW: I'm appearing on behalf of 14 the National Association of Manufacturers, the 15 preeminent industrial association in the United 16 States, and also the largest industrial trade 17 association, representing employers large and small 18 in all industrial sectors in all 50 states.</p> <p>19 The tens of thousands of manufacturers 20 have a distinct interest in the rulemaking, and we 21 respectfully submit that the rules that compress 22 time frames for the conduct of an election would 23 have a significant adverse impact on the meaningful 24 exercise of employees' Section 7 rights, 8(c) 25 rights, and on the workplace in general.</p>
<p style="text-align: right;">Page 428</p> <p>1 worth it.</p> <p>2 MR. JOHNSON: So your position is we 3 should sort of compress the election time from the 4 beginning on the supposition that objectionable 5 conduct and unfair labor practices is just going to 6 take place.</p> <p>7 MS. SEMEL: Yes.</p> <p>8 MR. JOHNSON: And one other thing. You 9 mentioned that CWA's practice is typically to give 10 de facto notice to employers that, "Hey, we're 11 organizing now." In order to deal with this free 12 speech issue should the Board consider having all 13 unions, since it is apparently the prevalent 14 position that the employers supposedly know that 15 organizing is taking place, should we require unions 16 some point in front of the petition if they want to 17 have an accelerated on the back end to inform the 18 employer that it's being organized formally?</p> <p>19 MS. SEMEL: Somebody mentioned that on 20 one of the earlier panels. I never even thought 21 about that idea, so I can't really speak to it. I'd 22 have to really think about what it meant and what 23 the ramifications are. And at what point? Ten days 24 before you file the petition? I would have to think 25 about it.</p>	<p style="text-align: right;">Page 430</p> <p>1 It's arguable that more time rather than 2 less time is necessary and at least no less than the 3 current median, whether that be 38 days to 42 days.</p> <p>4 As noted by Members Johnson and Miscimarra, there 5 are several federal statutes that outline specific 6 time periods that are longer than the 38 day median 7 for employees to consider matters no more 8 consequential than those involving the selection of 9 a collective bargaining representative.</p> <p>10 By compressing the time frame in a 11 representation election the proposed rules will 12 essentially eviscerate the ability of employees to 13 make an informed choice, an informed exercise of 14 their Section 7 rights, and, at the same time, 15 impair the 8(c) rights of employers to communicate 16 effectively to their employees.</p> <p>17 And as mentioned by Member Johnson during 18 some of the exchange earlier this morning, it will 19 chill the robust exchange of ideas as envisioned 20 both by Congress in enacting the Act and as 21 enunciated by the Supreme Court in several cases, 22 not just Chamber of Commerce versus Brown, but 23 Letter Carriers versus Austin and a whole host of 24 circuit court decisions, especially D.C. circuit 25 court decisions.</p>

<p style="text-align: right;">Page 431</p> <p>1 The cumulative effect of the proposed</p> <p>2 rules as they have an impact on Section 8(c) and on</p> <p>3 the compression of the election period, reducing the</p> <p>4 median time frame between the filing of a</p> <p>5 representation petition to the conduct of the</p> <p>6 election from 38 days, although there has been some</p> <p>7 dispute as to the number of days it would fall to,</p> <p>8 but anywhere from 10 to 20 days will deprive</p> <p>9 employers of the ability to communicate vital</p> <p>10 information to their employees regarding their</p> <p>11 rights and the effect of unionization.</p> <p>12 Even under the current median of 38 days,</p> <p>13 it's been my experience that many employers have a</p> <p>14 difficult time effectively communicating their</p> <p>15 message. Now, that's especially true for smaller</p> <p>16 employers, as has been testified to already, but it</p> <p>17 also affects larger companies as well.</p> <p>18 Under a not atypical organizational</p> <p>19 campaign the union may start collecting</p> <p>20 authorization cards even a year but often six to</p> <p>21 eight months before the filing of petition, and</p> <p>22 during that time they're communicating their message</p> <p>23 to the employees with very few legal constraints or</p> <p>24 practicable constraints. Not all employees are</p> <p>25 necessarily going to hear the message, and I would</p>	<p style="text-align: right;">Page 433</p> <p>1 ones, at least two weeks to figure out what they</p> <p>2 need or want to say regarding employee rights and</p> <p>3 unionization, and then they have three to four weeks</p> <p>4 under the current time frame to communicate that</p> <p>5 message to the employees in contrast to the 30 to 40</p> <p>6 weeks sometimes that the unions have been conveying</p> <p>7 their message to employees.</p> <p>8 Logistics can be even more challenging</p> <p>9 for the employers who don't have all their employees</p> <p>10 in a centralized workplace. Were the proposed rules</p> <p>11 implemented in a number of cases employers may not</p> <p>12 even have figured out what they want to say by the</p> <p>13 time the election is conducted. That would</p> <p>14 essentially deprive employers or impair employer</p> <p>15 8(c) rights and make Section 7 rights a fiction.</p> <p>16 The compressed time frame is enormously</p> <p>17 beneficial to unions. Indeed, for those of us who</p> <p>18 have been involved in hundreds of election campaigns</p> <p>19 over the years, it's difficult for us to conceive of</p> <p>20 a situation in which a union couldn't organize a</p> <p>21 workplace or successfully run an election especially</p> <p>22 given the impact of Specialty Healthcare.</p> <p>23 But I would submit that the compressed</p> <p>24 time frame is profoundly harmful to the interests of</p> <p>25 employees, many of whom would be making an</p>
<p style="text-align: right;">Page 432</p> <p>1 challenge the proposition that most employers are</p> <p>2 aware of the campaign from the very beginning</p> <p>3 because there is very often the case that employers</p> <p>4 are completely oblivious to the fact that an</p> <p>5 organizational campaign is under way.</p> <p>6 The employee population, or at least</p> <p>7 portions thereof, is hearing an unrebutted,</p> <p>8 sometimes one-sided story, frequently an inaccurate</p> <p>9 one. They may not hear of all the down sides of</p> <p>10 unionization. They may not hear about dues, fees</p> <p>11 and assessments. They may not hear about the</p> <p>12 union's political postures or social agenda with</p> <p>13 which employees may disagree. They may not hear</p> <p>14 about the prospects of unionized companies, some of</p> <p>15 which are faltering, some of which go out of</p> <p>16 business. The union controls the filing of the</p> <p>17 petition, which also controls the approximate time</p> <p>18 of the election.</p> <p>19 This may be the first time that many</p> <p>20 employers first hear about an organizational</p> <p>21 campaign, and it's also the first time that many</p> <p>22 employees are aware that there is a campaign under</p> <p>23 way, and the election date's a mere five and a half</p> <p>24 weeks away under current circumstances. It takes</p> <p>25 many if not most employers, even some of the larger</p>	<p style="text-align: right;">Page 434</p> <p>1 uninformed choice about one of the most important</p> <p>2 aspects of their lives and also profoundly harmful</p> <p>3 to the interests of employers, who would in many</p> <p>4 cases be effectively removed from the decision to</p> <p>5 unionize the workforce and provide very little input</p> <p>6 into that decision.</p> <p>7 For those reasons, the National</p> <p>8 Association of Manufacturers would respectfully</p> <p>9 submit that the rules, at least terms of their</p> <p>10 compression of the time frame, that the issuance of</p> <p>11 such rules be quashed. Thank you.</p> <p>12 MS. SCHIFFER: When you talked about the</p> <p>13 employer getting its message out, you said it takes</p> <p>14 how long to get the message out?</p> <p>15 MR. KIRSANOW: Under the current time</p> <p>16 frame, and we've heard a lot of anecdotal</p> <p>17 information, and that's why I think it might be</p> <p>18 beneficial to see if more empirical information</p> <p>19 could be adduced along these lines, but I've been</p> <p>20 doing this for 35 years despite my incredible robust</p> <p>21 and vigorous appearance, my compilation of</p> <p>22 anecdotes says that especially among the smaller</p> <p>23 employers you're looking at at least two weeks.</p> <p>24 What is happening is -- I'll give you</p> <p>25 something that happens maybe on a biweekly basis.</p>

<p style="text-align: right;">Page 435</p> <p>1 You get the phone call. "Denzel, I understand that 2 one of my factory workers has been talking about a 3 union." I said, "You should be aware that you're 4 probably going to get a request for recognition or a 5 petition imminently." "No, my employees aren't 6 really interested in unionizing." A true story. I 7 got one of those phone calls at about 9:45 in the 8 morning. By noon he calls me back, saying, "I got 9 the petition."</p> <p>10 From that period of time a lot of smaller 11 employers who don't have a standing HR department 12 and don't have a retention agreement with labor 13 counsel are scouring around, maybe talking to their 14 wills and trust attorney to try to find out who it 15 is they need to get in touch with to help them with 16 respect to a representation campaign. They will sit 17 down with their attorney and try to figure out what 18 it is in terms of unit placement what is going on, 19 what they should be doing in terms of possibly 20 stipulating, maybe going to a hearing. There are a 21 number of determinations going on at that time.</p> <p>22 Keep in mind that most companies, 23 strangely enough, are not in the business of 24 conducting union elections. They're in the business 25 of making widgets. And that same person who is</p>	<p style="text-align: right;">Page 437</p> <p>1 employer's message, does that equal to the 2 information that you believe employees should have 3 and might not have if the employer doesn't have that 4 two to four weeks?</p> <p>5 MR. KIRSANOW: That two to four weeks in 6 which to communicate their message is after they've 7 already decided that messages is going to be.</p> <p>8 MS. SCHIFFER: We did that. But what I'm 9 asking you is: Is the employer's message which you 10 referred to many times the same thing as the 11 information you believe employees need which you 12 also referenced? I wondered if you were using those 13 terms interchangeably.</p> <p>14 MR. KIRSANOW: I think they are to some 15 extent coextensive, but not completely.</p> <p>16 MS. SCHIFFER: So the information the 17 employees need is the information the employer wants 18 them to have.</p> <p>19 MR. KIRSANOW: Not necessarily. The 20 employer may not be giving them all the information 21 employees need. We have three parties involved 22 here, a union, employees -- and I think we had a 23 very eloquent witness earlier on that talked about 24 the fact that to a large extent much of what we're 25 discussing here seems to be not in the context of</p>
<p style="text-align: right;">Page 436</p> <p>1 making those determinations with respect to unit 2 placement and stipulation is the same guy who's 3 repairing tow motors, signing bills of lading, 4 dealing with a whole host of issues. He is wearing 5 multiple hats. So up to two weeks could go by 6 before he determines what his position is going to 7 be, before he even knows that he wants to send out 8 campaign materials and maybe have some elections.</p> <p>9 Now, that's not the case for T-Mobile or 10 some companies that have standing HR departments. 11 But I have the good fortune of representing ome 12 larger companies, and they have some of the same 13 issues as well.</p> <p>14 MS. SCHIFFER: None of that was my 15 question, but thank you for your comment. My 16 question was that you said there was a certain 17 period of time of two weeks to decide on what they 18 were going to campaign and then a certain amount of 19 time to get the message out. All I was really 20 asking for was that time period to get the message 21 out, what you said.</p> <p>22 MR. KIRSANOW: Three to four weeks.</p> <p>23 MS. SCHIFFER: So three to four weeks. 24 To communicate with their employees would take three 25 to four weeks. And so when you're talking about the</p>	<p style="text-align: right;">Page 438</p> <p>1 what's best for employees, and you have the union. 2 So employers may be giving them what they believe 3 the employees need. Employees, some of them are 4 gathering some of the information they believe they 5 need, the unions are giving them the information 6 they think they need, and hopefully all of those 7 circles will be to some extent coextensive and the 8 employees will get all of the information they need.</p> <p>9 MR. MISCIMARRA: Former Member Kirsanow, 10 getting to the -- and I don't mean to discount the 11 importance of the interests of employees or unions. 12 But again focusing on the interest of employees, our 13 statute adopts a majority rule concept, and I guess 14 the question that I have is: How much do we have to 15 care, if we have an election which ascertains that a 16 majority of unit employees at that point in time 17 have support for the union, how much is it our 18 province to care that much about whether the 19 remaining employees participate in election 20 discussions or actually have an understanding about 21 the relevant issues once you get beyond the point of 22 majority rule?</p> <p>23 MR. KIRSANOW: I think Section 7 presumes 24 that the Board care that all employees have at least 25 some meaningful opportunity to participate in the</p>

<p style="text-align: right;">Page 439</p> <p>1 process. And in any election, whether it's a Board 2 election or a national election, some people may 3 choose not to participate for whatever reason. 4 MR. PEARCE: So as you would know, having 5 been a former Board member, the election process 6 from petition to actual election has over the course 7 of years been reduced. It's been 56 down to 42 down 8 to 38. Is it your position that as that process 9 gets smaller the First Amendment rights of the 10 parties are being infringed, particularly the 11 employer? And if so, is it our responsibility as 12 the Board to expand that process out because we're 13 denying them their rights under the First Amendment? 14 MR. KIRSANOW: I do think that there is 15 an irreducible point beyond which, if the period is 16 compressed, First Amendment rights would be 17 infringed upon mainly from a logistical standpoint. 18 I think that it's difficult to effectively 19 communicate, whether it's the union, whether it's 20 co-workers or the employer, positions with respect 21 to unionization or information related to the effect 22 of unionization in a compressed time frame, 23 depending upon the nature of the employer. 24 MR. PEARCE: And what would be that 25 irreducible point?</p>	<p style="text-align: right;">Page 441</p> <p>1 we're talking about different things. With respect 2 to Warren, for example, employees are about to lose 3 their jobs and they need to make a provision. The 4 state employment agency needs that information as 5 well as the union also. With respect to the OWBPA, 6 another thing, they're about to lose their job and 7 they have to make a determination as to whether or 8 not they're going to accept certain benefits, so 9 maybe 21, or in the case of a number of people 45. 10 Here the employees are keeping their 11 jobs. It's something that's going to be a hopefully 12 long term endeavor. If they are unionized, they may 13 be unionized for the next 30 years. It's something 14 that could have even greater consequence than the 15 determination as to whether or not to sign a release 16 under the OWBPA. I think at least those are 17 benchmarks. And it should be informative that 18 Congress has chosen longer periods for those 19 terminal circumstances than in the ongoing 20 circumstance of a representation election. 21 MR. PEARCE: Well, wouldn't you say that 22 it's informative in the Agricultural Labor Relations 23 Board where they have seven days to have an 24 election? 25 MR. KIRSANOW: And I would submit that</p>
<p style="text-align: right;">Page 440</p> <p>1 MR. KIRSANOW: It's difficult to 2 ascertain. I do think that right now we're at a 38 3 day median. I think we're in an informational 4 vacuum. I think there is a good chance that we 5 might get a better idea if we had more information 6 related to the positions of labor organizations, 7 employers, and most importantly employees as to what 8 it would be. But the experience that many of us 9 have had is that the current 38 day minimum in fact 10 may not be enough time to get that information out. 11 MR. PEARCE: Mr. Washington, I enjoyed 12 you in The Hurricane. 13 (Laughter.) 14 MR. JOHNSON: One quick question not 15 related to your many movie roles. Basically, if we 16 had to search out to another statute to find -- if 17 we wanted to tether something to a congressional 18 enactment or legislative history like JFK's comment 19 on the 30 days, the ADEA on the 45 day group, for 20 example, the 21 day for the individual, the 60 days 21 in the Warren Act or some other yardstick, which one 22 would be appropriate? 23 MR. KIRSANOW: I wouldn't take a position 24 as to that, and I don't mean to be evasive, but I 25 think each of those is an imperfect measure because</p>	<p style="text-align: right;">Page 442</p> <p>1 that's a very discrete sector of the industry. I 2 think what needs to be done, as what Congress did 3 with OWBPA, that applies to all employers and all 4 employees regardless of occupation or industry. The 5 Board in large measure is more charged with that 6 circumstance than it is with the narrow confines of 7 one industry. 8 MR. PEARCE: Thank you. Mr. Meiklejohn. 9 MR. MEIKLEJOHN: I'm Tom Meiklejohn. I 10 also am the same person I was yesterday, but I 11 wasn't here, so I'll just briefly introduce myself 12 by saying I've worked in labor relations or as an 13 advocate in labor relations since 1977, however long 14 that is, 12 years as a field employee with the 15 National Labor Relations Board, and the rest of that 16 25 years or so as a representative of unions. 17 In that time, one of the more dramatic 18 changes I've seen is in the practice of unions with 19 respect to keeping their campaigns quiet and 20 concealed from the employer. In the early days of 21 my employment, it was almost always the case that 22 the unions tried to keep things under a lid right up 23 until the petition was filed, and you would have 24 something that those unfriendly to that tactic could 25 refer to as an ambush election. But today that's</p>

<p style="text-align: right;">Page 443</p> <p>1 changed, and that is the very rare exception where 2 the union doesn't go public with their campaign. 3 There are three reasons for that. One is 4 that the union, in order to build strength, has to 5 overcome, regardless of what the employer has done 6 or said in the past, employees come into the 7 campaign knowing that their employer is going to 8 oppose the campaign in almost every case and fearing 9 the employer's reaction. And the first phase of 10 that campaign is to build up the confidence among 11 the employees that they can join together to speak 12 up for themselves. 13 And then, in order to get that message to 14 the larger group of employees, there has to be some 15 committee, some group of people who are willing to 16 go public, have their faces on campaign literature 17 and have their names disclosed as the people who are 18 willing to lead the campaign. Once that happens, 19 the employer knows there is something going on. 20 The second reason for this is quite 21 simply that if you end up in litigation where 22 somebody was discriminated against because of their 23 union activity, you want to be able to show that it 24 was public. If it's been concealed you have a much, 25 much harder time proving that.</p>	<p style="text-align: right;">Page 445</p> <p>1 a flip comment, but an earlier panel member talked 2 about educating employees of their rights. The 3 Board has developed a notice, and the court says you 4 can't force employers to post that notice, but if 5 the employer wants to educate employees about their 6 rights they can voluntarily post those notices and 7 the employees will have that information. 8 I have one other -- maybe people 9 sometimes think it's a radical suggestion to look at 10 the statute, but the language of Section 9(a) says 11 that representatives designated or selected by a 12 majority of employees shall be the exclusive 13 representative. 14 We talked about the history of the Act a 15 little earlier. In the first 20 or 30 years of the 16 history of the Act the big issue was does an 17 employer confronted with the signatures of a 18 majority of its employees have the right to insist 19 upon an election, and we've come to the point where 20 that issue seems to be settled, that an employer has 21 the right to refuse to grant recognition based upon 22 a card majority if the employer so chooses. But 23 we've now taken that debate from 20 or 30 years ago, 24 taking it to another whole level, and we're arguing 25 that not only does the employer have the right to</p>
<p style="text-align: right;">Page 444</p> <p>1 And then the third reason is because it 2 doesn't work to keep it secret. In spite of 3 Mr. Washington's experience, my experience is that 4 the word gets to the employer and the employer knows 5 who the leaders are, and, if you hide that 6 information, then you expose those employees to 7 pressures without the protections of the Act. 8 With respect to the employer's Section 9 8(c) and constitutional rights to present their 10 opinions, the employer is free to start expressing 11 those opinions from the day the employees are hired. 12 And many employers, Target, Walmart, and we know the 13 classic examples, many employers take advantage of 14 that. Some employers may not, but I would submit 15 that the law gives the employers the right to 16 express their opinions. 17 It doesn't give them an obligation to go 18 out and formulate an opinion, and it doesn't require 19 you to give the employers time to figure out what 20 that opinion is. They have however long an employee 21 is working at the facility to express those 22 opinions. If they choose to do that, they have the 23 opportunity. If they choose not to, they're not 24 being deprived of the right to speak. 25 I would note, however, and maybe this is</p>	<p style="text-align: right;">Page 446</p> <p>1 refuse to recognize the signatures of its employees, 2 but it has the right to then launch a campaign to 3 convince the employees to change their minds. 4 And I would submit there are many 5 instances where the law requires that employees have 6 a chance to think things over before they decide. 7 But when the employee is hired and he signs a 8 non-compete agreement, a confidential information 9 agreement and an individual arbitration agreement, 10 which he has no choice but to sign when he's hired, 11 he's considered to be an adult who's bound by what 12 he's agreed to. 13 I think that this statute that you're 14 charged with enforcing calls upon you to treat -- in 15 spite of what Mr. Hogan said, the law considers the 16 employees not to be children but to be adults, and, 17 if they've made the choice to sign a union card, 18 then that choice should be given the same respect as 19 is given to these other documents that employees are 20 required to sign in order to get a job. 21 And if we're going to accept the law 22 requires that that decision be confirmed, the point 23 of the election is to confirm -- this is what the 24 court said before I started the practice -- the 25 purpose is to confirm that they want to be</p>

<p style="text-align: right;">Page 447</p> <p>1 represented by the union. If the purpose of the 2 election is to confirm that choice, it should not be 3 to give the employer an opportunity to convince them 4 to change their minds. The law doesn't require 5 that. I'm in favor of the language of the proposed 6 rule.</p> <p>7 MR. JOHNSON: We picked that up. 8 (Laughter.)</p> <p>9 MR. JOHNSON: I do have some follow-up, 10 but I want to defer to my fellow members.</p> <p>11 MR. PEARCE: Go ahead.</p> <p>12 MR. JOHNSON: I assume you don't want us 13 to ignore Chamber of Commerce Versus Brown because 14 it does establish that free-wheeling discussion of 15 labor issues is basically what Congress wanted to 16 protect. And without needing to go back to whether 17 prior Supreme Court decisions recognize that or not, 18 are we free to ignore a Supreme Court decision on 19 this?</p> <p>20 MR. MEIKLEJOHN: No, you're not free to 21 ignore a Supreme Court decision, but that does not 22 mean that you have to enforce the Act in a fashion 23 designed to facilitate or encourage a campaign 24 designed to get employees to change a decision that 25 they've made. Section 8 says you can't stop -- I'm</p>	<p style="text-align: right;">Page 449</p> <p>1 contractual documents that then we should basically 2 write our election process to simply ignore the fact 3 that employees might change their minds, are you?</p> <p>4 MR. MEIKLEJOHN: I'm not suggesting that 5 employees don't have the right to change their 6 minds. The Act doesn't embody the principle that 7 employers have a right to a period of time in which 8 to try to do that.</p> <p>9 MR. JOHNSON: Well, that's certainly not 10 written explicitly in the statute, but Section 8(c) 11 is, and although it doesn't apply directly to 12 representation proceedings, do you think Section 13 8(c) has any bearing on this?</p> <p>14 MR. MEIKLEJOHN: 8(c) says that the Labor 15 Board does not have the right to find it to be 16 unlawful for an employer to exercise its First 17 Amendment rights. But this may seem like a wild 18 suggestion or analogy, but the Supreme Court 19 obviously also says that people with lots of money 20 are entitled to use that money for speech purposes. 21 So it doesn't necessarily follow that if I disagree 22 with what the Koch brothers have to say that I'm 23 entitled to be given billions of dollars to express 24 that opinion. So the Board can't stop the employer 25 from speaking, but the Board doesn't have to --</p>
<p style="text-align: right;">Page 448</p> <p>1 sorry. I interrupted you.</p> <p>2 MR. JOHNSON: I understand. You have a 3 very good point, that the process rules might be 4 different than the substance rules, but at some 5 point they do intersect. If the Supreme Court is 6 telling us that employees have an underlying right 7 to receive information opposing unionization, I 8 don't think we can just construct a process that 9 says to forget about that. But I think the question 10 about authorization cards is a very interesting one, 11 and I appreciate all your passion that you bring to 12 these proceedings.</p> <p>13 MR. MEIKLEJOHN: I intended to stay more 14 calm.</p> <p>15 (Laughter.)</p> <p>16 MR. JOHNSON: It was a very illuminating 17 presentation you just made. I guess my follow-up is 18 more, "Look, 30 percent is the showing of interest." 19 Theoretically there could be 70 percent of people 20 who don't support a union. There are people who can 21 change their minds during a campaign. The law on 22 showing of interest, the reason why it is immune 23 from collateral attack is that it is what it says, 24 just a showing of interest. So you're not saying we 25 should interpret authorization documents as binding</p>	<p style="text-align: right;">Page 450</p> <p>1 MR. JOHNSON: Subsidize the employer is 2 what you're saying.</p> <p>3 MR. MEIKLEJOHN: Yes. I'm glad my 4 analogy made some sense to you.</p> <p>5 MR. JOHNSON: I see where you're going. 6 But what is the point between cutting into Section 7 8(c) free speech rights and subsidization, in your 8 view?</p> <p>9 MR. MEIKLEJOHN: I would start with the 10 language of the statute again, which is that it 11 cannot find it to be an unfair labor practice.</p> <p>12 MR. JOHNSON: I'm talking about 13 timeline-wise.</p> <p>14 MR. MEIKLEJOHN: I don't think that the 15 statute requires any time. I would agree with 16 Mr. Hermanson that the election should be held the 17 day the petition is filed.</p> <p>18 MR. JOHNSON: So from a process point of 19 view it's basically zero.</p> <p>20 MR. MEIKLEJOHN: Right.</p> <p>21 MR. JOHNSON: And then just one last 22 thing. Would your view change on any of this, and I 23 know you've been involved in seeing the shift in 24 union strategies, if the Board actually had a notice 25 requirement and we could say that disposes of the</p>

<p style="text-align: right;">Page 451</p> <p>1 free speech issue, if there was a pre-petition sort 2 of notice requirement, or do you think that's 3 unnecessary? 4 MR. MEIKLEJOHN: Well, I think it's 5 unnecessary, first of all, but I have another answer 6 to the question. I've been thinking about it since 7 you first raised it a couple panels ago. One of the 8 points that I've made is that the organizing 9 campaign starts with a period or a phase in which 10 the union is building up, for want of a better word, 11 the courage of the employees to band together and 12 stand together. And unions do keep their campaigns 13 secret at that point, because at that point 14 employees I would say can very easily be intimidated 15 by either legal or illegal conduct. It doesn't have 16 to be illegal, in my view. 17 I think there are good reasons to 18 preserve the right of unions to keep that first 19 phase of the campaign secret, and I think if you 20 tried to come up with a bright line rule you're 21 going to tread on that. 22 MR. PEARCE: Thank you very much, 23 Mr. Meiklejohn. Ms. Maciel. 24 MS. MACIEL: Good morning or afternoon. 25 I'm not sure which it is. I'm Kara Maciel. I was</p>	<p style="text-align: right;">Page 453</p> <p>1 that there is no objective basis to declare that the 2 median time of 38 days or even 60 days to prepare 3 for and hold an election amounts to unnecessary 4 delay. And I would note that the word "unnecessary" 5 was frequently used in the majority's point up to 23 6 times. NGA submits that it's the NPRM that is 7 unnecessary and not changes. 8 Since 2001, the Board's internal 9 guidelines are to hold elections within a median of 10 42 days and to have 90 percent of those done within 11 56 days. Under your performance and accountability 12 report, the Board has a statutory responsibility to 13 resolve all questions concerning representation in a 14 manner that gives full effect to the rights afforded 15 to all parties under the Act, and you fulfill that 16 responsibility when you resolve questions within a 17 hundred days. 18 You've consistently met that goal and in 19 the past five years have resolved at least 84 20 percent of all questions concerning representation 21 within that hundred days. This past year was your 22 best year yet. You resolved 87.4 percent of all 23 elections within a hundred days. Accordingly, those 24 statistic conclusively establish that the Board is 25 just looking to solve a problem that doesn't exist,</p>
<p style="text-align: right;">Page 452</p> <p>1 here yesterday. I represent the National Grocers 2 Association, which is the independent sector of the 3 grocery industry. NGA members are comprised of both 4 unionized and non-unionized workplaces, many of whom 5 enjoy positive labor relations with their union 6 counterparts. But above all, NGA strongly supports 7 the rights of their employees to make an informed 8 decision on whether or not to be represented by a 9 union, and the only way for employees to make such 10 an informed decision is by having election processes 11 and procedures that provide a full and fair 12 opportunity to hear the views of both the union and 13 the employer. 14 NGA submits that the NPRM reducing the 15 timing of the election silences the employer's 16 protected 8(c) rights and chills the Section 7 right 17 of employees. In particular, NGA opposes the 18 reduction of the scheduling of an election because 19 there is no legitimate evidence supporting a need to 20 hasten the time leading to an election and certainly 21 nothing supported by empirical evidence from the 22 Board. 23 We heard some statistics earlier from the 24 other panels, and I will not repeat them, but there 25 are a couple of other statistics that demonstrate</p>	<p style="text-align: right;">Page 454</p> <p>1 and there's no reason to change the current timing 2 of the election. 3 Why do you need to fundamentally 4 transform a longstanding process at the heart of 5 your statutory role when, by your own statistics and 6 measurements, the current process exceeds your 7 standards? As the old adage goes, "If it ain't 8 broke don't fix it." In the face of these 9 statistics, NGA submits that the NPRM is like a 10 house of cards, relying on a faulty premise that 11 accelerated elections are somehow superior to those 12 conducted after a thorough debate. 13 But hasty decisions are not good 14 decisions. Free speech is the cornerstone of the 15 Act's statutory protections, and the proposal 16 eviscerates an employee's opportunity to become 17 fully informed. Instead of deliberately evaluating 18 relevant information, employees will be rushed into 19 voting without a full opportunity to receive facts, 20 contemplate the consequences of their decision, and 21 make an informed choice whether to be represented by 22 a union. 23 Common sense dictates that the greater 24 the time an individual has to inform him or herself 25 and to reflect upon and consider all aspects of a</p>

<p style="text-align: right;">Page 455</p> <p>1 decision, the more likely the decision will be a 2 true reflection of that individual's interests. The 3 notion that faster equals better is 4 counterintuitive, because it conflicts with the 5 basic premise that a secret ballot should be 6 informed by a full, free and vigorous debate and 7 that more and not less opportunities for exchange of 8 information and ideas is beneficial when someone is 9 making an important decision that will impact 10 fundamentally their life and livelihood. 11 Employees faced with making such an 12 important workplace decision should be able to do so 13 in an environment conducive to reflection and 14 thought and not one that sacrifices deliberation for 15 speed. Remember that employees must live with the 16 consequences of their vote for at least twelve 17 months depending on the result of the election, and 18 measured by the length and consequences of that 19 decision the current time, the median time, is very 20 appropriate. 21 NGA is also very concerned about the 22 consequences of the implications on free speech that 23 has been well discussed by prior members of the 24 Board, and I won't repeat they said, but we 25 wholeheartedly support what they said. Even the</p>	<p style="text-align: right;">Page 457</p> <p>1 MS. MACIEL: No. I don't think that's 2 what I'm saying or what NGA is saying. What we're 3 saying is that the current timing demonstrates that 4 the system is working very well as is and that there 5 is no reason to change or reduce the time because of 6 the serious implications that would be impacted in 7 addition to the free speech rights of employers and 8 the Section 7 rights of employees. 9 MR. PEARCE: Would you endorse that we 10 build a campaign period into our regulations? 11 MS. MACIEL: I don't think you need to 12 change the regulations as all, because, as I 13 mentioned, they're working very well. Employers 14 have an opportunity to communicate to employees and 15 employees have an opportunity to communicate to 16 fellow employees. It's like a jury. In a jury room 17 oftentimes all the jury members make an initial 18 vote. And sometimes it's 8 to 1 or it's not 19 unanimous, but after a thorough opportunity to 20 review the evidence that was set forth and 21 communicate with their fellow jurors and have a 22 vigorous debate, oftentimes people's votes change. 23 That's what this process is intended to protect, and 24 hastening the time will impede upon that right of 25 employees and employers.</p>
<p style="text-align: right;">Page 456</p> <p>1 Supreme Court just last week pronounced in 2 McCutcheon versus FEC that free speech is tempered 3 by resources, and if the government limits 4 resources, including the amount of time and to whom 5 an employer can communicate to, the First Amendment 6 is violated. 7 In sum, the push for accelerated 8 elections cannot stand on its own merit, as the NPRM 9 has failed to identify a single problem to which the 10 proposed solution is responsive. In fact, by any 11 measure, whether it's historical or gauged by your 12 own current goals and internal guidelines, the 13 existing system is working very well. Accordingly, 14 NGA respectfully urges the Board to withdraw its 15 proposal. Thank you for the opportunity to speak 16 today. 17 MR. PEARCE: Now, you would agree that 18 the focus of much of the NPRM deals with the process 19 as it goes into the representation proceeding, from 20 petition through the representation proceeding 21 ultimately to the election. The vast majority of 22 elections that are held are uncontested. In your 23 view, would it be appropriate for employees to have 24 to wait three to five months to get the opportunity 25 to vote?</p>	<p style="text-align: right;">Page 458</p> <p>1 MR. PEARCE: You talked about the lack of 2 empirical evidence supporting the proposal of the 3 NPRM. Is there any empirical evidence that you're 4 relying on with respect to what effect reducing the 5 opportunity for an employer to campaign against 6 unionization has on an employee's free choice? 7 MS. MACIEL: I'm not aware of any 8 empirical evidence that has been conducted with 9 respect to the amount of time that an employer may 10 need to communicate with its employees after 11 petition, and I would submit that that would be a 12 good thing for the Board to consider before making 13 any changes. 14 MR. PEARCE: Any other questions? Thank 15 you very much. It is lunchtime. The next seating 16 will be at 2:00 p.m., and I would request that since 17 we have a lot to go through that we be prompt. 18 (Recess.) 19 MR. PEARCE: While we're waiting for our 20 panel to assemble, I think this might be a good 21 opportunity for us to recognize this being the eve 22 of the 77th anniversary of the Supreme Court's 23 decision upholding the constitutionality of the 24 National Labor Relations Act. 25 MR. JOHNSON: So we're authorized to be</p>

<p style="text-align: right;">Page 459</p> <p>1 here. We'd just like you to know that. 2 (Laughter.) 3 MR. PEARCE: It was passed in the middle 4 of the Great Depression. And as you know, it was 5 for the purposes of eliminating substantial 6 obstruction to the free flow of commerce by 7 encouraging the practice and procedure of collective 8 bargaining and protecting the exercise by workers of 9 full freedom of association, self-organization and 10 designation of representatives of their own 11 choosing. 12 And in the years that followed the 13 Supreme Court struck down other pieces of the New 14 Deal legislation, including our Act. And then it 15 was viewed that conventional wisdom predicted that 16 the NLRB's fate would be to be gone. But 17 conventional wisdom was wrong, and on April 12, 1937 18 the Supreme Court decided NLRB v. Jones and 19 Laughlin, upholding the NLRA and changing the 20 landscape of American law. So for years thereafter 21 the agency used to make a big deal about celebrating 22 Constitutionality Day, and we're bringing it back. 23 So Happy Constitutionality Day eve. Thank you all 24 for your indulgence. 25 Is our next seating group available? We</p>	<p style="text-align: right;">Page 461</p> <p>1 the statute sets up to assure employees make an 2 informed choice. 3 The appropriate standard for selecting an 4 election date, I submit, should not be "as soon as 5 practicable." The standard should be a date which 6 safeguards against rushing employees into an 7 election where they are unfamiliar with the issues. 8 Senator Kennedy said that that would require a 9 minimum of 30 days; in other words, a date assured 10 that the employees may make an informed decision 11 about representation. 12 In the words of Samuel Gompers, time is 13 the most valuable thing on earth, time to think, 14 time to act, time to extend our fraternal relations, 15 and yet time is exactly what the proposed rules 16 would deny workers in deciding whether they extend 17 their fraternal relationships. In 2010 the average 18 time from petition to election was only 31 days. 19 This is a reasonable range to satisfy election 20 standards. There has never been, and should never 21 be, an absolute arbitrary rule on the timing of 22 elections. 23 The Board's proposal for quickie 24 elections infringes on the employer right of free 25 speech by not permitting the employer ample time to</p>
<p style="text-align: right;">Page 460</p> <p>1 have Homer Deakins, Dr. Kate Bronfenbrenner and 2 Melinda Hensel. We are behind schedule. It's my 3 understanding that there some real scheduling 4 challenges that people have, and so I'm going to be 5 fairly rigid on my time allocations, so please 6 respect that. Thank you. Mr. Deakins. 7 MR. DEAKINS: Mr. Chairman and members of 8 the Board, I appreciate the opportunity to again 9 appear to discuss the question of the standard to be 10 applied for scheduling elections. 11 One of the most notable things I saw in 12 the proposed new rule was the total silence by the 13 Board on a central question in fair elections, and 14 that is the right of employees to make an informed 15 choice whether they wish to be represented by a 16 labor union. No one can dispute the obvious fact 17 that unions tell employees only one side of the 18 story about union representation. They tell them 19 the good things. It's equally clear that most 20 employees know little or nothing about unions. 21 Almost 94 percent of employees in the 22 private sector are not members of labor unions. It 23 falls on the employers to truthfully and in a 24 non-coercive way to educate employees on the 25 disadvantages of unions. This is the process which</p>	<p style="text-align: right;">Page 462</p> <p>1 educate employees, or, in the words of Mr. Gompers, 2 time to think. And the Board offers no reason why 3 granting employers a reasonable period to 4 communicate with employees before an election would 5 be harmful to anyone. 6 There is no balancing of rights required 7 in this instance. There is only one set of rights 8 in the equation. In fact, providing employers with 9 their free speech rights is completely consistent 10 with the purpose of the Act: to protect employee 11 rights. 12 There is no justification for quickie 13 elections because of employer misconduct. The 14 proposed rule is virtually silent on the question of 15 the extent to which unlawful conduct is a problem, 16 and the proposed rule suggests no change regarding 17 the Board's treatment of unlawful election conduct, 18 nor does the Board invite public comment about 19 better ways to remedy these situations. 20 I recognize the fact that there are a 21 number of studies which have advanced the quick 22 election idea to avoid giving employers time to 23 commit unfair labor practices. Those studies have 24 been sharply criticized by management on such 25 grounds as the fact that those studies are basically</p>

<p style="text-align: right;">Page 463</p> <p>1 largely reliant upon the views of union organizers 2 with no input from management. Those issues were 3 dealt with, I think rather thoroughly, in connection 4 with the management comments that were made on the 5 2011 proposed rule, and I don't go into those any 6 further.</p> <p>7 But with respect to this issue of unfair 8 labor practices, I think, rather than overhauling 9 the Board's well established R-Case rules, which by 10 any objective measure have worked, it's the general 11 counsel's responsibility to stop misconduct, 12 including seeking 10(j) injunctive release, Gissel 13 orders and so on. This is not an excuse for 14 depriving law abiding employers of their right to 15 fully communicate with employees on the union issue.</p> <p>16 The only last comment I would make is 17 with respect to this idea of the unions giving 18 employers notice before they file the petition. I 19 think it was said this morning that that notice 20 might be given at the beginning of an organizing 21 campaign. I don't think that would make any sense. 22 If you're going to consider such a rule, I think it 23 should be designed on the basis of giving notice to 24 the employer a certain number of days before the 25 petition is filed. I don't advocate that idea, but</p>	<p style="text-align: right;">Page 465</p> <p>1 date they're filed or the date of petition because 2 the timing of delay is really based on from when the 3 employer campaign starts, and a better measure is to 4 use the date of the first unfair labor practice 5 occurrence. Our research we're talking about today 6 is based on using unfair labor practice documents 7 FOIA'd from the NLRB with a 99 percent return rate 8 of a sample of elections from 1999, a random sample 9 of elections from 1999 to 2003, using everything 10 from the charge to the employer response to the 11 complaint to the Board decision.</p> <p>12 Our findings tell us a great deal about 13 the extent and impact of delay on election timing 14 and the two issues that are being addressed by this 15 panel. Employers are aware of union campaigns and 16 begin exercising their free speech rights much 17 earlier than has been assumed. We found that 56 18 percent of all unfair labor practices and 57 percent 19 of those that have merit determination occur before 20 the petition.</p> <p>21 46 percent of serious ULPs and 48 percent 22 of those that won or settled pre-merit determination 23 or pre-hearing are before the petition, and 30 24 percent of serious ULPs and allegations and 30 25 percent of ULPs won happen 30 days before the</p>
<p style="text-align: right;">Page 464</p> <p>1 I think, if you're going to consider it, it needs to 2 be designed on the basis of the time frame before 3 the filing of the petition and not when the 4 organizing begins. Organizing campaigns can go on 5 for years. Thank you, Mr. Chairman.</p> <p>6 MR. PEARCE: Thank you. Dr. 7 Bronfenbrenner.</p> <p>8 MS. BRONFENBRENNER: Thank you, Chairman 9 Pearce and members of the Board. I don't know if I 10 should say it's a pleasure to be here again, but I 11 appreciate how well you've organized these sessions.</p> <p>12 As you know, I was here three years ago 13 with my preliminary findings from a study that I did 14 with Professor Dorian Warren on the nature of 15 employer campaigns, unfair labor practices, serious 16 unfair labor practices, and serious unfair labor 17 practices won and settled and their impact on 18 election timing. Our findings from that study 19 helped to inform the rulemaking process, and at that 20 time we were asked to come back to the Board, 21 expanding our data to include five years' worth of 22 data. And here we are.</p> <p>23 Central to those findings was developing 24 a new and better measure of election timing based on 25 using the date ULPs actually occur rather than the</p>	<p style="text-align: right;">Page 466</p> <p>1 petition is filed.</p> <p>2 These serious allegations, many of them 3 involve speech. They're interrogations, they're 4 threats, they are harassment. But also, these are 5 the kinds of unfair labor practices that cause 6 campaigns often to stop in their tracks and that are 7 most intimidating to workers, discharges, alteration 8 of wages and benefits, and we found that these 9 unfair labor practice charges start long before the 10 petition is filed and continue unabated throughout 11 the campaign all the way through the petition, the 12 election, and continue beyond.</p> <p>13 What is most significant about these is 14 that not only do employers know about these tactics 15 before the petition is filed, but we aren't even 16 counting the many campaigns where unfair labor 17 practices occur and unions or workers don't even 18 file the charge because, if it's a win, they don't 19 want to bother to file a charge, or, if they know 20 that they're losing, workers don't file the charge, 21 or they don't file a charge because they feel all 22 they're going to get is a posting.</p> <p>23 In combination, what our data show is 24 that employer campaigns are starting before the 25 petition, and, in many cases, long before the</p>

<p style="text-align: right;">Page 467</p> <p>1 petition. They're continuing unabated all the way 2 through so that each day that goes by is another 3 day. Each day that you extend the time for when the 4 election happens is another day where workers are 5 threatened, harassed, discharged and coerced. 6 The timing of the election really 7 matters. And employer free speech is in no way, in 8 no way, threatened by this rule change, because 9 employers are beginning their campaigns and have 10 great opportunity to engage with workers and are 11 taking that opportunity because they know about 12 union campaigns well before the petition is filed. 13 Thank you. 14 MR. PEARCE: There has been discussion 15 about the impact this would have on small employers. 16 Does your study address situations involving small 17 employers? 18 MS. BRONFENBRENNER: One of the things 19 that we forget is that what may seem like a small 20 employer, the ultimate parent company is not small, 21 and so we have to separate out small employers and 22 who their parent company is. That's the first 23 thing. 24 Many of these construction firms are 25 ultimately often owned by much larger employers. We</p>	<p style="text-align: right;">Page 469</p> <p>1 consultants in the area, and you wondered how could 2 they afford that. Then we would realize that they 3 were being subsidized by -- that there actually was 4 an employer association that was probably helping 5 them in the area. 6 MR. MISCIMARRA: Professor 7 Bronfenbrenner, thanks for being with us today. 8 With respect to potential unlawful conduct that 9 occurs during campaigns, do you oppose the views 10 expressed in the dissenting opinion authored by 11 Member Johnson and myself suggesting that the Board 12 should directly attempt to more effectively identify 13 unlawful conduct that occurs during union 14 representation elections and that, if it occurs, we 15 should focus directly on trying to develop measures 16 that more effectively remedy that conduct if it's 17 found to have occurred? 18 MS. BRONFENBRENNER: Well, you try to do 19 that. I mean, many of us try to do that with the 20 Employee Free Choice Act, but you're not going to be 21 able to get more effective penalties unless you 22 involve Congress. 23 MR. MISCIMARRA: Well, we already have 24 the right in some range of cases to impose 25 bargaining orders in the face of unlawful conduct if</p>
<p style="text-align: right;">Page 468</p> <p>1 researched the ownership of every single firm in our 2 sample, and we found that many of the organizers and 3 many of the workers did not even know who owned 4 their firm. In construction, the employers are 5 often part of bigger firms than they think. 6 Also, these firms, construction, grocers, 7 all of these industries, they have many liability 8 issues, and we found that they all have lawyers. 9 Because they have lawyers for other issues, they 10 pull those lawyers in for labor issues. But they 11 have lawyers. When you look at the documents, they 12 had no trouble having a lawyer -- they weren't 13 slower in responding to charges than the large 14 employers. They weren't less likely to commit 15 unfair labor practices by any means. The size of 16 the employer had nothing to do with their reaction. 17 Actually, what we found that was most 18 striking is that these small employers were 19 expending an enormous amount of money on fighting 20 unions that seemed to outweigh what their budget 21 should be. You would have a very small nursing home 22 that had all Medicaid patients, and they were 23 spending great resources in hiring a consultant to 24 fight the union campaign, or a small construction 25 firm that was hiring one of the most expensive</p>	<p style="text-align: right;">Page 470</p> <p>1 it's found to exist within a range of types of 2 illegality and even dispense with an election. Is 3 that right? 4 MS. BRONFENBRENNER: That's right. And I 5 read through all the cases and I watched the 6 employers appeal every one of those bargaining 7 orders all the way through the courts, and that 8 doesn't help in a campaign if it takes five years to 9 get a bargaining order. 10 MR. MISCIMARRA: But my question was: Do 11 you support or would you oppose efforts by the Board 12 to directly address unlawful conduct if it occurs 13 during a union representation election and to 14 directly attempt to devise more effective measures 15 to address that if it's found to have occurred? 16 MS. BRONFENBRENNER: I think the Board 17 should do everything that's practicable, yes. 18 That's what the proposal is. But I don't think you 19 can do more than that. That's what the proposal is. 20 I think the problem is that you don't control the 21 courts and the time it takes. So yes, by all means 22 use bargaining orders, but bargaining orders will be 23 challenged by the people in this -- well, there are 24 not that many people in the room anymore, but the 25 people in this room. There needs to be a shortening</p>

<p style="text-align: right;">Page 471</p> <p>1 of the time between the petition and the election 2 because there is so much time that occurs before the 3 petition. 4 MR. MISCIMARRA: The one other question I 5 had, and I've referred to more effective measures 6 and used bargaining orders as one possible example, 7 but the Act permits a union to file a petition based 8 on a 30 percent showing of interest, but a union can 9 be certified by the Board only if more than 50 10 percent of the employees end up expressing support 11 for the union in an election. 12 Do you agree that that structure means 13 Congress intended that there would be some 14 reasonable period after petition filing for unions 15 among other things, to have the opportunity to get 16 more employee support than maybe had been expressed 17 in the original showing of interest? 18 MS. BRONFENBRENNER: No union today in 19 their right mind files with less than 60 or 70 20 percent on cards. 21 MR. MISCIMARRA: But my question relates 22 to what Congress intended and the structure 23 reflected in the Act. 24 MS. BRONFENBRENNER: Congress wrote the 25 Act at a different time. At the time they wrote the</p>	<p style="text-align: right;">Page 473</p> <p>1 shortening the time period. Employer free speech is 2 not at risk. Employers have lots of time to 3 communicate. There is no question that they know 4 when union campaigns are happening, because unions 5 cannot win today unless they are open about their 6 campaigns. 7 MR. MISCIMARRA: I'll defer to my other 8 members for any other questions. 9 MR. JOHNSON: I just have two data 10 questions, really simple. You said that in 11 conducting the study you came across instances of 12 time of hiring consultants and time of hiring of 13 lawyers. I assume you must have found that 14 somewhere since you're testifying about it. 15 Is it anywhere in the 2011 or 2014 16 comments or somewhere on an online exposition of the 17 study where that was actually measured, when 18 employers hired consultants or when employers hired 19 lawyers when you went through your database? 20 MS. BRONFENBRENNER: I collected the 21 documents and saw the employer responses, but we 22 researched every company. We would see who signed 23 the documents when they filed an unfair labor 24 practice, so we'd see whether it was a small company 25 or a large company. We had the size of the company.</p>
<p style="text-align: right;">Page 472</p> <p>1 Act most unions were organizing through recognition. 2 MR. MISCIMARRA: Are we circumscribed by 3 what Congress intended and what Congress ending up 4 incorporating into the Act? 5 MS. BRONFENBRENNER: I think that the 6 legislative history binds you, but you have your 7 regulatory powers to do rule changes. That's what 8 you can do. The law says that you're supposed to 9 try to do everything to promote the right of workers 10 to organize, the individual's right to choose 11 between an employer and a union, and right now 12 workers are not able to make that choice because 13 they are afraid, they are terrified, they have to 14 jump through hoops of fire before they're able to 15 organize, and that was not the intent of the Act. 16 It was not the intent of the Wagner Act or 17 Taft-Hartley that workers literally had to go 18 through trials of fire to choose whether they wanted 19 a union or not. 20 MR. MISCIMARRA: And if we can address 21 that issue directly, I take it you would support 22 those efforts. 23 MS. BRONFENBRENNER: Yes. But I think 24 that the way to do it is to not have them have to go 25 through that over and over and over again. That's</p>	<p style="text-align: right;">Page 474</p> <p>1 We went and looked at the size of the parent 2 company, and so we would know when they had filed 3 unfair labor practices we would know -- we looked up 4 the parent company for all the thousand cases. 5 MR. JOHNSON: Maybe I'm not being clear. 6 I'm just trying to find out in your study if you 7 started collecting data points on time when the 8 employer hired a consultant or time when the 9 employer hired a lawyer related to the campaign, not 10 necessarily the unfair labor practice. 11 MS. BRONFENBRENNER: We knew in terms of 12 when their first unfair labor practice was 13 committed. 14 MR. JOHNSON: So the unfair labor 15 practice is basically the proxy that you're using 16 for the employer's running of its campaign. 17 MS. BRONFENBRENNER: Yes. 18 MR. PEARCE: Thank you very much. Ms. 19 Hensel. 20 MS. HENSEL: Good afternoon. Thank you 21 again for having me back today. Again, I appreciate 22 the opportunity. I'm going to try to be brief. I 23 know there has been ad nauseam comments on this 24 topic. There are a couple of things in particular 25 I'd like to address.</p>

<p style="text-align: right;">Page 475</p> <p>1 First, of course, I support this proposed 2 rule to hold an election as soon as practicable 3 after the filing of a petition because that sort of 4 a rule supports the primary objective of the 5 National Labor Relations Act, which is to protect 6 employee rights to have a free and fair election 7 regarding representation. 8 My experience is that typically by the 9 time employees, or I should say a sufficient number 10 of employees, have signed authorization cards 11 they've already undertaken multiple attempts to 12 obtain the benefits that they're hoping to achieve 13 through bargaining on their own with the employer. 14 They've approached the employer, and it has had 15 absolutely no effect. 16 During those interactions one might call 17 that a robust exchange of ideas: "Hey, pay me more 18 money." "No, I'm not going to pay you more money." 19 "Well, maybe I should get somebody to help pay me 20 more money." "Well, no, that's not going to help 21 you, either, and we're not going to pay you more 22 money." A robust exchange of ideas. 23 During those sessions the employer has 24 more than adequate opportunity to speak with its 25 employees regarding its views. The employer holds</p>	<p style="text-align: right;">Page 477</p> <p>1 after the weak link and see who they can get to 2 change their mind. I don't think employers need six 3 weeks to do that. They can do that in three weeks. 4 In conclusion, I would just say the Act 5 does indeed provide employers to have the right to 6 speak freely to their employees within the confines 7 of legal speech. The Act does not provide a minimum 8 time frame to do so, and I don't believe that 9 Congress did intend that there be a minimum time 10 frame, but simply that they have the right to do it. 11 Thank you. 12 MR. PEARCE: Thank you. Thank you all. 13 Is Ms. Crawford still here? Those in seating five, 14 Mr. Ford, Mr. Hernandez, Mr. Messenger, Ms. Bunn, 15 Mr. Sharma and Mr. Friedman, we have a logistical 16 problem here, and I'd like to accommodate the 17 testimony of Ms. Crawford so that she wouldn't be 18 impacted by thousands of dollars to get back to her 19 place of residence and her job. 20 I would like seating one of the voter 21 lists to take place now. Ms. Crawford, when you're 22 done you'll be able to exit. If Ms. Crawford, Mr. 23 Velazquez, Mr. Torres, Mr. Meiklejohn and Ms. Davis 24 can come forward now, I'd appreciate it. This 25 testimony will be addressing whether or how the rule</p>
<p style="text-align: right;">Page 476</p> <p>1 the keys during the unrepresented at-will status to 2 freely and fairly treat their employees and create a 3 satisfied workforce when it chooses to do so. It's 4 when the employer chooses not to do so that the 5 employees will turn to a third-party union. And 6 again, during those sessions it has an ample 7 opportunity to share its views through its 8 conduct -- you can give a raise -- and its 9 communication. 10 Now, in my experience, in a stipulated 11 election situation 42 days out -- because, trust me, 12 I have never ever had an employer agree voluntarily 13 to hold an election before the 42nd day -- what I 14 typically see, and I don't know if there is some 15 psychological warfare study that employers use for 16 this formula, but the first three weeks of the 17 anti-union campaign tends to be a soft pedal. And 18 what I mean by soft pedaling is they're really 19 trying to feel out their employees. It's not that 20 they don't know what to say. They just don't now 21 who to say it to. So that first three weeks is 22 aimed at figuring out who their targets are. 23 Then in that last three weeks before the 24 election, that's the big push. They know which ones 25 aren't worth bothering with, and they're going to go</p>	<p style="text-align: right;">Page 478</p> <p>1 should address voter lists. 2 Ms. Crawford, you can proceed. 3 MS. CRAWFORD: Thank you so much. I have 4 been a registered nurse for 26 years and an employee 5 of Universal Health Service, UHS, for 20 years. 6 However, I am here today to share mine and some of 7 my colleagues' point of view regarding the NLRB 8 elections. I am not representing UHS in any way. 9 Last year RNs at my hospital and its 10 sister hospital moved to organize a union without 11 success. Please allow me to share with you how the 12 current process could be changed to be fair and 13 equitable to all employees. 14 I strongly support the Board's proposal 15 to require personal phone numbers and e-mail 16 addresses on the voter eligibility list to be shared 17 with the union earlier and electronically. RNs 18 communicate with each other and the union through 19 cell phones, text messages and e-mails. This 20 proposal would not hamper employer free speech 21 interests. 22 Even before the RNs at our sister 23 hospital filed for an election, the company had 24 begun its aggressive anti-union campaign at my 25 hospital. It communicated with the RNs frequently</p>

<p style="text-align: right;">Page 479</p> <p>1 every day in person and by sending messages over the 2 internal electronic mail system. The company also 3 sent anti-union text message blasts to the RNs' 4 personal cell phones even though the system they 5 used had previously been restricted to managing our 6 work schedules.</p> <p>7 In my experience last year, we had a 8 difficult time getting accurate unit information to 9 the RNs at my facility because of the lack of 10 contact information that is provided. Where the 11 employer had access to a myriad of methods to 12 contact nurses, we lacked reliable contact 13 information with which to inform the nurses of their 14 options. We did our best to contact the nurses, but 15 we were limited to outdated forms of communication.</p> <p>16 We held multiple informational meetings 17 off campus, but it was difficult to get RNs to 18 attend another meeting. Most RNs work twelve hours, 19 twelve hour shifts, and have families at home. They 20 do not have the time or energy to travel to attend 21 an informational meeting. Their families are their 22 first priority. If we would have had access to 23 their contact information we would have been able to 24 provide accurate information in a manner that was 25 convenient for them and their families.</p>	<p style="text-align: right;">Page 481</p> <p>1 communication, and you mentioned some of them, for 2 the union to try to respond to the text blasts or 3 the e-mails that were coming from the employer? 4 What was the union's form of response to text blasts 5 and e-mails that were coming from the employer? 6 MS. CRAWFORD: The union didn't have any 7 response to that. As the employees, we were a 8 little shocked to get a text message on our personal 9 cell phone. Again, like I said, that was normally 10 just used to tell us when you're were working and 11 when to come in, so when we got that we were like 12 "Whoa, what is that." 13 But the only way we could get information 14 out to the employees is by going to their home. All 15 we had is an address. If we would have had personal 16 phone numbers or e-mail addresses we could have sent 17 the information to them, and they could contact us 18 or we could arrange a contact. Otherwise, we had to 19 show up -- and it's very difficult when you have a 20 24 hour work period. 21 Nurses that work a twelve hour work 22 shift, if you show up at their house at ten o'clock 23 in the morning, they're not going to be very 24 friendly because it would be like showing up at your 25 house at ten o'clock at night. It's hard to know</p>
<p style="text-align: right;">Page 480</p> <p>1 As it is now, the process doesn't work. 2 It needs to be changed to make it fair for every 3 employee. This proposal merely gives the petition 4 for a union a chance to respond to the employer's 5 arguments and criticisms before the election occurs, 6 and this in no way would limit the employer's free 7 speech rights, as they can continue to speak with 8 employees on paid time on every shift leading up to 9 the election in person, by our work e-mail accounts, 10 by having to attend mandatory meetings, and by text 11 message on our personal cell phones during off work 12 hours.</p> <p>13 Therefore, employees don't get all the 14 necessary information from the union to make an 15 informed decision. Employees deserve to have access 16 to all the information, not just the one-sided 17 information that is being forced on us on a regular 18 basis. The proposal would help to level the playing 19 field. Thank you for allowing me the opportunity to 20 talk about this important issue.</p> <p>21 MS. SCHIFFER: Thank you so much. I 22 appreciate your coming forward to talk to us. I 23 think it's important to get views from workers. I 24 have a question. During the campaign without e-mail 25 or text or phone information, what were the forms of</p>	<p style="text-align: right;">Page 482</p> <p>1 what shift they work because that information is not 2 available, either, on the list. Their address and 3 name, that's all there is. It seems that it would 4 be more fair to all the employees to have some 5 personal information so that we can contact them and 6 give them the opportunity to get information.</p> <p>7 MR. PEARCE: Do you think having their 8 e-mail addresses and cell phone numbers would be an 9 invasion on an employee's privacy? 10 MS. CRAWFORD: No, I don't. Personally, 11 I would feel that it's less intrusive than having an 12 address. I think when you show up to somebody's 13 house, they're kind of forced in a way to respond, 14 but if you receive an e-mail you can easily delete 15 it if you're not interested. And the same with a 16 phone call. I screen my phone calls all the time 17 whether I want to answer it or not. It's easier to 18 disregard those if you choose to, but it's also 19 easier, if you are interested, to answer the phone 20 and set up an appointment that, "Yes, I would like 21 this information." 22 MR. JOHNSON: Do you think an employee 23 should have any right not to express a wish, saying, 24 "I don't want that information turned over," if it's 25 their personal information?</p>

<p style="text-align: right;">Page 483</p> <p>1 MS. CRAWFORD: Again, my personal opinion 2 is that if the employer has that information, I 3 think the organizing committee and the union should 4 have that information, too. But I do think they 5 have a right if they say, "Please do not call me 6 again," that you should respect that right. But the 7 same with the employer sending messages to my phone? 8 I didn't give them permission to do that. I gave 9 them permission to give me my schedule, but I did 10 not give them permission to send other forms of text 11 messages. 12 MR. JOHNSON: But for those employers, 13 for example, that don't require as a condition of 14 employment personal e-mail information, they just 15 happen to have it, do you think that should be 16 turned over without the employees having any 17 opportunity or say in the matter? 18 MS. CRAWFORD: Yes, I do. I'd find that 19 fair. 20 MR. PEARCE: Thank you so much. You 21 don't have to stay. Ms. Dunn. 22 MS. DUNN: Good afternoon. My name is 23 Katy Dunn, and I'm associate general counsel for 24 Local 32BJ, which is a property services local up 25 and down the East Coast. As part of my job at 32BJ</p>	<p style="text-align: right;">Page 485</p> <p>1 or false information and sets forth penalties for 2 misuse. In addition, commercial e-mails must 3 include features such as opt-outs and accurate 4 subject line headings. 5 Similarly, the Telephone Consumer 6 Protection Act of the TCPA regulates unsolicited 7 calls and texts to residential or cellular telephone 8 lines via autodialers. It sets forth consumer 9 protection such as opt-outs and carries steep 10 penalties for violations of the Act. Finally, there 11 are also industry groups such as the CTIA and the 12 MMA that issue additional recommendations. There 13 are already many cooks in this technological 14 kitchen. 15 While the primary purpose of these 16 regulations is to protect consumers in commercial 17 relationships, they've created a best practices 18 atmosphere in both the commercial and the non-profit 19 world. Individuals have been conditioned to expect 20 certain functionalities in their e-mails such as the 21 ability to unsubscribe from receiving future 22 communications. 23 Because of this, even though they're not 24 required to do so, many unions who regularly 25 communicate with their members by text and e-mail</p>
<p style="text-align: right;">Page 484</p> <p>1 I research and give advice on social media issues 2 and have also spoken on these issues at various 3 conferences. 4 As SEIU explained in its written remarks, 5 we were wholly supportive of the Board's modest 6 contact information the types of employee contact 7 information that employers are obligated to provide 8 via the Excelsior list. In fact, we've recommended 9 that the Board expand eligibility list information 10 to ensure that it has the flexibility to adopt to 11 technological changes over time. 12 As my time is short, I'd like to limit my 13 remarks this afternoon to why it's unnecessary for 14 the Board to restrict the use of the eligibility 15 list to purposes related to the representation 16 proceeding and related Board proceedings or to 17 require the use of third-party platforms or masked 18 e-mails. 19 These measures are unnecessary because 20 unions already comply with a comprehensive federal 21 scheme that sets forth numerous compliance 22 requirements and penalties. The CAN-SPAM Act was 23 passed in 2003 to craft a nationwide remedy for 24 unwanted and deceptive e-mail. CAN-SPAM bars 25 senders of e-mail from sending material misleading</p>	<p style="text-align: right;">Page 486</p> <p>1 have text and e-mail messaging programs that comply 2 with the highest commercial standards. This ensures 3 that members continue to elect to receive union 4 communications and that they view our electronic 5 messaging in a positive light. Employers are no 6 different than unions in this respect, and many set 7 up programs to communicate electronically with 8 clients and consumers. 9 It is worth noting that despite the 10 privacy concerns that various employer groups have 11 voiced in their comments, many employers reserve the 12 right to share e-mail addresses with third parties. 13 I checked the website terms of use for many of the 14 employer groups that have appeared before you as 15 part of your rulemaking, and several of them, 16 including the Chamber of Commerce, the American 17 Hospital Association and the National Federation of 18 Independent Business, all reserve the right to share 19 e-mail addresses with third parties. 20 Because of the regulatory scheme that I 21 just outlined, these employer practices like the 22 Board's proposal are not a big deal. E-mail 23 addresses have become the equivalent of postal 24 addresses in the brick and mortar world. They are 25 quite literally where people receive their mail on</p>

<p style="text-align: right;">Page 487</p> <p>1 line. Workers know how to respond to unwanted 2 e-mail, whether it's by blocking the sender or 3 marking the e-mail spam, just as they learn how to 4 cope with unwanted bulk mail. Adding an additional 5 layer of Board regulation to the present scheme is 6 thus unnecessary and could have the unintended 7 effect of complicating union compliance with 8 existing regulations.</p> <p>9 Finally, I would like to briefly respond 10 to the wild speculation that unions may purposefully 11 infect employer computers with viruses during an 12 election campaign. The Computer Fraud and Abuse Act 13 expressly prohibits attempting to access another's 14 computer with the malicious intent to cause damage. 15 Thus, not only is there no logical incentive for 16 unions to participate in this type of behavior, it 17 is already prohibited by law. E-mail and telephone 18 communication is not new. Additional regulation by 19 the NLRB is unnecessary and will not further the 20 goals of an informed electorate and a decrease in 21 litigation. Thank you.</p> <p>22 MR. JOHNSON: Just a couple of 23 follow-ups. So a few things here. One, let's just 24 assume from the perspective of union speech 25 quasi-political it shouldn't be subjected to kind of</p>	<p style="text-align: right;">Page 489</p> <p>1 case, to respond and craft an appropriate remedy 2 without prospectively saying what unions, or 3 employers for that matter, need to include in their 4 e-mail communications.</p> <p>5 MR. JOHNSON: But I guess the concern is 6 that some commenters have expressed, at least 7 expressed a bit in the dissent, that if you're not 8 going to have an opt-in on the front end before the 9 information goes over to the union, why wouldn't you 10 at least have it on the back end if this is 11 somebody's personal e-mail address.</p> <p>12 MS. DUNN: Is the proposal, though, that 13 if it was required for unions to have some type of 14 opt-out that employers would also be required to 15 have a similar opt-out so that employees could tell 16 their employers that they would choose to no longer 17 receive any type of communications from their 18 employer?</p> <p>19 MR. JOHNSON: Well, I don't think we can 20 regulate complete symmetry in the terms and 21 conditions of employment and private employers. In 22 essence, a lot of these employers and employees have 23 consented to turn that information over, and maybe 24 in some cases they haven't. What I'm trying to just 25 feel out is your position on whether an opt-out on</p>
<p style="text-align: right;">Page 488</p> <p>1 commercial type regulation on the one hand. But 2 let's also assume that there is some concern over 3 employees' personal e-mail information because it is 4 qualitatively different because it does not require 5 physical space like a house where anyone can walk by 6 and see where the house is.</p> <p>7 Is your position on the opt-out matter 8 such that if employees were regulated or unions were 9 regulated by the Board to require an unsubscribed 10 feature, even though you say that's a best practice 11 already, that that would address concern over the 12 opt-out because it would lessen the intrusion?</p> <p>13 MS. DUNN: I think it's unnecessary for 14 the Board to make such a prescription to require 15 things such as an unsubscribe, one, because I think 16 unions have no interest in continuing to contact 17 people who don't want the union to contact them. 18 And I think that, to the extent that the Board gets 19 into technical regulations of contemporary 20 technologies, you're going to run into trouble in 21 the future just because technologies change so 22 rapidly.</p> <p>23 If there was, for example, some sort of 24 misuse of the list by a union hypothetically, the 25 Board would have the power in an election, in a</p>	<p style="text-align: right;">Page 490</p> <p>1 the back end is something that we should end up 2 regulating, or do you basically think unions should 3 be left to their own devices with this information 4 when they have it.</p> <p>5 MS. DUNN: I think that it's unnecessary, 6 one, because of the best practices that I described, 7 and also just because employees are able to 8 essentially do this on their own, whether it's by 9 marking the e-mails from the union as spam or 10 otherwise blocking the communications from the 11 union, so it's simply unnecessary for the Board to 12 get into that type of regulation.</p> <p>13 MR. JOHNSON: Thank you.</p> <p>14 MR. PEARCE: Thank you very much. Mr. 15 Torres.</p> <p>16 MR. TORRES: There has been a lot written 17 about the privacy concerns and those issues, and so 18 I won't dwell on those. I just wanted to note, from 19 a more practical perspective, I think within the 20 next five to ten years requiring the disclosure of 21 e-mail addresses, personal or business, will have as 22 much effect on expanding employees' access as 23 requiring Excelsior lists to be provided on floppy 24 disks. The rapid pace of technological change in 25 personal communication habits would show us that any</p>

<p style="text-align: right;">Page 491</p> <p>1 purported benefit to be gained by imposing this 2 requirement is far outweighed by the burdens imposed 3 upon employer property rights and employee privacy. 4 The notice of proposed rulemaking notes 5 that there are a few examples of employers who used 6 its property to communicate during a campaign. As 7 Member Johnson noted a moment ago, not all employers 8 elect to invade the province of their employees' 9 workspace in such a fashion. So it's certainly not 10 a foregone conclusion that it's sort of the Wild 11 West in terms of communications on non-business 12 related matters. 13 It's not even clear, and there is no 14 evidence that I've seen here, as to how many 15 employees actually possess work e-mails. We're 16 talking about broad ranges of individuals in the 17 service industry and the manufacturing and 18 construction industries, so I'm not even sure that 19 that there is any indication that there would be any 20 marked benefit by making such a requirement to the 21 extent we're talking of business e-mails. 22 And third, as I said, employers are 23 migrating to communication systems that discard 24 e-mail and look at text messaging and unified 25 communications that integrate with business</p>	<p style="text-align: right;">Page 493</p> <p>1 free social media platforms to target and reach very 2 specific audiences. We just heard from Professor 3 Bronfenbrenner, saying that no union in its right 4 mind would even file a petition unless they had 60 5 or 70 percent of the employees signed up on 6 authorization cards. So I question, given those 7 statistics that presumably the professor has 8 researched, that there is any incremental benefit to 9 be gained here by providing access to this type of 10 information. 11 There was a recent article that I found 12 about workers in China who organized themselves 13 without a labor union by using social media and 14 cheap smartphones. I think the need for this type 15 of additional requirement needs to take into 16 consideration the fact that there are technological 17 advances out there that will continue to evolve that 18 provide direct access to these employees in a manner 19 that allows the employee to evaluate whether it 20 wants to engage in the conversation that is being 21 offered. It doesn't have to be faced with an e-mail 22 in its inbox any more than it has to be faced with 23 someone standing at their front door or any more 24 than it has to be faced with someone ringing their 25 phone. I would suggest that this proposal doesn't</p>
<p style="text-align: right;">Page 492</p> <p>1 information, so I think there are serious questions 2 about whether the Board should be invading the 3 employer's property rights in such a significant 4 fashion given the numerous other alternatives that 5 unions possess in order to reach out and communicate 6 with employees. 7 On the personal e-mail front, the 8 generation that will be most affected by the 9 regulations that you are considering are stopping to 10 use e-mails in increasing numbers. They are using 11 social media platforms, Tumblr, Instagram, Facebook. 12 I suspect that the communication standards that will 13 be most utilized five to ten years from now don't 14 even exist. 15 And I think that that doesn't mean that 16 we sort of broaden this obligation. We just 17 understand and realize that unions have a myriad of 18 avenues by which they can make outreach to employees 19 that don't require us to be burdening employers' 20 property rights or employees' privacy rights by 21 disclosing personal e-mail addresses or Instagram 22 accounts or text messaging accounts. 23 There are countless examples that you can 24 find out there of individuals, political parties and 25 other groups employing inexpensive and sometimes</p>	<p style="text-align: right;">Page 494</p> <p>1 serve any material benefit to the process. 2 MR. PEARCE: But isn't that the point? 3 Aren't you making the point? Right now the 4 Excelsior list is the law, there is an obligation to 5 provide a name and address, and knocking on the 6 employee's door unannounced, there are arguments 7 that say that that's an intrusion on privacy. 8 That's the law. 9 MR. TORRES: That's a fair point. But I 10 could take that same Excelsior list, Google those 11 employees, find their Facebook pages and send an 12 invitation and ask that employee to accept my 13 invitation to have a conversation. I can send an 14 invitation to their LinkedIn account and ask them to 15 have a conversation. I think that's the point. You 16 can take the names of these individuals and, through 17 technology, outreach them without having to provide 18 their personal e-mail addresses. I don't think that 19 there is any requirement that that is a necessary 20 step in conducting any of these electronic outreach 21 efforts. 22 MR. PEARCE: Do you think that the 23 employer has a more proprietary interest in having 24 possession of that information than the union would? 25 MR. TORRES: To the extent that you're</p>

<p style="text-align: right;">Page 495</p> <p>1 talking about an employer's work e-mail address, I 2 do think they have a greater proprietary interest. 3 As to their personal e-mails, I think it's a 4 question of the terms and conditions under which it 5 was provided. 6 I understand the concern of the woman who 7 was here a moment ago about the employer using their 8 information to text information. Well, I think the 9 question there is was it provided to them in the 10 circumstance where they understood it would be used 11 for a more limited purpose. If it wasn't, then I 12 agree with you that there may be some questions as 13 to what the scope of the proprietary right really 14 is. 15 MR. JOHNSON: A quick question. I think 16 your point about looking at the whole universe of 17 alternative channels makes sense. But one of the 18 comments, and I think it was by SEIU, in fact noted 19 that, for example, you're going to find Harry 20 Johnson on Facebook or whatever. And that's not me, 21 by the way. I don't have a Facebook account. 22 (Laughter.) 23 MR. JOHNSON: Basically, you might be 24 looking at 300 or 400 people, so what utility is 25 that going to be if the union doesn't actually get</p>	<p style="text-align: right;">Page 497</p> <p>1 don't want any of that anymore." 2 MR. TORRES: Well, again, as I think 3 Member Johnson said, we're not talking about an 4 equilibrium of standards here. That's the 5 differential here, I think. 6 MR. PEARCE: Thank you. Mr. Meiklejohn. 7 MR. MEIKLEJOHN: Well, at least I think I 8 have a name that, if I had a Facebook account, it 9 would be easy to find. 10 I'm going to start by talking about a 11 case I had a few years ago where an Excelsior list, 12 in accordance with the current standards, was 13 provided to the union, and it was replete with 14 incorrect addresses. And it was filled with 15 incorrect addresses not because the employer was 16 trying to hide anything or make the campaign more 17 difficult for the union. It was because the 18 employer didn't bother to keep them up to date 19 because the employer didn't use the addresses to 20 communicate with the employees. 21 When Excelsior Underwear was decided, 22 before all of our times, addresses in the mail and 23 personal visits were the vehicles for visiting and 24 communicating with employees. As Mr. Torres has 25 recognized or advocated, communication methods have</p>
<p style="text-align: right;">Page 496</p> <p>1 the social media ID? 2 MR. TORRES: Actually, I think that 3 that's an overstatement of the difficulty. I think 4 if you can throw in someone's name and their city 5 you can locate -- I realize there may be the Sam 6 Joneses and the Harry Johnsons out there, but there 7 certainly are innumerable individuals whose personal 8 identification information is -- 9 MR. PEARCE: And the Joseph Torreses out 10 there, too. 11 MR. TORRES: Well, don't go to Mexico 12 because you'll never find me. 13 (Laughter.) 14 MS. SCHIFFER: I don't think you could 15 find any of those things for me. 16 (Laughter.) 17 MS. SCHIFFER: But do you think, then, 18 that if the union's opportunity to inform employees, 19 which seems to be the word for today, was to ask the 20 employee if they wanted to be so contacted that the 21 employer should have a similar sort of opt-in? In 22 other words, if the employer was having a meeting, 23 if the employer was sending an e-mail, sending a 24 text message, giving a piece of literature that the 25 employer could turn all of that down and say, "I</p>	<p style="text-align: right;">Page 498</p> <p>1 changed, they're changing rapidly, and he certainly 2 points out that in the future there may be a need to 3 update this rule further. But today, in 2014, 4 e-mail addresses in particular are one of the 5 principal means by which people communicate. 6 I don't believe anybody has identified 7 any reasons that vehicle shouldn't be available to 8 unions on an equal basis, and that, if the employer 9 has that information, why they shouldn't have to 10 share it so that both sides can communicate. It is 11 not an invasion of the employer's property on the 12 order of the union having an opportunity to speak to 13 the employees in the plant. If we're trying to have 14 an equal system, it seems like that would certainly 15 be the place to start, having both sides having the 16 opportunity to have face-to-face communications at 17 work. 18 We're talking about a method that does 19 not involve a significant invasion of the employer's 20 property and certainly has less danger of invading 21 the employee's privacy compared to home addresses. 22 If I get an e-mail that I don't like, and I think 23 this point has been made many times, but it's much 24 easier to deal with that than somebody who's on my 25 doorstep. I don't even believe there have been any</p>

<p style="text-align: right;">Page 499</p> <p>1 real significant accusations that unions have used 2 home addresses for any purposes other than to 3 campaign. And I don't believe that any need has 4 been demonstrated in 2013 to add a regulation that 5 would restrict union -- 2014. I lost a year there, 6 didn't I?</p> <p>7 MR. JOHNSON: It's a bit of a reboot.</p> <p>8 MR. MEIKLEJOHN: There is no reason to 9 impose a restriction on the use of the Excelsior 10 information just because it's going to include 11 e-mails or telephone numbers where there's no 12 history of this kind of misuse. And as has been 13 pointed out, the Board is really not in a position 14 to enforce -- I think you understand that I'm 15 talking about the last sentence of the rule that 16 would limit it to purposes related to the 17 representation case and related purposes. There has 18 been no demonstration of a need for that. There's 19 no reason to believe that unions are going to misuse 20 the information.</p> <p>21 I have one example of a case that's going 22 on right now that illustrates the problems that 23 would be confronted in implementing that regulation. 24 About five or six months ago a union lost an 25 election. One of my clients lost the election by a</p>	<p style="text-align: right;">Page 501</p> <p>1 the other? Work e-mail addresses give rise to the 2 treatment of company information technology, 3 resources policies and other kinds of surveillance 4 type issues potentially. What are your thoughts 5 about that?</p> <p>6 MR. MEIKLEJOHN: I'll put myself in my 7 own position. If both are available, I would advise 8 my clients to use personal e-mail addresses to 9 communicate with the employees and not to 10 communicate through the employer e-mail addresses 11 for the reasons that you've just identified.</p> <p>12 The reason why I think both are needed is 13 two-fold. One is because in many cases the employer 14 may not have personal e-mail addresses. And the 15 other is that there may be circumstances in which 16 there are employees who set up personal e-mail 17 addresses but that are not in the habit of regularly 18 consulting their personal e-mail addresses. That 19 would be also. I read my work e-mail much more 20 regularly than I do my personal e-mail.</p> <p>21 MR. JOHNSON: Should we change the rule 22 basically for the Excelsior list, where it's 23 personal e-mails that sometimes the employer has no 24 occasion to see whether they're accurate or not? 25 For example, if the Excelsior list is</p>
<p style="text-align: right;">Page 500</p> <p>1 tie vote. The union has obviously an interest in 2 staying in touch with the employees, in the 3 expectation that the employer won't keep its 4 promises perhaps, but they have an interest in 5 staying in touch. The employer appears to have 6 embarked on a campaign of weeding out the employees 7 who identified themselves as union advocates. We 8 filed charges over the discharge of the person who 9 served as the observer in the election, and we 10 needed to contact witnesses to support certain 11 aspects of his story.</p> <p>12 Now, would it be a violation of this 13 regulation if we were to use the Excelsior list from 14 six months ago, assuming the new regulation was in 15 place of course, but if we were to use that 16 Excelsior list from six months ago to contact 17 witnesses and to try to convince them to give an 18 affidavit to the Board? I think you're creating 19 many potential areas of dispute, fine distinctions 20 where you have no real method to enforce it and 21 where there is no real problem.</p> <p>22 MR. MISCIMARRA: Mr. Meiklejohn, just one 23 quick question. If you were in your position, do 24 you think work e-mail addresses and personal e-mail 25 addresses are the same? Is one more important than</p>	<p style="text-align: right;">Page 502</p> <p>1 inaccurate, we have certain standards when it's 2 basically the home addresses. Should that be a more 3 lenient standard if it's personal e-mail addresses 4 because those typically can sit uncorrected for 5 years with an employer?</p> <p>6 MR. MEIKLEJOHN: I don't recall the exact 7 standards, but my recollection is that the list has 8 to be pretty bad before it will result in 9 overturning the election unless there is some 10 indication that it was deliberate. It's in my 11 testimony from two and a half years ago what the 12 percentages were in that case that I referred to. I 13 think there were more than 10 percent of the 14 addresses that were bad, and it didn't result in 15 overturning the election because it wasn't 16 deliberate.</p> <p>17 I don't remember exactly what the 18 standards are, but I don't think that's something 19 that can be addressed in the rules. When the 20 objections are filed there would be a need to look 21 at the issue on a case-by-case basis with regard to 22 if the information is inaccurate enough to warrant 23 setting aside the election or not. I think it would 24 be one situation if the address was right and the 25 phone number was right but some of the e-mail</p>

<p style="text-align: right;">Page 503</p> <p>1 addresses were wrong. It's a different situation if 2 all of the information is inaccurate. I don't have 3 a client that I can refer to you folks, fortunately, 4 but I haven't figured out exactly what those 5 standards should be.</p> <p>6 MR. JOHNSON: We have to move on.</p> <p>7 MR. PEARCE: Thank you. Ms. Davis.</p> <p>8 MS. DAVIS: Good afternoon, Chairman 9 Pearce and Members Hirozawa, Miscimarra, Schiffer 10 and Johnson. Once again, thank you for allowing me 11 to appear before you and to speak on these most 12 important issues. My name is Doreen Davis. As you 13 heard yesterday, I'm a partner at Jones Day, and I'm 14 here representing the Retail Industry Leaders 15 Association, and I'm accompanied today, as I was 16 yesterday, by Kelly Kolb from RILA.</p> <p>17 I want to first address my supposition, 18 which is that, contrary to what some of the other 19 speakers have said, I believe that requiring e-mail 20 addresses and phone numbers is in fact a bigger 21 invasion of privacy than requiring the provision of 22 home addresses. The reason is that if you get a 23 visitor at your home who's unwanted you don't have 24 to open the door, or you can shut the door in that 25 person's face and you can be done. You don't have</p>	<p style="text-align: right;">Page 505</p> <p>1 two years, a case in the New Orleans region. It was 2 a decertification election, and I talked about this 3 in the comments, where the petitioner for the decert 4 election was sent pornography to his home address 5 repeatedly by the union. It was actually 6 substantiated in the e-mail among the union 7 organizers that they were going to do this to this 8 guy because he filed a petition. Of course we got 9 the election set aside, we got a re-run, but if that 10 can happen now under the rules, I think, at a 11 minimum, at a minimum, if the Board's going to 12 consider requiring employees to turn over e-mail 13 addresses and phone numbers, they have to allow the 14 employers to seek the consent of the employee before 15 that information is turned over.</p> <p>16 And I'd suggest to you that with the two 17 day time limit of having to turn around the 18 Excelsior list, practically I don't know how that 19 would work. I don't think there's enough time in 20 the two days to go out to employees and get their 21 express content to turn over that information, so I 22 think you'd have to look at that time period as 23 well.</p> <p>24 Data breach issues are of extreme 25 importance to my clients in the retail industry.</p>
<p style="text-align: right;">Page 504</p> <p>1 to speak to that person at all. You don't have to 2 deal with any message coming from that person. An 3 e-mail address, if someone has your e-mail address, 4 you can't turn off your inbox. You do have the 5 ability, of course, to mark something as spam or to 6 block a particular sender. But in today's world 7 that these e-mail addresses are given, they're being 8 provided to the union member to also be provided to 9 the union organizing committee, and e-mails can be 10 sent incoming to employees from many different 11 addresses. You could have a different person 12 sending an e-mail every day so that you couldn't 13 effectively block the e-mails coming into your 14 inbox.</p> <p>15 Similarly with your cell phone. I don't 16 know about you, but I'm getting more and more spam 17 type phone calls on my cell phone, and even though 18 you try to block one number, a different number 19 comes up, and you can't look them. So you don't 20 really have the ability, either in your e-mail inbox 21 or your cell phone, to just say no very easily like 22 you do at your home, where you can shut your door.</p> <p>23 With regard to the restriction on the use 24 of the Excelsior list, I think that that would be a 25 good start. I have personal experience in the last</p>	<p style="text-align: right;">Page 506</p> <p>1 You've read too much about that. That is a 2 particular concern of theirs in the event that they 3 would be required to turn over personal e-mail 4 addresses that they have of any employees. I don't 5 know about all of you, but I you use my personal 6 e-mail address for banking, for too much online 7 shopping according to my husband, and for many other 8 personal reasons I use my personal e-mail address. 9 Turning those over makes it very susceptible to 10 someone with an evil motive, and certainly not all 11 union campaigns or union organizers have evil 12 motives, but it could very easily lead to a breach 13 of an employee's personal data.</p> <p>14 And in the situation where the employer 15 does not have personal e-mail addresses but does 16 have company e-mail addresses, by requiring the 17 employer to turn over the company e-mail addresses 18 you are of course automatically requiring that the 19 employer give access to the union to their e-mail 20 system, which of course under current law is not the 21 state of the law. It could be changed in the 22 future, but as of right now employers are not 23 required to allow union access to their company 24 e-mail systems, but under this proposed rule that's 25 the upshot of what would happen.</p>

<p style="text-align: right;">Page 507</p> <p>1 And then I just have an additional 2 concern about the shift and location being required 3 on the Excelsior list. Again, this is particular to 4 retail employers. Employees often get a change in 5 shift or change in department on the retail selling 6 floor. One day they could be in one place, another 7 day they could be in another. They could be 8 covering more than one area, and they could also be 9 changing shifts. What's going to happen is at what 10 point, if the employer does not constantly update 11 that list with the change in the shift or the 12 department, does it put them at risk for having the 13 election being overturned because the Excelsior list 14 is not accurate? I think that's a practical 15 problem, at least in the retail industry, with the 16 requirement of the shift and the location. Thank 17 you. 18 MR. MISCIMARRA: I just have one 19 question. In the retail industry, if there are 20 questions regarding the scope of unit, are there 21 instances -- and I don't know -- where people may 22 actually be in the unit on Sundays and outside of 23 the unit on other days because of position 24 interchange? 25 MS. DAVIS: Absolutely. It happens</p>	<p style="text-align: right;">Page 509</p> <p>1 hearing. 42 days is way too long. Most workers get 2 very stressed out before an election. In my 3 experience, the main reason for this is that many 4 companies bombard their workers with scary 5 anti-union propaganda about what might happen if the 6 union wins. 7 For example, in one recent campaign the 8 company set up monitors in the workers' break rooms 9 and in other areas where workers congregate. For a 10 week and a half before the election the company 11 continuously broadcast anti-union videos. The 12 videos were negative and included misleading 13 information. Several workers I talked to about the 14 videos, they were so disturbed about what they saw 15 and heard on those videos that they were crying. 16 Workers should not go through this 17 painful process in a campaign day after day. We 18 recognize that the rule requiring elections within 19 ten days or even as soon as possible might not work 20 in every case, so Local 99 and I support the Board's 21 proposal to hold elections as soon as practicable. 22 But the language should be explained that 23 specifically the rule should require elections 24 between 15 days after the petitioner receives the 25 Excelsior list unless the parties agree to a later</p>
<p style="text-align: right;">Page 508</p> <p>1 frequently in retail. 2 MR. PEARCE: Well, that wasn't exactly a 3 voter-less question, but thanks for your answer. I 4 want to revert back to the fifth seating on the 5 election date, so I've asked Mr. Ford, 6 Mr. Hernandez, Mr. Messenger, Ms. Bunn, Mr. Sharma 7 and Mr. Friedman to take your places. I appreciate 8 your indulgence. Mr. Ford, you may proceed. 9 MR. FORD: Thank you, Mr. Chairman. 10 Martin Hernandez will speak first. 11 MR. HERNANDEZ: Thanks for the 12 opportunity to speak again in support of the Board's 13 proposal. 14 MR. PEARCE: Mr. Hernandez, can you bring 15 your mic a little closer? 16 MR. HERNANDEZ: Sure. As a union 17 organizer, my point of view is that the Board should 18 schedule elections as soon as possible. I would 19 like to see elections held ten days after the 20 petition is filed. I believe that most workers, no 21 matter where they stand about the union, they also 22 want the election as soon as possible. 23 It normally takes about 42 to 45 days to 24 get an election if we sign a stipulated election 25 agreement and longer if we have a pre-election</p>	<p style="text-align: right;">Page 510</p> <p>1 date. Although petitioners can waive the right to 2 have the list for at least ten days, I am not aware 3 of Local 99 ever doing that. 4 Regional directors should not be allowed 5 to schedule an election any later. If an election 6 can be held on the employer's premises between the 7 15 days after the petitioner gives an Excelsior 8 list, the regional director should direct a timely 9 mail ballot or outside election. There should be no 10 minimum time period between the petition and 11 election. Employers can inform worker of their 12 anti-union views whenever they want. Most 13 companies, they start campaigning once they learn of 14 union organizing activity, and that's usually long 15 before the petition is filed. 16 Just to give you another example, a few 17 years ago Local 99 had an organizing campaign at the 18 company. By the way, this was a small employer with 19 less than 100 employees. In our initial meeting 20 with the workers, and this happened on a Friday 21 evening, as I recall, by the next Tuesday the 22 company, they had already brought in a union busting 23 consultant and they were calling the workers into 24 captive audience meetings. The company's strong 25 anti-union campaign scared the workers and caused</p>

<p style="text-align: right;">Page 511</p> <p>1 Local 99 to suspend its campaign without even filing 2 a petition. The employers, they already have enough 3 time to do their campaign. They don't need any 4 additional time. Thank you. 5 MR. FORD: Thanks again for the 6 opportunity to speak. I'm going to make three brief 7 points. A lot of this has already been said in 8 other ways. 9 First, I wanted to reiterate that 10 employers already can express their anti-union views 11 to workers before there is an organizing campaign, 12 and some employers actually do that. Walmart and 13 Target are two examples of companies that show 14 anti-union videos to workers during orientations. 15 Secondly, most other employers start 16 campaigning as soon as they learn of an organizing 17 campaign, but even those organizers who wait to 18 campaign until the critical period would have ample 19 opportunity to campaign if the Board's proposals are 20 adopted. If you count out the dates, there's going 21 to be at least seven days until the hearing. There 22 is going to be at least one day before a DD&E is 23 issued, another two days before the Excelsior list 24 is due, and then there's the ten days that the 25 petitioner can have the Excelsior list. That's 20</p>	<p style="text-align: right;">Page 513</p> <p>1 the longest days and the most painful days of their 2 lives. That's a shame that we have to say that to 3 the workers. 4 MR. JOHNSON: Two quick things. One, 5 thank you for keeping your 2014 comments very tight 6 in terms of non-duplication. And, two, it sounded 7 like 20 days was around sort of the minimum bracket 8 between petition and election, and it sounds like 9 you have the position that 42 days is too long. Do 10 you all have a position on what that should be if 11 there was a minimum/maximum? 12 MR. FORD: Well, we don't really think 13 there should be a minimum/maximum. We do think 14 that, even under the proposed rules in the most 15 extreme situation, there would be ample time for the 16 parties to get their views out. In most instances, 17 that period of time during the critical period is 18 going to be three weeks or more, which isn't all 19 that different than the current situation. 20 MR. JOHNSON: Would it be fair to say 21 that you don't think 21 days poses any problems for 22 an employer getting its message out? 23 MR. FORD: No, I don't. 24 MR. PEARCE: Thank you. Mr. Messenger. 25 MR. MESSENGER: Mr. Chairman, Board</p>
<p style="text-align: right;">Page 512</p> <p>1 days. And of course it can be longer. There can be 2 special circumstance that would postpone the 3 hearing. DD&Es often take more than one day to 4 issue, and so forth. 5 And finally, as Member Johnson alluded 6 to, 8(c) doesn't strictly apply in our cases. Of 7 course, the First Amendment does need to be 8 considered, but there is nothing in either 8(c) or 9 the First Amendment that gives any party the right 10 to speak for any particular length of time. And 11 finally, the proposed rule, and I think it's obvious 12 but it should be stated, doesn't regulate campaign 13 speech in any way. Thank you. 14 MS. SCHIFFER: I just have a question for 15 Mr. Hernandez. Thank you for coming to talk to us. 16 In your experience with workers involved in 17 organizing, do you get the sense that they do not 18 have enough information to decide whether or not 19 they want to be represented by a union? 20 MR. HERNANDEZ: No, ma'am. Employees 21 already have the information. It's very unfortunate 22 that I have to say to workers that the only thing 23 they wanted to do is to improve their working 24 conditions. I have to tell them that once we file 25 the petition the next 40 to 45 days are going to be</p>	<p style="text-align: right;">Page 514</p> <p>1 members, thank you for the opportunity to speak 2 today. I'm here on behalf of the National Right to 3 Work Legal Defense Foundation. Since 1968 we've 4 been providing free legal aid and information to 5 employees who oppose compulsory unionism. 6 Today, to avoid repeating points that 7 have already been made and also in the interest of 8 brevity, I just want to make one comment about the 9 proposed rule and the problem it will cause if the 10 election time spans are shortened and that will 11 impair the ability of individual employees to 12 campaign against a union and get their message out 13 to their co-workers. 14 Now, much has already been said about the 15 effect that shortening the election will have on the 16 ability of an employer to get its message out and to 17 communicate with employees before votes are cast, 18 but the effect on individual employees who have 19 Section 7 rights will be much worse. 20 In my experience, in most organizing 21 campaigns there is usually one or more employees who 22 don't want to just be passive against the union but 23 who actually want to speak out against it. The 24 problem is that at the beginning usually these 25 employees are very unsure of their options, unsure</p>

<p style="text-align: right;">Page 515</p> <p>1 of their legal rights and often disorganized. 2 After all, this isn't what they do for a 3 living, unlike a paid union organizer or even a 4 management consultant. This is all foreign to them, 5 so it takes a long time for these employees to 6 educate themselves about their rights or options, 7 decide if they want to campaign against the union, 8 and then actually figure out how to do it. 9 Shortening the time frame will impair the ability of 10 these employees to organize themselves and to get 11 out their message, and, therefore, impair their 12 Section 7 rights to engage in concerted activities 13 with like-minded employees and to speak in 14 opposition to unionization, which is the right under 15 the act. 16 And so for this reason and for the other 17 reasons stated in the written comments, the 18 Foundation opposes the proposed rule. 19 MR. PEARCE: Is it your experience that 20 employees who want to campaign against the union 21 consult with the employer about that? 22 MR. MESSENGER: It depends. Often if the 23 employer has some sort of advice, usually they'll so 24 no. If an employee goes to their supervisor and 25 says, "Hey, the union is here, what can I do," most</p>	<p style="text-align: right;">Page 517</p> <p>1 to employees that tells them what's going to happen 2 and describes the election process and also tells 3 them how to contact the National Labor Relations 4 Board? 5 MR. MESSENGER: Well, there already is a 6 poster put up of course announcing the fact that 7 there will be an election. 8 MS. SCHIFFER: I'm sorry, but I mean 9 right at the time that the petition is filed, not 10 right before the election is conducted. 11 MR. MESSENGER: At the time the petition 12 is filed there is usually a notice posted saying a 13 petition has been filed, this is occurring. I mean, 14 informing employees that a petition has been filed 15 and that there will probably be an election of 16 course will be useful. And some employees may 17 contact the NLRB. I obviously don't have knowledge 18 of the employees who don't contact us and just 19 contact the NLRB, so your agency would probably know 20 better than I would about how many help inquiries 21 you all get. 22 MR. JOHNSON: Really quickly, based on 23 your experience in dealing with employees who 24 eventually get to you, how long does it take your 25 average or median employee from the point in time</p>
<p style="text-align: right;">Page 516</p> <p>1 supervisors who are coached by their employer will 2 say, "Sorry, I can't help you, I can't tell you 3 this," or they read from a particular script. So 4 most of these employees have really nowhere to go 5 other than organizations like the Foundation to 6 really get unadulterated information about what 7 their options are and what their rights are. 8 MR. PEARCE: Isn't that script usually 9 one that includes, "Call the National Labor 10 Relations Board." 11 MR. MESSENGER: It may be. I don't know 12 the script offhand. I don't represent employers. 13 But oftentimes you get employees who call up saying 14 "We can't find information anywhere else," and 15 that's one of the reasons often they call us or send 16 e-mails. 17 MR. PEARCE: Do you tell them to call the 18 National Labor Relations Board? 19 MR. MESSENGER: No. I generally inform 20 them of their rights, what they can do, their legal 21 options, what can be objectionable activity, what 22 can't be, things to that effect. 23 MS. SCHIFFER: Do you think it would 24 help, in connection with that, if when the petition 25 is filed the employers are required to post a notice</p>	<p style="text-align: right;">Page 518</p> <p>1 where they decide they may not be in favor of the 2 unionization of their workplace to make it to you? 3 MR. MESSENGER: It really varies, and it 4 varies in particular upon how out in the open the 5 post-election activity was. For example, in an 6 organizing agreement situation, usually employees 7 know pretty quickly the union is here, they're in 8 the workplace, they're knocking on their doors. 9 Sometimes of course campaigns are more stealthy, and 10 employees don't really know that there is going to 11 be a unionization drive until the election petition 12 is filed. 13 How long does it take individual 14 employees to get themselves together, so to speak, 15 if that's what they choose to do? Again, it really 16 varies, but it usually takes a few weeks, because, 17 again, they have day jobs and families and 18 everything else. This is something they do on the 19 side, and the whole concept is foreign to them, and 20 so bringing them up to speed on what they can and 21 can't do and then for them to decide to exercise 22 their rights can take a few weeks. 23 MR. PEARCE: Thank you very much. Ms. 24 Bunn. 25 MS. BUNN: Good afternoon. I just want</p>

<p style="text-align: right;">Page 519</p> <p>1 to say that my experience in the aggregate mirrors 2 the results of the research conducted by 3 Dr. Bronfenbrenner in terms of the timing of 4 employer knowledge and the compelling testimony of 5 workers and their representatives in terms of 6 workers' experience during organizing campaigns. I. 7 I have nothing additional to add, but 8 would be happy to answer specific questions. We 9 support the proposed rule. 10 MR. SHARMA: And I'd also just like to 11 make a couple of really quick points that are, I 12 guess, in addition to what has already been said 13 repeatedly this morning and afternoon, which is just 14 simply the idea that employer rights are somehow 15 impinged by a potential condensing of the election 16 period. Again, that's sort of premised on this idea 17 that employers don't know about the campaign until 18 the petition is filed. And as Professor 19 Bronfenbrenner and a number of other people pointed 20 out, that simply doesn't seem to hold up in reality. 21 In addition to that, in that survey that 22 I had mentioned yesterday, of the attorneys who 23 responded reported that they counseled at some point 24 on an organizing drive where the employer knew of 25 the drive prior to the filing of the petition, 78</p>	<p style="text-align: right;">Page 521</p> <p>1 find many, many similar examples. 2 MR. JOHNSON: Right. But just to follow 3 up, and I think I may have been on that panel, or 4 maybe not, because at this point it's all a blur, 5 but -- 6 MR. PEARCE: You're remarkable. 7 (Laughter.) 8 MR. JOHNSON: At the end of the day what 9 should we be regulating to address? I mean, that 10 kind of surfaces the question. Let's say that we 11 all have varying views on what percentage of the 12 time employers have advance knowledge. I would 13 gladly agree with you that it's well north of zero 14 percent of the time. But are we agreeing that we 15 are going to basically regulate the entire 16 community, assuming everyone has foreknowledge, when 17 even your own survey says that 22 percent of folks 18 don't have knowledge? 19 MR. SHARMA: I would say that in no way 20 are these rules regulating speech. They don't 21 address the content of speech in any way, and, on 22 top of that, they don't address the ability of 23 employers to speak at any time prior to the day the 24 election is held other than the ways that the Board 25 has said that they're limited.</p>
<p style="text-align: right;">Page 520</p> <p>1 report counseling on drives where the employer began 2 its anti-union campaign prior to the filing of the 3 petition. 4 And if you're looking for more examples, 5 you should just look at your own case law. One of 6 the most recent published decisions you issued was 7 Lucky Cab, which you issued at the end of February, 8 a decision that was fairly unremarkable, no 9 offense -- 10 MR. JOHNSON: We've already been told 11 that what we're doing is very easy, so you don't 12 have to repeat that. 13 MS. SCHIFFER: And I would say that I was 14 not on that panel. 15 MR. SHARMA: That's why it was so 16 unremarkable. 17 (Laughter.) 18 MR. SHARMA: If you look at the facts, 19 the union filed a petition on March 30th but 20 informed the employer of its organizing activity on 21 February 25th. And the Board found that the 22 employer knew of the organizing drive for months 23 prior to that because employees solicited cards 24 openly in front of supervisors in that case. And 25 I'm sure if you went through your cases you would</p>	<p style="text-align: right;">Page 522</p> <p>1 People have testified about examples 2 where employers begin their speech from the day the 3 employee is hired. Nothing prevents the employer 4 from beginning its anti-union campaign at any time, 5 and therefore I would say that in no way are these 6 rules regulating speech. 7 MR. JOHNSON: But just to be 8 intellectually clear here, the idea that an employer 9 is going to put in its handbook, for example, some 10 language to the effect of, "We don't want a third 11 party here, we don't like unions," or whatever the 12 case may be, that's not a campaign in the sense of 13 here are seven or eight different campaign issues 14 about higher wages, better health benefits, what 15 happened at other plants, things like that. 16 And so I think what we're trying to 17 grapple with here is not shutting down that 18 discussion getting joined on specific issues that 19 actually happen in a campaign, because I think you 20 and I both know that campaigns are more 21 sophisticated than simply, "A union would be a great 22 idea for you," and that's the end of the 23 conversation. 24 And so I'm wondering if the AFL-CIO has 25 ever done any studies on basically what stages a</p>

<p style="text-align: right;">Page 523</p> <p>1 campaign goes through, what kind of communications 2 go back and forth, and how long does that process 3 take. Do you have anything like that? 4 MS. BUNN: If I may just say a couple 5 things in response. First of all, there has been 6 several references during the day to the union as 7 the third party, and what a union is is a group of 8 workers who want to collect a voice. 9 MR. JOHNSON: Right. And you're the 10 exclusive bargaining representative representing the 11 workers. 12 MS. BUNN: And I think there have been a 13 number of comments here when you have asked to 14 workers about the union this and the union that, 15 their response is that the organizing committee, you 16 know, we talk to our co-workers. I think it is 17 important to make that distinction. 18 But the issue of the timing, which is 19 what I think you raised, we both addressed that, and 20 several other people have, because the employer 21 community has suggested that the first time it has 22 knowledge that its workers are organizing and want 23 to collect a voice is when the petition is filed. 24 Those comments really were to address that, as a 25 factual matter, that's really untrue.</p>	<p style="text-align: right;">Page 525</p> <p>1 communicate has to be part of the discussion of 2 whether there is the right to free speech. And 3 secondly, you know, I understand, I really do 4 understand the Supreme Court's rulings about robust 5 and free speech. As a legal matter I understand 6 that, but as a practical matter workers in the 7 workplace don't have that robust debate. They have 8 one side from the employer day in, day out. 9 You know, one case that I was going to 10 raise but in the interest of time didn't, there was 11 a campaign very recently, three weeks, 25 days, 12 eight employees, 30 as an individual captive 13 audience in three weeks. They actually wrote a 14 petition saying, "Please stop, we understand your 15 point of view, we've heard your point of view, we 16 have plenty of information, we're grownups, we can 17 make a decision," and nonetheless the captive 18 audience meetings continued. So there is just ample 19 opportunity all day, every day. 20 MR. JOHNSON: Right. And I think 21 campaign fatigue could be an indicator of that. Did 22 you ask any questions in the survey about the 23 campaign fatigue question? 24 MR. SHARMA: No. Honestly, that's a 25 concept conceptualized, I guess, to me afterward.</p>
<p style="text-align: right;">Page 524</p> <p>1 But more broadly, I think the point is 2 that employers communicate with their employees all 3 the time, all day and every day, and they have 4 complete control over that communication. 5 MR. JOHNSON: But is that the relevant 6 question in terms of just simply having the right or 7 the power to discuss or communicate generally versus 8 the actual free-wheeling robust debate on a specific 9 set of campaign issues? That's what I'm struggling 10 with. Do you have any research on that? 11 MS. BUNN: The only research I have was 12 from an employer lawyer who said, "First week, third 13 party; second week, dues; third week, strikes; 14 fourth week, please give us another chance." And 15 that came from an employer lawyer. 16 MR. JOHNSON: But was that right after 17 the petition was filed? 18 MS. BUNN: No. He was saying that that's 19 handbook the persuaders use. 20 MR. JOHNSON: So they put all that in 21 their employee handbook? 22 MS. BUNN: No. But on a more serious 23 note, the answer is yes. I would say two things. 24 First of all, yes, in answer to your specific 25 question, all of that time that the employer has to</p>	<p style="text-align: right;">Page 526</p> <p>1 MR. PEARCE: Now, there are several of us 2 here that would have differing views relative to 3 whether or not a union-free workplace publication 4 and employer's handbook constitutes campaigning. 5 My question is one that I've asked 6 before, and that is: These conversations have been 7 focused on time. Is the opportunity for 8 communication to the employees impacted by 9 technology, and should we be sensitive to technology 10 when we're talking about opportunity and time in 11 terms of communication to the employees? 12 MS. BUNN: I would say yes, as several 13 other people have said also. Increasingly, we're 14 seeing employers communicating with their employees 15 on campaign messages through the internet, through 16 e-mails and even through texts, as one of the 17 workers said, and of course the speed of that is 18 remarkable. 19 MR. SHARMA: I would just add one recent 20 publicity campaign that I'm aware of where employees 21 were provided anti-union videos on flash drives so 22 they could take them home and watch them. That 23 election took place in a very short amount of time, 24 less so than what people are saying the proposed 25 rules would create, the time period they would</p>

<p style="text-align: right;">Page 527</p> <p>1 create.</p> <p>2 MR. PEARCE: So an anti-union flash drive</p> <p>3 would happen a lot quicker, you're saying, than a</p> <p>4 captive audience speech?</p> <p>5 MR. SHARMA: Right. I think what we're</p> <p>6 saying is that technology can speed up all of this</p> <p>7 communication. I think that's absolutely correct.</p> <p>8 MR. PEARCE: Thank you all. Mr.</p> <p>9 Friedman.</p> <p>10 MR. FRIEDMAN: Thank you, Chairman Pearce</p> <p>11 and Board members for the opportunity to be here and</p> <p>12 close out this topic at long last. My name is Ross</p> <p>13 Friedman. I'm a partner at Morgan, Lewis & Bockius</p> <p>14 in Chicago. I'm speaking on behalf of the Coalition</p> <p>15 for a Democratic Workplace. The Coalition is an</p> <p>16 organization of many businesses that employ millions</p> <p>17 and millions of employees.</p> <p>18 CDW does not believe that the "as soon as</p> <p>19 practicable" standard for scheduling an election is</p> <p>20 appropriate, because it singularly focuses on how</p> <p>21 quickly the election would take place at the expense</p> <p>22 of other very important considerations. I want to</p> <p>23 touch quickly on three main points: the perceived</p> <p>24 need for quicker elections, the problems that are</p> <p>25 inherent with the acceleration of the timeline for</p>	<p style="text-align: right;">Page 529</p> <p>1 guaranteed by the Act, and CDW believes that the "as</p> <p>2 soon as practicable" standard does not appropriately</p> <p>3 recognize that statutory responsibility.</p> <p>4 It cannot be seriously disputed, I don't</p> <p>5 think, that most non-union employees and many</p> <p>6 non-union employers have a limited understanding of</p> <p>7 our complicated rules and processes that govern</p> <p>8 collective bargaining. And many, if not most,</p> <p>9 employees don't really know what it means</p> <p>10 practically or legally to be in a union or to work</p> <p>11 in a unionized workforce.</p> <p>12 This is something the Board itself I</p> <p>13 think has recognized and attempted to cure through</p> <p>14 the notice posting rule and through the protected</p> <p>15 concerted activity website. Obviously,</p> <p>16 understanding those issues associated with the</p> <p>17 decision to vote for or against a union is vitally</p> <p>18 important to ensuring their fullest freedom, and</p> <p>19 that understanding takes time and a full opportunity</p> <p>20 for debate.</p> <p>21 The focus only on how soon it would be</p> <p>22 practicable to schedule an election ignores some</p> <p>23 other important factors that must be taken into</p> <p>24 account when deciding when to schedule elections,</p> <p>25 such as due process, free speech and employees'</p>
<p style="text-align: right;">Page 528</p> <p>1 the elections under the NPRM, and the Board's</p> <p>2 responsibility to further elucidate its position on</p> <p>3 how quickly elections could or should be held.</p> <p>4 First, CDW believes that the proposed</p> <p>5 rules are in large part a solution in search of a</p> <p>6 problem. And I won't belabor the point here.</p> <p>7 Everybody knows the statistics, and they've been</p> <p>8 discussed several times today. But one of the</p> <p>9 things that struck me in preparing for this is I</p> <p>10 found this pie chart on the Board's website which</p> <p>11 shows that 94.3 percent of elections were held</p> <p>12 within 56 days in 2013. It's hard to imagine</p> <p>13 looking at that lopsided chart and coming to the</p> <p>14 conclusion that the R-Case process is taking too</p> <p>15 long such that it requires major changes. More</p> <p>16 simply put, I think the point is that our position</p> <p>17 is that the Board already has efficient and</p> <p>18 effective processes in place to ensure fair and fast</p> <p>19 elections, and there is no need to dramatically</p> <p>20 speed up that process.</p> <p>21 Second, there are serious problems</p> <p>22 inherent with the acceleration of the timeline that</p> <p>23 the NPRM doesn't address. The Board's statutory</p> <p>24 responsibility is to assure employees the fullest</p> <p>25 freedom guaranteed in exercising the rights</p>	<p style="text-align: right;">Page 530</p> <p>1 rights or ability to be educated about a complicated</p> <p>2 process that will affect their working life</p> <p>3 potentially for years and years to come.</p> <p>4 So how much time is required? CDW thinks</p> <p>5 that the current time frames are adequate and that</p> <p>6 they serve the Board and the parties effectively,</p> <p>7 all the parties, employees, unions and employers,</p> <p>8 and that they give all of those parties time to get</p> <p>9 their points of view across and understand the</p> <p>10 implications of their actions. A significant</p> <p>11 shortening of that time frame runs a serious risk of</p> <p>12 depriving the parties of the opportunity to present</p> <p>13 their views and gives employees less time to learn</p> <p>14 about the process and weigh their options.</p> <p>15 My third and last point is that the NPRM</p> <p>16 proposes changes to many of the Board processes in</p> <p>17 order to achieve accelerated elections. What it</p> <p>18 doesn't do is state anywhere what the Board thinks</p> <p>19 is an appropriate time frame from petition to an</p> <p>20 election. CDW thinks the Board should state what</p> <p>21 the time targets would be under the proposed rule</p> <p>22 and then seek comment on those specific time</p> <p>23 targets. This may slow the process down a bit, but</p> <p>24 I think ultimately it would serve all of the parties</p> <p>25 better.</p>

<p style="text-align: right;">Page 531</p> <p>1 The Board has held training sessions with 2 the regional offices, it has studied this process 3 for years and years, and it has to have an idea 4 regarding how long it intends the representation 5 process to take. The position of CDW is that the 6 Board should put forth what those targets should be. 7 There are other timing issues that are not addressed 8 like, for example, will the parties get more or less 9 time under the new rules if there is a stip. Not 10 knowing this fact is likely to decrease the stip 11 rate, which would cause delays and could 12 unnecessarily complicate the process and could lead 13 to more litigation. 14 Member Miscimarra earlier, in response to 15 one of the speakers, noted that one of the goals of 16 the Act is to promote stable collective bargaining 17 relationships. Stips are the first and often an 18 easy chance for parties to do this. These are 19 parties that may be obligated to bargain with each 20 other for years to come, and to be able to reach an 21 agreement on a stip is no small thing and can set 22 the tone for the bargaining relationship. These are 23 important points that are implicated in nearly every 24 position, but the NPRM omits any discussion of them. 25 So to sum up, CDW urges the Board to</p>	<p style="text-align: right;">Page 533</p> <p>1 issues, confidentiality issues, fraud and abuse, the 2 employer liability issues for inadvertent or 3 intentional disclosure of information. 4 The one discrete point I would like to 5 make is that the rules in some respects seem to 6 create more problems than they solve with respect to 7 the voter lists. In this particular respect, there 8 is a presumption on the part of the rules, and I 9 think it's a false presumption, that employers 10 either uniformly or to a great extent maintain the 11 requested information electronically, or, if not 12 electronically, in a format readily available for 13 submission to the Board. 14 I think that's a faulty presumption 15 regardless of whether it's electronic, regardless of 16 what the format is, regardless of what the available 17 information is, not just from the standpoint of the 18 smaller employers but also for larger employers as 19 well. 20 Employers, regardless of size, maintain 21 records in a variety of formats. Producing such 22 records may seem simple to some, but, as I mentioned 23 earlier in my testimony earlier this afternoon, the 24 individuals in some employer locations are not human 25 resources personnel. There may not be standing</p>
<p style="text-align: right;">Page 532</p> <p>1 maintain the current election time frames and time 2 targets which have served the parties well and have 3 resulted in the vast majority of elections taking 4 place within a short time after the filing of the 5 petition. Thank you. 6 MS. SCHIFFER: Just one question. I 7 thought actually that we had invited comment on a 8 time target, and specifically this panel had asked 9 that, and so I wonder what you think the appropriate 10 time should be. 11 MR. FRIEDMAN: Well, I think the 12 appropriate times are the existing times. I think 13 the point I was trying to make is if the Board wants 14 to shift the existing times, the Board should say 15 what they think the new times should be. 16 MR. PEARCE: Thank you all. We'll return 17 to the topic of voter lists. Mr. Kirsanow. 18 MR. KIRSANOW: Thanks for indulging me 19 since I have to depart imminently. A number of the 20 points that we would make have already been made, so 21 for the sake of brevity I just want to make one 22 discrete point in addition to the points that were 23 cited by the panel preceding the previous panel 24 relating to voter lists, and that is the issues with 25 respect to potential problems related to privacy</p>	<p style="text-align: right;">Page 534</p> <p>1 human resource departments for a given employer, and 2 the person who's in charge of personnel matters is 3 the same person who is, as I think I mentioned 4 earlier, signing bills of lading or repairing the 5 tow motor. For that person to produce the requested 6 information when it's unclear in what format it's 7 supposed to be within the two day time frame is a 8 bit of a challenge regardless of even the size of 9 the employer. 10 Moreover, the provision of sensitive 11 information, e-mail addresses, telephone numbers and 12 the like, could render the employees vulnerable to 13 harassment or worse. There is a wealth of 14 information that's being provided, and Ms. Davis 15 talked about that earlier in the access that e-mail 16 information could provide to bad actors, whether 17 those bad actors be employees, employers, unions or 18 fourth parties or fifth parties who may get access 19 to that information, especially when you consider 20 not just e-mail addresses and telephone numbers but 21 shift information. 22 That gives people a time frame. It gives 23 them a picture for where the employee may be, where 24 he's likely to be in the next hour or two hours, and 25 unscrupulous individuals would have access to that</p>

<p style="text-align: right;">Page 535</p> <p>1 information.</p> <p>2 The risks associated with the proposed</p> <p>3 rules I think would outweigh the ostensible benefits</p> <p>4 from any increase of that information, and the</p> <p>5 National Association of Manufacturers would submit</p> <p>6 that there is little in terms of the NPRM that shows</p> <p>7 a demonstrable need for changing the current status</p> <p>8 of the law related to Excelsior lists. Thank you</p> <p>9 very much.</p> <p>10 MR. PEARCE: Thank you. Ms. Kutch.</p> <p>11 MS. KUTCH: Thank you. My name is Jess</p> <p>12 Kutch. I'm the co-founder of Coworker.org.</p> <p>13 Coworker.org is an online platform for workers'</p> <p>14 rights. We launched in early 2013, and we're now</p> <p>15 hosting more than 30 workplace campaigns by</p> <p>16 individuals around the country. Before creating</p> <p>17 Coworker.org I served as organizing director for</p> <p>18 Change.org, which is one of the world's largest</p> <p>19 online petition sites. I also served five years in</p> <p>20 the digital department at the Service Employees</p> <p>21 International Union, SEIU.</p> <p>22 I think I can offer the Board today some</p> <p>23 perspective about the use of e-mail by employees</p> <p>24 advocacy organizations and just about everybody</p> <p>25 else. I can also speak to the feasibility of</p>	<p style="text-align: right;">Page 537</p> <p>1 list. It's also in most cases prohibitively</p> <p>2 expensive. But for two years we sent biweekly</p> <p>3 e-mails to that list. Our e-mails mobilized nurses</p> <p>4 around issued impacting their profession, spurring</p> <p>5 them to write letters to the editor, submitting</p> <p>6 testimony to the CMS and more.</p> <p>7 I bring up this example to highlight that</p> <p>8 e-mail contact between unions and employees is</p> <p>9 nothing new. In this case the RNs had no prior</p> <p>10 contact with the union, yet tens of thousands</p> <p>11 engaged with our campaigns and took part in our</p> <p>12 action. Those who no longer wished to receive</p> <p>13 e-mails simply opted out by hitting the unsubscribe</p> <p>14 link on the bottom of that e-mail, and many did just</p> <p>15 that, but the vast majority remained subscribed to</p> <p>16 our list, and we assume that's because they found</p> <p>17 value in it.</p> <p>18 I have no doubt that people who work for</p> <p>19 an employer where there is an active union</p> <p>20 organizing drive will be interested in receiving</p> <p>21 information from union staff via e-mail, and those</p> <p>22 who are not interested can unsubscribe, filter those</p> <p>23 e-mails to folders or block a sender. The fact that</p> <p>24 union organizers can knock on your door but can't</p> <p>25 schedule their visit via e-mail seems strange to me.</p>
<p style="text-align: right;">Page 536</p> <p>1 operating an e-mail portal or some type of messaging</p> <p>2 system, and then finally I'd like to address</p> <p>3 concerns about privacy and potential abuse of e-mail</p> <p>4 addresses.</p> <p>5 In 2014 the public expects to engage with</p> <p>6 organizations electronically. We bank on line and</p> <p>7 we shop for health insurance on line. I'm even at</p> <p>8 this hearing today because I e-mailed the Board a</p> <p>9 request to appear before you. So every day we're</p> <p>10 increasingly organizing every aspect of our lives on</p> <p>11 line, and e-mail is still a major part of any</p> <p>12 organization's communications program. I think this</p> <p>13 was perhaps most evident during the last two</p> <p>14 election cycles.</p> <p>15 In 2006 I managed an e-mail program for</p> <p>16 SEIU called Value Care Value Nurses. The campaign</p> <p>17 sought to engage non-union nurses nationwide around</p> <p>18 safe staffing and patient care issues. The union</p> <p>19 matched publicly available RN registry lists with</p> <p>20 commercially available e-mail addresses, and from</p> <p>21 those matches we built an e-mail list of 300,000</p> <p>22 non-union nurses nationwide.</p> <p>23 Now, I want to note that the union's</p> <p>24 ability to do this kind of e-mail matching is highly</p> <p>25 unusual and particular to nurses in the registry</p>	<p style="text-align: right;">Page 538</p> <p>1 I'd also like to address the question of</p> <p>2 whether to address a closed off e-mail portal or</p> <p>3 messaging system. I recognize this could take shape</p> <p>4 in a number of different ways, and the Board doesn't</p> <p>5 go into much detail on that subject. But regardless</p> <p>6 of the details, I strongly encourage the Board to</p> <p>7 stay out of the business of delivering e-mail</p> <p>8 messages to people.</p> <p>9 I can share my experiences at Change.org</p> <p>10 to give you a sense of just how complicated that</p> <p>11 might be. Change earns revenue from petitions</p> <p>12 sponsored by organizations, political campaigns and</p> <p>13 companies, and its e-mail list is what drives the</p> <p>14 vast majority of petition signatures. So as you can</p> <p>15 imagine, Change.org staff are therefore very careful</p> <p>16 to ensure that their e-mails are getting through to</p> <p>17 users and aren't blocked by spam filters or ending</p> <p>18 up in junk e-mail folders.</p> <p>19 This is a term called e-mail</p> <p>20 deliverability. It's used to describe the ability</p> <p>21 get an e-mail into the intended recipient's e-mail</p> <p>22 inbox. And let me tell you it's not easy. E-mail</p> <p>23 providers are constantly changing the requirements</p> <p>24 for mass e-mails in an attempt to protect their</p> <p>25 users from spam. But these changes impact</p>

<p style="text-align: right;">Page 539</p> <p>1 everybody.</p> <p>2 In 2011, only 76.5 percent of commercial</p> <p>3 e-mails sent reached recipient inboxes according to</p> <p>4 the industry leader Return Path and their experts of</p> <p>5 e-mail deliverability. Furthermore, e-mail blocked</p> <p>6 and flagged as spam increased 24 percent that year.</p> <p>7 Every outgoing mail server IP has a reputation</p> <p>8 score, and that score is impacted by a number of</p> <p>9 factors ranging from the number of e-mails sent to</p> <p>10 recent user spam flags. If your IP address gets hit</p> <p>11 with a low score it will be nearly impossible to get</p> <p>12 e-mails into your recipients' inboxes.</p> <p>13 When I worked at Change we frequently</p> <p>14 encountered deliverability problems. On any given</p> <p>15 month a service like AOL would decide to block our</p> <p>16 e-mails. This would result in a steep drop in</p> <p>17 e-mail open rates and petition signatures because</p> <p>18 far fewer people were even seeing Change.org's</p> <p>19 e-mails. A drop in open rates would send our team</p> <p>20 scrambling to contact the responsible servers and</p> <p>21 negotiate a solution. It's basically a never-ending</p> <p>22 game of cat and mouse, and companies that rely on</p> <p>23 e-mail revenue have whole teams dedicated to</p> <p>24 ensuring deliverability. All of this is to say that</p> <p>25 running any kind of system that sends e-mails to</p>	<p style="text-align: right;">Page 541</p> <p>1 So even if an employee is successful at finding the</p> <p>2 online messaging system, it's unlikely a worker will</p> <p>3 complete the steps necessary to access that system</p> <p>4 and communicate with others.</p> <p>5 I'd just like to thank the Board for</p> <p>6 allowing me to testify today. I do believe that</p> <p>7 e-mail is one of the safest methods for</p> <p>8 communicating on line. Most providers like Google</p> <p>9 are vigilant at locating and identifying malicious</p> <p>10 attachments in e-mails. Employers' internal e-mail</p> <p>11 systems are also well protected by commercially</p> <p>12 available software. Those are my comments. Thanks</p> <p>13 for providing me with the opportunity.</p> <p>14 MR. MISCIMARRA: Ms. Kutch, something you</p> <p>15 said actually scared me. Member Hirozawa tells me</p> <p>16 that every e-mail I send him ends up in his spam</p> <p>17 folder, and I've always suspected that it was</p> <p>18 intentional.</p> <p>19 But if we have the forced disclosure of</p> <p>20 work e-mail addresses, and if hypothetically some of</p> <p>21 those e-mails end up in spam folders by virtue of</p> <p>22 the normal operation of the spam folder, my fear is</p> <p>23 we will end up getting 8(a)(1) charges and that I'll</p> <p>24 have to learn something about how technology works.</p> <p>25 Do some of those issues, again, maybe militate in</p>
<p style="text-align: right;">Page 540</p> <p>1 people is a complicated business.</p> <p>2 Now, if the messaging system being</p> <p>3 proposed functions more as a private online message</p> <p>4 board, then the concern I have is primarily about</p> <p>5 access. Most online communication occurs through</p> <p>6 channels, social media, text messaging and e-mail.</p> <p>7 And as I stated earlier, the vast majority of</p> <p>8 traffic at Change.org was generated by its own</p> <p>9 e-mail list. Just 26 percent of the traffic on my</p> <p>10 own website, Coworker.org, has been generated by</p> <p>11 people directly entering in that address to its</p> <p>12 browser window. So if employees must affirmatively</p> <p>13 enter a chat room, very few will receive information</p> <p>14 from a union about an upcoming election.</p> <p>15 I know I'm low on time. I was going to</p> <p>16 touch on that things get more complicated when you</p> <p>17 start requiring a log-in access, and I just would</p> <p>18 request that the Board be mindful that many people</p> <p>19 today are accessing the internet via their mobile</p> <p>20 phones. According to a recent Pew Research internet</p> <p>21 project, 67 percent of adults in the U.S access the</p> <p>22 internet via their phones and 34 percent of adults</p> <p>23 rely entirely on their phones for internet access.</p> <p>24 I'm sure if you've ever tried to log in to something</p> <p>25 on your phone, you know how difficult that can be.</p>	<p style="text-align: right;">Page 542</p> <p>1 favor of focusing on personal contact information in</p> <p>2 this area rather than business contact information</p> <p>3 because of the possible peripheral issues that it</p> <p>4 may generate in other areas that we focus on, like</p> <p>5 surveillance is another one, or do you think they're</p> <p>6 really equivalent and we should just address</p> <p>7 personal contact information and work related</p> <p>8 contact information the same?</p> <p>9 MS. KUTCH: If I'm understanding you</p> <p>10 correctly, I don't think that it's really an issue</p> <p>11 of whether it's an employer e-mail address or a</p> <p>12 personal e-mail address. You'll still be dealing</p> <p>13 with the same complications. An employer postmaster</p> <p>14 can block an IP address, but so can AOL or Gmail.</p> <p>15 The triggers are probably going to be different, but</p> <p>16 you're still running that risk that those e-mails</p> <p>17 are never reaching those inboxes.</p> <p>18 MR. MISCIMARRA: But your advice would be</p> <p>19 if we go down the road of some sort of even</p> <p>20 supplemental third-party portal, we need to be</p> <p>21 cognizant of the possibility that spam filters may</p> <p>22 end up influencing whatever the Board may sponsor if</p> <p>23 we were to do that?</p> <p>24 MS. KUTCH: That's correct.</p> <p>25 MR. HIROZAWA: Do you have any views</p>

<p style="text-align: right;">Page 543</p> <p>1 based on your experience about privacy concerns that 2 might be raised based on requiring employers to 3 provide e-mail addresses or cell phone numbers of 4 employees? 5 MS. KUTCH: So this would be the question 6 of opt-in versus opt-out? 7 MR. HIROZAWA: That's one of the 8 questions. 9 MS. KUTCH: I brought up the example of 10 the Value Care Value Nurses campaign for that 11 reason. Nurses on that list were able to 12 unsubscribe. It was a very clear process. It 13 didn't seem to cause confusion. I think that 14 increasingly our e-mail addresses are available in 15 the world, and I think, especially in an environment 16 where employees are aware that there is an active 17 union organizing drive, it's not going to be an 18 issue of privacy to receive an e-mail from a union. 19 MR. JOHNSON: What's the theory behind 20 allowing people to unsubscribe? 21 MS. KUTCH: Most unions use e-mail 22 providers to send out mass e-mails, and so those are 23 companies like Blue State Digital, NationBuilder, 24 Salsa, Convio. All of those companies require an 25 unsubscribe link, and the reason they require an</p>	<p style="text-align: right;">Page 545</p> <p>1 providers and the servers that send out mass 2 e-mails, but that's just my guess. 3 MR. JOHNSON: And are there any 4 organizations that you would sort of look to as a 5 lodestar of being think tanks in the area of area 6 electronic privacy like EPIC, anyone like that? 7 MS. KUTCH: You know, none come to mind. 8 The e-mail deliverability industry leader Return 9 Path has a ton of case studies, so they might be 10 worth consulting on that issue. 11 MR. JOHNSON: And then the last piece -- 12 I'm just going to try a summation of what you were 13 trying to get across to us -- if you're not a nimble 14 organization, trying to manage your own e-mail 15 message board or some portal or any sort of mass 16 e-mail system would be a big technical undertaking? 17 MS. KUTCH: Yes. 18 MR. PEARCE: In terms of opting in and 19 opting out -- and let me know if you have had the 20 experience -- would it be correct to say that an 21 unsubscribe might be a safer route than an opt-in or 22 opt-out that is administered by an employer, given 23 that opting in and opting out may be a gauge to the 24 employer of the interest or non-interest in a union 25 being contacted by an individual?</p>
<p style="text-align: right;">Page 544</p> <p>1 unsubscribe link, and it's an established best 2 practice, but they don't want users flagging things 3 as spam. They would rather they just unsubscribe 4 from the list, and that protects their IP address so 5 that the deliverability remains high. 6 So there are already sort of mechanisms 7 in place in the market to ensure that that be an 8 option when mass e-mails are sent out. Now, the 9 other option is there will be, I'm sure, individual 10 e-mails sent out, and I feel like that is a 11 different thing. You don't unsubscribe from -- I 12 can't unsubscribe from an e-mail from you. 13 MR. JOHNSON: You might want to, but 14 maybe you technically can't. 15 MS. KUTCH: Well, I could block you or 16 ignore the e-mail. 17 MR. JOHNSON: I guess what I'm thinking 18 of is obviously unsubscribe developed as a matter of 19 technology for some reason, and I'm wondering if you 20 know why that was, other than the technical piece of 21 the IP address. 22 MS. KUTCH: I'm actually not familiar 23 with the history. I imagine it had to do in part 24 with making sure deliverability remained high, so it 25 was sort of a compromise between the e-mail</p>	<p style="text-align: right;">Page 546</p> <p>1 MS. KUTCH: I'm not entirely clear on the 2 process that's being proposed around opting in or 3 opting out. E-mail's been around for more than 20 4 years, and active unsubscribing is well known among 5 everyone I've ever met who's used e-mail and on the 6 many e-mail lists I've operated. I think that's an 7 acceptable way for people to opt out of e-mail lists 8 and of receiving them. 9 MR. PEARCE: Thank you. Ms. Maciel. 10 MS. MACIEL: Good afternoon. Thank you 11 again for allowing me the opportunity to speak to 12 you on this important issue, particularly on the 13 privacy implications. As you know, I still 14 represent the National Grocers Association. 15 NGA is very concerned about the 16 proposal's compulsory disclosure of employees' 17 personal and confidential e-mail accounts and phone 18 numbers on voter lists. This non-consensual 19 disclosure constitutes in their opinion a gross 20 invasion of employees' privacy and opens up 21 employees to potential use and abuse of their 22 personal information. 23 As I said before, many NGA members are 24 small and medium size businesses who just don't 25 collect and don't want to collect employees'</p>

<p style="text-align: right;">Page 547</p> <p>1 personal and private information. In fact, many 2 employees in the grocery industry are part-time and 3 seasonal workers. They don't have even work 4 e-mails. The reality is that technology is not as 5 prevalent in these types of small businesses as may 6 be in other types of industries.</p> <p>7 So while the proposal suggests a possible 8 amendment to prohibit the use of the list from being 9 used for anything other than an organizing campaign, 10 such an agreement would not bind anyone beyond the 11 labor organizers from using employees' personal 12 information.</p> <p>13 And as a key stakeholder to this Board, 14 individual employees' interests should be paramount, 15 and many employees do not want their personal e-mail 16 address and/or phone number shared at all, so their 17 privacy rights would be violated even if the use of 18 the information were limited. NGA submits that the 19 Board should at a minimum provide that employees be 20 required to opt in to the disclosure of their 21 personal information to labor unions so that it's an 22 informed and knowing decision.</p> <p>23 As we discussed yesterday in yesterday 24 morning's meeting regarding the importance of 25 employee consent to an electronic signature on an</p>	<p style="text-align: right;">Page 549</p> <p>1 they don't know who's going to be included in the 2 unit? Under the Board's proposal, unit 3 determinations will not be conclusively decided 4 until after an election and after the voting list is 5 disclosed. Without clear direction from the Board, 6 coupled with this new requirement that they have to 7 turn over and serve the Excelsior list within two 8 days at the direction of an election, it's 9 inevitable that labor unions will challenge the 10 accuracy of the voting list, which will lead to 11 objections to the election, more unfair labor 12 practices and protracted litigation. That result is 13 counterproductive to the Board's stated purpose of 14 expediting elections in an efficient manner.</p> <p>15 Because I have a little bit of time, not 16 a lot, but I do want to touch on the privacy issue. 17 I know other people have spoken about it, but this 18 is important to the National Grocers Association.</p> <p>19 Currently, there aren't any safeguards 20 contemplated by the NPRM to protect against 21 unforeseen abuses and causing irreparable harm to 22 employees, so NGA submits it's incumbent upon the 23 Board to establish the rules safeguarding personal 24 information, including potentially monetary 25 sanctions and criminal penalties to parties that</p>
<p style="text-align: right;">Page 548</p> <p>1 authorization card, so too should employees be given 2 the opportunity to consent to the disclosure of 3 their personal and private information to labor 4 unions.</p> <p>5 The proposed rule lacks clarity on the 6 type of personal information that must be disclosed; 7 for example, it's what type of e-mail address, is it 8 their work e-mail address, is it their home e-mail 9 address or is it both. What if the home e-mail 10 address is shared with other family members like 11 minor children and they have access to it? Would 12 they be then opening up to communications from labor 13 unions?</p> <p>14 The same thing with the type of telephone 15 number. Are you talking about a home phone number, 16 a cell phone number or a work provided cell phone 17 number? Even where you've got work e-mail and work 18 cell phone numbers -- and as I mentioned, many in 19 the grocery industry do not have that type of 20 information -- it opens up both the employee and the 21 employer to unwanted potential union solicitation at 22 the workplace during working hours, causing a 23 significant disruption to business and operations.</p> <p>24 How can an employer determine which 25 employee's information to provide in the list if</p>	<p style="text-align: right;">Page 550</p> <p>1 fail to maintain the privacy of such information.</p> <p>2 Increasingly we're seeing large and 3 global sophisticated companies that have been the 4 target of significant data and security breaches. 5 How can we expect small and medium size employers or 6 the National Labor Relations Board or even labor 7 organizations to protect data in light of increasing 8 third-party criminal activity?</p> <p>9 And I want to touch on the one point that 10 the dissent requested comment on in terms of getting 11 employees their own potentially agency sponsored and 12 protected e-mail accounts to avoid the surrender of 13 proprietary information. NGA submits that option 14 raises a serious concern that the Board is putting a 15 seal of approval on the union solicitations and 16 communications to employees and could be perceived 17 by workers as coercive or intimidating in that the 18 federal government is now monitoring and approving 19 union speech. Congress has required that the Board 20 remain neutral while preserving employee choice, and 21 any agency sponsored e-mail account would violate 22 that mandate for neutrality in the Board's 23 procedures.</p> <p>24 Thank you for allowing me to speak today.</p> <p>25 MR. PEARCE: Do members of your</p>

<p style="text-align: right;">Page 551</p> <p>1 organization have policies that reserve them the 2 right to supply employee e-mail addresses to third 3 parties? 4 MS. MACIEL: NGA's membership is made up 5 of a wide variety of sizes, from single store 6 operators to a handful of operators to some medium 7 and larger size grocers, so it really does vary as 8 to what type of information they collect at the 9 beginning of employment. But as I mentioned, many 10 of these employees are part-time and seasonal. 11 MR. PEARCE: I understand that, but there 12 may be some members of your organization that have 13 those kinds of requirements? 14 MS. MACIEL: I can't answer that question 15 specifically because I haven't asked that of NGA's 16 members, but I would presume that probably some of 17 them do. I don't know how many. 18 MR. PEARCE: Would that impact upon your 19 view of the disclosure of e-mail addresses? 20 MS. MACIEL: No, because I think even if 21 employers have personal information of their 22 employees, the employee should be required to opt in 23 to disclosures at a minimum if that's going to be 24 given to labor unions. I think employee choice in 25 this regard, just like employee choice on electronic</p>	<p style="text-align: right;">Page 553</p> <p>1 the workplace for reasons other than terms and 2 conditions of employment. 3 MS. SCHIFFER: Could you clarify for me 4 on this opt-in whether your position is that that 5 would apply to the current Excelsior requirement? 6 MS. MACIEL: My comments today are 7 related to the Board's proposal with respect to 8 opting in for the changes. Currently, I understand 9 that there is no opt-in obligation under Excelsior. 10 MS. SCHIFFER: And would the opt-in under 11 your position also apply to the employee opting in 12 to receive e-mail and phone communications from the 13 employer as well regarding the campaign? 14 MS. MACIEL: I think that if an employer 15 is communicating to its employees about the 16 consequences of unionization as it relates to its 17 terms and conditions of employment, that is part and 18 parcel to what the employer can communicate about in 19 any fashion. 20 MS. SCHIFFER: So employees would receive 21 campaign information from the employer, but they 22 would need to opt in to receive it from the union. 23 MS. MACIEL: Yes. 24 MR. PEARCE: One last question about 25 opting in. How would you recommend this opting in</p>
<p style="text-align: right;">Page 552</p> <p>1 signatures of authorization cards, that needs to be 2 consented to by the employee. 3 MR. PEARCE: Would there be a distinction 4 between that kind of consent and consent that an 5 employee ought to have or possibly should have to an 6 employer providing their information to other third 7 parties? Would you say that opting in and opting 8 out should be across the board for all third-party 9 disclosure? 10 MS. MACIEL: I'm not sure I understand 11 your question, because I don't know when -- 12 MR. PEARCE: Simply, if an employer makes 13 an employee as a condition of employment sign an 14 agreement saying, "We reserve the right to supply 15 your e-mail information to other organizations like 16 the Kiwanis Club," or whatever, shouldn't that 17 policy be an across the board policy, this opting 18 policy? 19 MS. MACIEL: If an employer is disclosing 20 employee private information to third parties 21 outside of the terms and conditions of employment, 22 then I would think that you should be able to 23 distribute it to anybody, but I'm unaware of 24 employers distributing their private personal 25 information of their employees to anybody outside of</p>	<p style="text-align: right;">Page 554</p> <p>1 go? Should it be something that the employer 2 administers? 3 MS. MACIEL: Yes. 4 MR. PEARCE: So wouldn't you think that, 5 if an employer administers an opt-in policy with 6 respect to unit contact, that could be perceived as 7 polling employees' sentiments and desires about 8 union activity? 9 MS. MACIEL: I don't think so, if that is 10 what the Board is implementing in part of its 11 regulations. So no, I don't think that that would 12 be considered coercive or surveillance or polling. 13 MR. PEARCE: And why wouldn't you? 14 MS. MACIEL: I wouldn't think so, because 15 you're implementing a regulation to protect and 16 balance employees' privacy rights against the rights 17 of employees to make sure that that information is 18 being used for the purposes that it's intended to. 19 MR. PEARCE: And would you have a problem 20 with a system that provides, as has been suggested, 21 for an unsubscribability on the part of the worker? 22 MS. MACIEL: I think an unsubscribe 23 situation doesn't really address the issue, because 24 you're still then having compulsory disclosure of 25 private information without employee consent, and</p>

<p style="text-align: right;">Page 555</p> <p>1 that's the heart of the problem. I think at the end 2 of the day if someone has to unsubscribe, they're at 3 least receiving that communication from a labor 4 union at home or in their personal account or on 5 their personal cell phone. Initially that first 6 message is potentially unsolicited, and that should 7 only be received with their consent. 8 MR. PEARCE: Thank you. 9 MR. JOHNSON: Let's assume it's an 10 opt-out versus an opt-in, and let's assume it's an 11 opt-out. Why was an opt-out any lesser form of 12 informed consent assuming it basically says, "Look, 13 if you do not opt out your personal information goes 14 over to the labor organization?" 15 MS. MACIEL: I think it's a slippery 16 slope, and I think that the opt-out provision, 17 again, is one less step away from true employee 18 consent. You have to receive that initial message 19 to begin with in order to opt out, and if you don't 20 opt out you're going to continue to receive that, 21 and that would be implied consent. 22 MR. JOHNSON: What if it comes from the 23 government and it basically says that -- I mean, 24 this happens all the time in class actions, as you 25 know, because I know your firm defends a lot of</p>	<p style="text-align: right;">Page 557</p> <p>1 Hensel. 2 MS. HENSEL: Good afternoon. Again, 3 thank you once again. It's been a pleasure to be 4 before you and have an opportunity to share my 5 views. 6 I'd like to start with a spirit of table 7 cooperation here. The one thing I think we all seem 8 to uniformly agree on is the idea of a government 9 portal to facilitate the communications between the 10 union and its potential hopefully future members. I 11 questioned myself when I looked at it whether or not 12 the portal could be viewed or if the Board had given 13 any thought to it appearing that it was sanctioning 14 certain communications simply by its operation, and 15 on that ground I agree with the National Grocers 16 Association. Unfortunately, from there we depart. 17 MR. JOHNSON: It has unified everyone on 18 it who's commented on it, frankly, that proposal. 19 MS. HENSEL: Well, the world does need 20 things to bring it together, so if government 21 portals what's going to do it today, it works for 22 me. 23 With respect to the technology issues, I 24 would rest on Jess's testimony because she certainly 25 is the expert. I couldn't repeat in any manner what</p>
<p style="text-align: right;">Page 556</p> <p>1 them. There is a third-party administrator who is 2 not the employer and is not the plaintiff's law 3 firm, and it basically sends the notice out, and it 4 says that your contact information is going over 5 unless you opt out. 6 MS. MACIEL: I think communications from 7 the government directly to employees in terms of 8 whether they should or should not opt out bleeds 9 into a risk of not having Board neutrality in the 10 processes. 11 MR. JOHNSON: But we have a lot of 12 notices that basically say, "By the way, we're 13 totally neutral in all these election matters." Why 14 couldn't a notice like that solve the issue? 15 MS. MACIEL: I still don't think it would 16 solve that issue. I think it's a slippery slope. 17 MR. JOHNSON: And just one last thing. 18 Basically, in terms of your experience in this 19 area -- do you defend class action litigation? 20 MS. MACIEL: I do. 21 MR. JOHNSON: So are opt-outs commonly 22 used? 23 MS. MACIEL: Yes. Depending on the 24 jurisdiction, but yes. 25 MR. PEARCE: Thank you very much. Ms.</p>	<p style="text-align: right;">Page 558</p> <p>1 she said, but it certainly made sense to me. I 2 don't think that the Labor Board is equipped to do 3 that. 4 Anyway, information that should be 5 contained on a list, this personal information, for 6 50 years we've had a name, we've had a home address, 7 and including a phone number and an e-mail address 8 does not violate anyone's privacy in any which way 9 or form. I don't know if any one of you have ever 10 googled yourself, but I can promise you that you can 11 find all of that information on line. Occasionally, 12 if it's a particular website, Spokeo or whatever, 13 you might have to pay a fee if you actually want to 14 access the profile, but I promise you the 15 information is available. 16 You can also find out how much you paid 17 for your house, exactly when you bought it and who 18 you bought it from. So this notion that there is 19 this private information that needs to be retained 20 and kept close to the employer's heart I think is a 21 bit of a red herring. The information's out there. 22 There's no way around it. 23 Frankly, as you know, the employers are 24 concerned about their free speech rights with 25 respect to shortening the time period between the</p>

<p style="text-align: right;">Page 559</p> <p>1 petition and the election. The union is equally 2 entitled to free speech rights. That means access 3 to the entire bargaining unit, and that means access 4 in the same or similar ways that the employer has 5 access, which is through cell phone numbers, e-mail 6 addresses and home telephone numbers. 7 The days of union visits to people's 8 homes I think are -- I wouldn't say it's over, but I 9 think it's a much less popular manner of organizing 10 these days. Especially given the time constraints 11 on people, it's much easier to make a phone call or 12 send a text message or shoot out an e-mail to 15 13 people at once than it is to try to make these 14 individual home visits. That's my position on 15 privacy. I think it's a complete red herring. The 16 information is out there. 17 With regard to any notion that the union 18 is going to misuse information on the Excelsior 19 list, this same concern was brought up in the 20 Excelsior case, and I believe the determination at 21 that time was, "We are going to deal with that if 22 and as problems arise." I don't know of any long 23 litany of Board cases dealing with how union 24 organizers misused Excelsior list information. It 25 doesn't exist. Again, I think that's another red</p>	<p style="text-align: right;">Page 561</p> <p>1 sorry, my time is up -- and turning it over prior to 2 the final date for entry of a stipulation so that 3 the parties have something to work with. Thank you. 4 MR. JOHNSON: It sounds like you were 5 referencing something like a Spokeo that has a bunch 6 of personal e-mail addresses on it. Do you have 7 something in mind? 8 MS. HENSEL: Well, Spokeo.com is one. 9 There's a hundred of them, sites where you can do a 10 background check on just about anybody you want to 11 as long as you pay your \$39.95. 12 MR. JOHNSON: But those tend to be 13 business e-mail addresses if you get them. I used 14 to do a lot of marketing back in the day, and that's 15 what I would typically find. Do you have a 16 particular site that has personal e-mail addresses 17 like that? 18 MS. HENSEL: There are so many different 19 sites out where I have found people's personal 20 e-mails, you know, when I'm looking for an old 21 friend, say. I've never used them in the context of 22 my work, but yes, they do exist. 23 MR. JOHNSON: So is it relatively easy to 24 find personal e-mails just out on the internet? 25 MS. HENSEL: Whether they're accurate or</p>
<p style="text-align: right;">Page 560</p> <p>1 herring. We've had personal information for 50 2 years, and apparently we've done a pretty good job 3 of using it wisely and using it respectfully. 4 With regard to the date of the turnover 5 of the Excelsior list, I advocated yesterday for the 6 earlier we get a position, the better. I think the 7 earlier we get the Excelsior list, the better, 8 because that Excelsior list helps to inform the 9 position of the parties. 10 If we get that Excelsior list prior to or 11 during the pendency of a stipulation negotiation, 12 there might be a whole lot of issues that can be put 13 to bed by the parties by simply being able to 14 negotiate off of a list. Everyone's got the full 15 information. We know who we're talking about. We 16 know what their classifications are. We know when 17 they work. 18 That way people can speak with full 19 knowledge, and this includes the Board agent who's 20 attempting to mediate this stipulation. Everybody 21 can work at it with the full information. Of 22 course, this requires the employer coming into the 23 process with good faith and wanting to get to a 24 stipulation. Again, I would urge you to consider 25 requiring turning over an Excelsior list -- I'm</p>	<p style="text-align: right;">Page 562</p> <p>1 not, I suppose, is another question. Are you 2 suggesting that we should rely on our own ability to 3 research the matter as opposed to asking the 4 employer to provide it? 5 MR. JOHNSON: Well, I don't know. At the 6 end of the day it sounds like your position is that 7 these things are easy to find out there and that 8 indicates that there's no privacy. Is that correct? 9 MS. HENSEL: That is my position. 10 However, insofar as it's the employer's obligation 11 to provide information about their employees and 12 they're most likely to have the most updated 13 information, I still think they should be required 14 to provide what they have rather than risk, you 15 know, finding a personal e-mail address on line 16 that's five years old and no good anymore. 17 MR. JOHNSON: Would it be fair to say 18 that at least when people submitted their comments 19 to us, or at least when you submitted your comments 20 to us in your request to speak, that you didn't put 21 your personal e-mail address on there? 22 MS. HENSEL: No, I didn't, but you can 23 have it if you'd like. 24 MR. JOHNSON: I'm very flattered, first, 25 but that's not necessary, second.</p>

<p style="text-align: right;">Page 563</p> <p>1 (Laughter.)</p> <p>2 MR. PEARCE: Thank you all very much.</p> <p>3 (Recess.)</p> <p>4 MR. PEARCE: Mr. Wszolek has a plane to</p> <p>5 catch, so be kind. We're back in session. Mr.</p> <p>6 Wszolek, you may proceed.</p> <p>7 MR. WSZOLEK: Mr. Chairman and members of</p> <p>8 the Board, my name is Fred Wszolek. I'm a</p> <p>9 spokesperson for the Workforce Fairness Institute.</p> <p>10 Thanks for the opportunity to address the Board on</p> <p>11 that portion of the proposed election rule that</p> <p>12 would extend the Board's Excelsior list requirements</p> <p>13 to include disclosure of an employee's telephone</p> <p>14 numbers, and, where available, e-mail addresses to</p> <p>15 the union seeking to organize them. We are opposed.</p> <p>16 We believe that an employee's personal contact</p> <p>17 information, whether it be a home or e-mail address,</p> <p>18 should not be disclosed to third parties absent the</p> <p>19 employee's consent.</p> <p>20 In his famous dissent in the 1928 case</p> <p>21 <i>Olmstead v. United States</i>, Justice Louis Brandeis</p> <p>22 said "the right to be left alone is the most</p> <p>23 comprehensive of rights, the right most valued by</p> <p>24 civilized men." Today Brandeis's view is the law,</p> <p>25 and the right to be left alone, the right to</p>	<p style="text-align: right;">Page 565</p> <p>1 rules in this area, it should do so in a manner</p> <p>2 consistent with our society's contemporary concern</p> <p>3 for individual privacy. That means putting the</p> <p>4 worker in control and not releasing any personal</p> <p>5 contact information absent his or her prior concept.</p> <p>6 In the Board's Excelsior Underwear</p> <p>7 decision, the employer mailed an eight page letter</p> <p>8 to employees that allegedly made misstatements about</p> <p>9 the union and contained threats of retaliation. It</p> <p>10 then refused to give the union a mailing list of</p> <p>11 employees to enable the union to counter what it</p> <p>12 said. It was under those circumstances that the</p> <p>13 Board adopted the current Excelsior requirements to</p> <p>14 remove an impediment to communication and to allow</p> <p>15 for a fully formed and reasonable choice.</p> <p>16 While disclosure of an eligibility list</p> <p>17 with home addresses may have been necessary 50 years</p> <p>18 ago under the facts in that case, disclosure of</p> <p>19 personal contact information such as being proposed</p> <p>20 is wholly unnecessary today. Today, if an employer</p> <p>21 communicates with his employees on the issue of</p> <p>22 unionization it will likely be by e-mail or the</p> <p>23 internet or at a mandatory meeting. The contents of</p> <p>24 these communications will become readily known to</p> <p>25 the union, which can counter them on its own website</p>
<p style="text-align: right;">Page 564</p> <p>1 privacy, is recognized as an essential component of</p> <p>2 our liberty. It protects our individuality, allows</p> <p>3 us to exercise control over information about</p> <p>4 ourselves, and to make decisions free from coercion.</p> <p>5 There is no express right to privacy in</p> <p>6 the Constitution. Its contemporary contours largely</p> <p>7 developed in American law over the past half</p> <p>8 century. In addition to important Supreme Court</p> <p>9 jurisprudence, as privacy has become increasingly</p> <p>10 threatened by new technologies and business</p> <p>11 methodologies, a variety of state and federal laws</p> <p>12 have been passed protecting individuals from</p> <p>13 unwanted disclosure of personal information.</p> <p>14 The Board's proposal is inconsistent with</p> <p>15 these developments in the law. It improperly</p> <p>16 invades private space and is contrary to the</p> <p>17 reasonable expectations of today's workers. An</p> <p>18 employee's personal contact information is provided</p> <p>19 to the employer with the expectation that it will be</p> <p>20 kept private and used by the employer in the event</p> <p>21 of an emergency or when circumstances require that</p> <p>22 the employee be contacted outside of work hours and</p> <p>23 of course to send you the delightful tax document at</p> <p>24 the end of the year.</p> <p>25 If the Board wishes to modernize its</p>	<p style="text-align: right;">Page 566</p> <p>1 or blog, all of which are easily accessible, or by</p> <p>2 contacting employees by the manner they have</p> <p>3 consented to.</p> <p>4 Let me add that picketing, even the</p> <p>5 threat to picket, is inherently coercive because of</p> <p>6 the history of violence surrounding it. Today</p> <p>7 contemporary media with its 24 hour news cycle is</p> <p>8 saturated with stories of union intimidation and</p> <p>9 violence. I would submit an exhibit which I</p> <p>10 respectfully request be made part of the hearing</p> <p>11 record that catalogs a very small bit of it. It</p> <p>12 supports the conclusion that the existing rule that</p> <p>13 forcing the disclosure of employees' home addresses</p> <p>14 without their consent is intimidating, if not</p> <p>15 coercive, and that the proposal for expanding the</p> <p>16 disclosure of personal information is ill</p> <p>17 considered. Thank you.</p> <p>18 MR. JOHNSON: Do you want us to overrule</p> <p>19 <i>Wyman-Gordon</i>?</p> <p>20 MR. WSZOLEK: No. My understanding is</p> <p>21 that the court gave you the discretion as to what</p> <p>22 information is prudent to share and that now you</p> <p>23 could choose to decide that it's prudent to no</p> <p>24 longer share home addresses.</p> <p>25 MR. JOHNSON: But the court seemed to</p>

<p style="text-align: right;">Page 567</p> <p>1 give the imprimatur or lend its imprimatur to that 2 policy. What do you think has changed since then? 3 MR. WSZOLEK: I think all of our desire 4 to protect our personal privacy has grown 5 dramatically in the last 50 years, and the idea that 6 someone can come knocking on your door at any time 7 they want without your permission, without being 8 invited, to pressure you to consent to unionization 9 is just not the way we feel things should be these 10 days. 11 MR. JOHNSON: Well, is there a Supreme 12 Court case other than the FLRA case, which dealt 13 with the Privacy Act/FOIA interplay on home 14 addresses and which obviously was federal workers, 15 which we don't regulate, is there some Supreme Court 16 precedent that you're basing this on? 17 MR. WSZOLEK: No. I'm just basing it on 18 the trend toward us wanting to control more of our 19 personal contact information, to control our 20 privacy, and to avoid identify theft. There is just 21 a whole range of reasons why we want more control 22 rather than less these days. 23 MS. SCHIFFER: And this right to be left 24 alone, would this contact restriction that you're 25 proposing apply both as to communications about the</p>	<p style="text-align: right;">Page 569</p> <p>1 speech and those kind of opportunities being 2 protected. Wouldn't that be counter to that notion? 3 MR. WSZOLEK: If the employee consents to 4 the release of his home address, perhaps he can 5 consent to whether he wants to have that just be for 6 mailing purposes or to be actually visited. They 7 should have control of that and open the door or 8 close the door. 9 MR. PEARCE: Well, would that apply to 10 the employer? Should the employee be able to opt 11 out of the employer sending them information or 12 their position on unions or anti-union messages? 13 MR. WSZOLEK: I don't think we would 14 object to applying the same stricture to a mailing 15 from the company or the company coming and visiting 16 you at home. That's your home. 17 MR. PEARCE: What about e-mails? 18 MR. WSZOLEK: If the employee consents to 19 the release of his e-mail address for those reasons, 20 that's certainly useful. 21 MR. PEARCE: So you're saying that the 22 employee should have the right to opt out of getting 23 that information via e-mail from the employer as 24 well. 25 MR. WSZOLEK: Perhaps from his personal</p>
<p style="text-align: right;">Page 568</p> <p>1 campaign from any party? 2 MR. WSZOLEK: Well, I suppose if you're 3 in the workplace and the employer wants to 4 communicate with you about the company, I'm not sure 5 you can necessarily opt out of that. There has been 6 great debate over whether people can opt out of 7 releasing their e-mail address, which is an 8 electronic address that doesn't exist in the real 9 world, yet we seem to just accept as an absolute 10 given that being told where you live is fair game. 11 MS. SCHIFFER: So you're saying it would 12 apply to employer contacts through e-mail or through 13 home address? 14 MR. WSZOLEK: I suppose it could. But 15 the Excelsior decision involved a mailing to 16 people's homes. Companies just really doOn't do 17 that anymore. They have so many other methods of 18 communicating with their workers that they don't 19 need to mail eight page letters to people's homes. 20 They can communicate in the workplace. 21 MR. PEARCE: Well, isn't that the point? 22 If companies are not communicating by mail, then the 23 union should be able to communicate the way the 24 companies can, don't you think? We heard testimony 25 about robust debate and discourses as part of free</p>	<p style="text-align: right;">Page 570</p> <p>1 e-mail address. If it's the company e-mail address, 2 I don't think the employee can control the flow of 3 content from the company's e-mail account. 4 MR. PEARCE: I see. And if the union 5 wants to communicate with the employee in the 6 company's e-mail account so that it has the same 7 access as the company, do you have a problem with 8 that? 9 MR. WSZOLEK: I think there is a property 10 issue there, that the company need not necessarily 11 turn over their digital property to the union. 12 MR. PEARCE: Thank you very much. Mr. 13 Hogan. 14 MR. HOGAN: Thank you very much. I'm 15 Aloysius Hogan, senior fellow with the Competitive 16 Enterprise Institute, a D.C. free market think tank. 17 My colleague, Trey Kovacs, points out 18 some of the unintended consequences that could arise 19 from the Board's proposed rule. Of particular 20 concern is privacy. I want to run through something 21 you all are familiar with, but for people who may be 22 watching this or reading the transcript ultimately, 23 it's Fisher versus Communication Workers of America. 24 It displays some of the inconsistencies in 25 determining when the federal labor law preempts</p>

<p style="text-align: right;">Page 571</p> <p>1 state law.</p> <p>2 The case involves the Communication</p> <p>3 Workers of America Local in North Carolina, where</p> <p>4 its union president, John Glenn, posted in a public</p> <p>5 area at the company's North Carolina facility the</p> <p>6 names and Social Security numbers of AT&T employees</p> <p>7 who chose to rescind their union membership. At</p> <p>8 first the AT&T employees filed an unfair labor</p> <p>9 practice with the NLRB claiming that their NLRA</p> <p>10 Section 7 rights were violated by being coerced into</p> <p>11 exercising the employees' right to</p> <p>12 self-organization. The NLRA protects every worker's</p> <p>13 right to refrain from exercising their Section 7</p> <p>14 rights.</p> <p>15 A former general counsel, Lafe Solomon,</p> <p>16 refused to prosecute CWA for posting and</p> <p>17 disseminating the AT&T employees' Social Security</p> <p>18 numbers, but the CWA and NLRB agreed to a voluntary</p> <p>19 settlement where CWA admitted no wrongdoing. After</p> <p>20 that, the employees, with legal assistance from the</p> <p>21 National Right to Work Foundation, filed a lawsuit</p> <p>22 in North Carolina under its Identify Theft</p> <p>23 Protection Act. The trial court and the North</p> <p>24 Carolina Court of Appeals found that the unions are</p> <p>25 entitled to a special exemption from being penalized</p>	<p style="text-align: right;">Page 573</p> <p>1 won't move forward, if there are federal exemptions</p> <p>2 judicially created, and if, as has been previously</p> <p>3 mentioned, legislators are not moving forward with</p> <p>4 correcting some of this, it can cause a problem.</p> <p>5 I wanted to move to another quick point.</p> <p>6 As I mentioned earlier, I analogized to the</p> <p>7 Labor-Management Reporting Disclosure Act of 1959,</p> <p>8 and suggested that that provides a ready structure</p> <p>9 for elections in the union context. And the guide</p> <p>10 for election officials regarding conducting local</p> <p>11 union officer elections provides a reference in</p> <p>12 Chapter 7, Inspecting the Membership List, which</p> <p>13 states, quote: "Candidates in union officer</p> <p>14 elections also have a right to inspect a list of</p> <p>15 members and their addresses subject to a collective</p> <p>16 bargaining agreement which requires union membership</p> <p>17 as a condition of employment. This right to inspect</p> <p>18 is limited to once within 30 days before the</p> <p>19 election, and does not include the right to copy the</p> <p>20 list."</p> <p>21 And I want to take up the last few</p> <p>22 seconds here to point out that an opt-in avoids some</p> <p>23 of the problems of undeliverability and flagging and</p> <p>24 a degraded score that had been mentioned earlier.</p> <p>25 Really, it comes down to freedom and people's</p>
<p style="text-align: right;">Page 572</p> <p>1 for revealing employees' personal information. Both</p> <p>2 North Carolina courts ruled that unions may put</p> <p>3 employees at risk of identify theft because the</p> <p>4 activity is covered by the NLRA and consequently may</p> <p>5 not be punished by state authorities. North</p> <p>6 Carolina's courts have held that the federal labor</p> <p>7 law preempts state identify theft law even though it</p> <p>8 is arguably unrelated to national labor policy and</p> <p>9 involves deep-rooted local interests.</p> <p>10 Our concern, Competitive Enterprise</p> <p>11 Institute's concern, is that the new rule which</p> <p>12 would supply unions with employees' phone numbers</p> <p>13 could put employees more at risk. You know, you run</p> <p>14 into some of the same concerns with Freedom From</p> <p>15 Union Violence Act that's been proposed to make up</p> <p>16 for the divot, let's say, that was taken out of the</p> <p>17 Hobbs Act with the Enmons case in terms of union</p> <p>18 violence and extortion.</p> <p>19 You're running into some of the same</p> <p>20 issues here with the remedies that people would have</p> <p>21 when they face forms of coercion, extortion and</p> <p>22 violence at the hands of unions. There is a problem</p> <p>23 between the lack of federal enforcement if the</p> <p>24 general counsel doesn't move forward on something in</p> <p>25 a way that the workers find useful, if the states</p>	<p style="text-align: right;">Page 574</p> <p>1 liberties. I might go to a bar tonight and give my</p> <p>2 e-mail address to somebody, but that's a free</p> <p>3 choice. When the government gets in between and</p> <p>4 starts mandating, that's what people don't like.</p> <p>5 Whether it's the government getting between the</p> <p>6 student and the university or it's the government</p> <p>7 getting between the employee and the employer or the</p> <p>8 government getting in between a doctor and the</p> <p>9 patient, as it were, that's where the line is drawn,</p> <p>10 when it's government coercion versus, for example,</p> <p>11 an association which could fight for improving your</p> <p>12 situation or whatever association it may be, and</p> <p>13 they have lobbyists and you freely associate with</p> <p>14 them. You may pay the dues and join a couple of</p> <p>15 associations. But when the government is mandating</p> <p>16 stuff, that's where the dividing line is.</p> <p>17 MR. PEARCE: First of all, this NPRM</p> <p>18 doesn't propose the disclosure of Social Security</p> <p>19 numbers.</p> <p>20 MR. HOGAN: That's exactly right, but</p> <p>21 that was obviously at issue in the Fisher case.</p> <p>22 MR. PEARCE: Do you have an idea as to</p> <p>23 how many union coercion cases there are versus the</p> <p>24 number of employer threat and unfair labor practice</p> <p>25 cases sent out via e-mail and text?</p>

<p style="text-align: right;">Page 575</p> <p>1 MR. HOGAN: I don't have a statistic on 2 that. I know where you're going with that, but I 3 don't have a statistic on it, though. 4 MR. JOHNSON: I understand the state 5 action point, your last point, and obviously we're a 6 federal agency, so if we establish rules it's going 7 to be state action. Going back to the first point, 8 is what you're saying basically if we jump into this 9 area we are going to have to construct a remedy, 10 because otherwise, because of Garmon preemption or 11 Machinists preemption, no state court is going to be 12 able to follow up with state law that could be an 13 effective remedy? 14 MR. HOGAN: You're exactly right. 15 MR. PEARCE: Thank you very much. Ms. 16 Sencer. 17 MS. SENCER: Thank you for having me. 18 This is my fourth panel here, but I'll reintroduce 19 myself since this is my first one today. My name is 20 Caren Sencer. I'm a shareholder at Weinberg, Roger 21 & Rosenfeld. We are a labor firm based in Alameda, 22 California, four offices, lots of clients up and 23 down the West Coast, mainly in California, Hawaii 24 and the rest of the western states. 25 I'm going to start at a different point.</p>	<p style="text-align: right;">Page 577</p> <p>1 every week by hand, but their listed address is a 2 P.O. box. When you're organizing you can't go visit 3 somebody at a P.O. box. The Agricultural Labor 4 Relations Board, which you've heard me talk about 5 before, requires that the employer provide an actual 6 residence to the union within two days. The 7 employer in that case does have to go out of their 8 way to find that address, but it actually requires a 9 street address to be provided so that there is 10 actually a way to have communication. 11 In those same industries you find that 12 employees are not recalled to their seasonal work by 13 means of a letter to their P.O. box. They are 14 recalled by means of a call to their cell phone. It 15 just seems like a logical extension of that to have 16 that same method of communication that the employer 17 uses to reach the employee be the method that's 18 given to the union as a way to reach the employee. 19 That doesn't seem particularly radical. 20 I also advocate for the inclusion of the 21 shifts. I know some people have said that they 22 think this might give rise to something like 23 increased property theft. If the union is doing 24 their job and organizing they should be learning 25 what the shifts are about anyway, but earlier in the</p>
<p style="text-align: right;">Page 576</p> <p>1 I think that regardless of the format that it winds 2 up in, at the very least the standing Excelsior list 3 rule should be formalized. The reason I say that is 4 that although it's been in place for 50 years and 5 has not been disturbed, this agency tends to have 6 some flip-flop decisions in its history, and to 7 protect it regardless of what the membership of the 8 Board is at any given time, that very basic 9 provision in some format should be protected. 10 I do, of course, advocate for including 11 more information than the home address or the 12 address as it is. The address is not really a great 13 way to get in touch with people, nor does the list 14 that you receive necessarily even include a home 15 address. One thing that I see frequently with one 16 of the client groups that I work with is they have a 17 lot of seasonal workers that they're organizing, 18 National Labor Relations Board covered, but somewhat 19 agriculturally related, packing houses, salad 20 plants, those types of things, migrant work, 21 sometimes migrant work for the same employer 22 throughout the year, but at three different 23 locations for the same employer throughout the year. 24 But for purposes of what they give the 25 employer for an address, they receive their check</p>	<p style="text-align: right;">Page 578</p> <p>1 campaign it actually becomes less disruptive to the 2 rest of the family if the union has the information 3 regarding the shift. 4 It's less disruptive to the rest of the 5 family, because then the union representatives are 6 visiting at a time when they know that I'm not 7 there. They know that I work nights, let's say. 8 Let's say I work at a 24 hour facility and I work 9 nights. If they come and knock on my door at eight 10 o'clock in the morning they've probably disrupted my 11 sleep cycle, which makes it harder for me to perform 12 my job the next day and may interrupt anything else 13 that's going on inside my home. Having the shift 14 information there would be quite helpful in ensuring 15 that the rest of the family as well as the sleep 16 schedule of employees who work on something other 17 than the nine to five shift are not disrupted by 18 visits from union representatives. 19 The ag board, again, also requires these 20 lists to be produced in two days. It's not 21 particularly burdensome. Most employers keep some 22 type of electronic recordkeeping now, and they use 23 that electronic recordkeeping for their payroll 24 system, amongst other things. Larger employers or 25 employers who have part-time help have even more of</p>

<p style="text-align: right;">Page 579</p> <p>1 a reason that this information is digitized in some 2 way: so that it's easily accessible when they need 3 to call additional employees in. Producing these 4 kinds of lists and producing then in a short time 5 frame is not particularly overwhelming. 6 There was one question that was raised 7 earlier regarding people who are challenged and are 8 going to be challenged and how that would be dealt 9 with if there are more challenges. In the current 10 situation, when there is a stipulated election 11 agreement and some people are voting by challenge 12 due to the agreement of the parties, those people 13 show up on the Excelsior list even if they are going 14 to be challenged. I don't why this raises any more 15 concern that there are a couple more people on that 16 list who will vote as challenged ballots but will 17 still show up on the Excelsior list. 18 In short, I think the Board's rule 19 actually should be more broadly stated to provide 20 all contact information or any contact information 21 that the employer may have, and that way you're not 22 tied down to how the technology may change over time 23 and what methods of communication might be available 24 to the employer and therefore to the union by 25 extension. Thank you.</p>	<p style="text-align: right;">Page 581</p> <p>1 Although California was sort of my adopted state 2 before I came back here, it would be fair to say 3 that employers are very heavily regulated in 4 California, so they have to keep this information in 5 many dimensions. Right? 6 MS. SENCER: Yes. 7 MR. JOHNSON: And it would also be fair 8 to say that the employees we're talking about are 9 essentially seasonal or migratory, so the 10 opportunity for the union to communicate with them 11 in terms of physical space is fairly limited because 12 they're moving around. 13 MS. SENCER: Yes and no to some degree, 14 because many of the unions that do organizing of 15 groups who have migrant labor, they have offices 16 that are set up in each of the areas where they may 17 be working throughout the year, organizers who are 18 down in those areas. And depending on the length of 19 the season, and some of these seasons can be longer 20 than others -- I mean, I found out recently that 21 back baklava has a season. It's a couple of months 22 in the early fall. 23 MR. JOHNSON: So we're not in season yet? 24 MS. SENCER: We're not in season yet. 25 But it turns out they have a season, and this</p>
<p style="text-align: right;">Page 580</p> <p>1 MR. PEARCE: In your experience, do you 2 know whether or not employers have an obligation to 3 keep a list relative to shifts and hours worked and 4 contacts based on responsibilities for wage and hour 5 or other governmental agencies? 6 MS. SENCER: For some things they do and 7 some things they don't. I do a lot of work with 8 Teamsters. There's a lot of drivers involved. They 9 always know the hours that they work because they're 10 subject to the DOT hours of service regulation, so 11 they always know what they are. The same is true if 12 you work with anyone who's in healthcare. They need 13 to know how many hours healthcare staff has been on 14 shift because they like to make sure that they get 15 rest due to patient safety concerns. They also now 16 how many are going to be on shift because they have 17 ratios that they have to keep. 18 So to some degree that really depends on 19 the industry and whether or not there is other 20 regulation that requires them to keep it. But they 21 tend to keep that information because they want to 22 make sure that they don't violate anything like 23 overtime requirements, too, so they always know how 24 many hours a week employees are going to be working. 25 MR. JOHNSON: One quick follow-up.</p>	<p style="text-align: right;">Page 582</p> <p>1 particular facility has the same people who come 2 back every year to work in it. They actually do 3 live in the area, but they just have other jobs the 4 rest of the year. In that case the physical address 5 is really helpful, but other information would be 6 very, very helpful. When it comes to a salad plant 7 with three locations, and I'm thinking of one with 8 locations in Yuma and El Centro and in Salinas, 9 across two states, those people all use post office 10 boxes and cell phones. 11 MR. JOHNSON: But most of the workers we 12 regulate are not nomadic, essentially. 13 MS. SENCER: I would say most but not 14 all. These are people who are covered by the 15 National Labor Relations Act. 16 MR. JOHNSON: And California's made a 17 different call essentially on privacy versus union 18 access. I mean, there's basically the LA County 19 versus LACERA case, which was a big one that came in 20 last year, but even in that case the California 21 Supreme Court said nothing in the relevant statutes 22 or case law appears to prohibit agencies such as 23 PERB or ERCOM, two of the public equivalents of us, 24 from developing notice and opt-out procedures that 25 would allow employees to preserve the</p>

<p style="text-align: right;">Page 583</p> <p>1 confidentiality of their home addresses and 2 telephone numbers, so even in California the Supreme 3 Court gave a nod to the consideration here of 4 privacy. 5 MS. SENCER: And there is always a 6 consideration of privacy, but it is a balancing act 7 you are always trying to strive between. 8 I'm going to anticipate that a question 9 might be asked about the opt-out versus opt-in on 10 this. I think that an opt-out, if either are being 11 considered, that an opt-out makes it easier for an 12 employer to make a fully informed choice. And it is 13 less of a way for the employer to take the pulse of 14 the bargaining unit regarding what they want. If 15 you have to opt in through the employer, that is 16 subject to all kinds of pressure on the employee for 17 making their voice known. 18 MR. JOHNSON: One might say it's 19 equivalent to handing out, you now, union related 20 hats, for example, and seeing who takes the hat and 21 who doesn't. 22 MS. SENCER: But it's okay for the union 23 to take the pulse of the bargaining unit. Under 24 current law it's not okay for the employer to do it. 25 MR. JOHNSON: Right. That's what I'm</p>	<p style="text-align: right;">Page 585</p> <p>1 supporters, including sometimes employees in the 2 bargaining unit at issue. 3 This information doesn't do the union any 4 good sitting in a closed box. They need to use it. 5 And of course once these individuals obtain the 6 information, they in turn can disseminate it to 7 still others, either intentionally or 8 unintentionally, simply by being careless with it. 9 Once employees' personal information is 10 out there, it's both inevitable and foreseeable that 11 some of those individuals will misuse it. An easy 12 example. An individual who has personal information 13 about an employee could use that not only to target 14 them for union related reasons but simply because 15 they have a personal grudge against that person or 16 perhaps to stalk a female co-worker they have an 17 unhealthy attraction to. 18 The identify of course can most obviously 19 be used for identify theft purposes, which is one of 20 the fastest growing white collar crimes around. For 21 these reasons, the Board can't simply require that 22 citizens' private information be given to another 23 organization and simply hope for the best that 24 they'll take care of it. The information needs to 25 be safeguarded.</p>
<p style="text-align: right;">Page 584</p> <p>1 saying. It's the employer that's the one who's in 2 charge of deciding or monitoring who's opting in and 3 who's opting out. 4 MR. PEARCE: Thank you. Mr. Messenger. 5 MR. MESSENGER: Mr. Chairman and Board 6 members, thank you again for the opportunity to 7 testify today. Again, my name is Bill Messenger, 8 and I'm with the National Right to Work Legal 9 Defense Foundation. 10 Now, many have already spoken and written 11 about why disclosure of employees' personal 12 information, e-mail addresses, work schedules and 13 phone numbers to unions violates their right to 14 personal privacy. And while it's true, today I'd 15 like to address my comments about the problem created 16 by these disclosures to misuse of this information 17 by union supporters and by third parties. 18 Information is very difficult to protect 19 even under the best of circumstances because, of 20 course, it can easily be copied and easily 21 disseminated. And here the rule contemplates at 22 least implicitly that this information will be 23 disseminated by unions. In order to use it in an 24 organizing campaign, the union must naturally share 25 this information with its agents and potentially its</p>	<p style="text-align: right;">Page 586</p> <p>1 And the problem is I don't believe that 2 the Board can effectively require that unions 3 safeguard this information. The first question 4 should be: How could you write regulations that 5 impose certain protocols to make sure this 6 information is kept confidential and only used for 7 its intended purpose. Then, if you could craft such 8 regulations, does the Board have the legal authority 9 to even do it? Does it have the authority to 10 require that unions follow certain protocols for 11 this information? Could it punish a union for not 12 doing so? You know, making failure to protect 13 information an 8(b)(1) violation is a rather round 14 peg/square hole type situation. 15 And then even if you could do all those 16 things, as a practical matter how would the Board 17 actually enforce it to ensure that unions and their 18 supporters safeguard this information and use it 19 only for the intended purpose? Of course, these 20 problems are multiplied if you're talking about not 21 just the union but how the individual supporters use 22 it. You can even have jurisdictional problems, 23 because if the supporter we're talking about is a 24 direct union agent the Board might not even have 25 authority to do anything to that particular</p>

<p style="text-align: right;">Page 587</p> <p>1 individual who has that information.</p> <p>2 In short, I don't see how this agency can</p> <p>3 ensure that an employee's personal information once</p> <p>4 it's given to the union isn't misused by others,</p> <p>5 including without the union's intent or without the</p> <p>6 union's knowledge. The only way to avoid these</p> <p>7 problems is for the Board not to require this</p> <p>8 personal information be given to unions in the first</p> <p>9 reason. For that reason and others, the Foundation</p> <p>10 opposes the disclosure contemplated by this rule.</p> <p>11 Thank you.</p> <p>12 MR. PEARCE: How an employer ensure that</p> <p>13 personal information is not leaked? Let's say we</p> <p>14 have a love triangle going on on the plant floor</p> <p>15 that includes a confidential employee that has</p> <p>16 access to all of this information and all of that</p> <p>17 information gets out. That happens, doesn't it?</p> <p>18 MR. MESSENGER: It does happen, but there</p> <p>19 the government is not compelling that disclosure.</p> <p>20 So when one individual shares their information with</p> <p>21 another, or in this case an employer, that potential</p> <p>22 is there, and there are some state laws that can</p> <p>23 protect that, especially since employers are</p> <p>24 generally very liable for their actions.</p> <p>25 MR. PEARCE: But isn't the employer</p>	<p style="text-align: right;">Page 589</p> <p>1 occur then on working time and other things,</p> <p>2 surveillance issues.</p> <p>3 If we were to come out -- and I tell</p> <p>4 everyone this is hypothetical -- but if we would</p> <p>5 hypothetically come out no forced disclosure of</p> <p>6 business contact information, the employer is only</p> <p>7 required to disclose employee contact information</p> <p>8 like e-mail addresses if the employer happens to</p> <p>9 have it, but there is no requirement that the</p> <p>10 employer have it, we require unions if they end up</p> <p>11 sending e-mails to employee personal e-mail accounts</p> <p>12 that they have an unsubscribe link with appropriate</p> <p>13 sanctions if either that link is missing or not</p> <p>14 given effect if or when an employee unsubscribes,</p> <p>15 that kind of approach, is that better in a material</p> <p>16 way than having forced disclosure of work related</p> <p>17 information and personal contact information, or is</p> <p>18 that actually worse, in your view, for personal</p> <p>19 contact information to be in the mix?</p> <p>20 MR. MESSENGER: I think from the</p> <p>21 employee's point of view the personal information is</p> <p>22 worse. The problem with the work information, a lot</p> <p>23 of times there's a blend and employees will use work</p> <p>24 e-mails for personal purposes. That also brings up</p> <p>25 a whole host of employer related issues, you know,</p>
<p style="text-align: right;">Page 588</p> <p>1 compelling that disclosure? The employer can</p> <p>2 require employees to provide that information for</p> <p>3 its database.</p> <p>4 MR. MESSENGER: Yes. But the employer is</p> <p>5 a private organization. It's a whole different ball</p> <p>6 game when the federal government is compelling that</p> <p>7 disclosure. So now, as the government, you have a</p> <p>8 duty, I believe, to ensure that this information is</p> <p>9 safeguarded. If two private parties don't use</p> <p>10 information correctly, perhaps that is a</p> <p>11 justification for more regulation of them.</p> <p>12 But speaking to this rule today, the</p> <p>13 question is how can this agency ensure that the</p> <p>14 information given to unions isn't so much misused by</p> <p>15 the union intentionally but is safeguarded so it</p> <p>16 isn't misused by others, and I don't see how it can</p> <p>17 be done.</p> <p>18 MR. MISCIMARRA: Mr. Messenger, this is</p> <p>19 kind of a question I asked before. In your view,</p> <p>20 does work contact information stand on the same</p> <p>21 footing as personal contact information? And this</p> <p>22 would be the example. Let's suppose we concluded</p> <p>23 that requiring the disclosure of work contact</p> <p>24 information gives rise to other problematic</p> <p>25 information for us, like a solicitation that may</p>	<p style="text-align: right;">Page 590</p> <p>1 control over their own systems and IT systems such.</p> <p>2 The personal information purely about</p> <p>3 employees, let's say Hotmail accounts, their own</p> <p>4 personal accounts, that doesn't create those</p> <p>5 problems for the employer, but from the employee's</p> <p>6 point of that might be even be worse, because,</p> <p>7 again, for the employee themselves it's no longer</p> <p>8 associated with work.</p> <p>9 So if you do have an employee who keeps a</p> <p>10 very firm line between their working world and their</p> <p>11 working e-mail and their personal e-mail, like for</p> <p>12 example I do, I would say it's worse if my personal</p> <p>13 e-mail is floating out there than if you could find</p> <p>14 my work e-mail. I mean, my work e-mail, you can</p> <p>15 find it real easy. But that's for work. There is a</p> <p>16 reason it's out there, so people can contact me.</p> <p>17 But my personal e-mail, I would find a bigger</p> <p>18 violation of my privacy than disclosure of my work</p> <p>19 e-mail.</p> <p>20 MR. JOHNSON: What if there was an</p> <p>21 opt-out on the front end as opposed to an</p> <p>22 unsubscribe so that basically people had the same</p> <p>23 choice to allow their personal e-mail to go over,</p> <p>24 just like they had the choice upon being employed by</p> <p>25 the employer to agree to the condition of, "Well,</p>

<p style="text-align: right;">Page 591</p> <p>1 you have to disclose this contact information?"</p> <p>2 I'm talking about an Opt Out, that the</p> <p>3 employee get full notice that if you do nothing the</p> <p>4 default is this information is being turned over.</p> <p>5 MR. MESSENGER: I see two problems with</p> <p>6 the opt-out, the first of which of course puts the</p> <p>7 onus on the employee to do something. I don't</p> <p>8 believe the employee should have to do anything to</p> <p>9 protect their personal privacy. They should make</p> <p>10 the affirmative choice to put that out there. They</p> <p>11 shouldn't be put in a situation where, if I do</p> <p>12 nothing, something happens. Just as general human</p> <p>13 nature, the default usually happens. There's a</p> <p>14 reason, you know, companies give rebates instead of</p> <p>15 reducing the price. A lot of people just don't send</p> <p>16 in the rebates even if they could.</p> <p>17 MR. JOHNSON: For example, our votes in</p> <p>18 our election are based on who shows up, and so if</p> <p>19 you don't act you're stuck with the consequences of</p> <p>20 that.</p> <p>21 MR. MESSENGER: And then the other</p> <p>22 problem with the opt-out which I can't quite wrap my</p> <p>23 mind around is the time frame. We're talking about</p> <p>24 that under these proposed rules on the 9th or the</p> <p>25 11th day the information will be given out, so these</p>	<p style="text-align: right;">Page 593</p> <p>1 option to opt out at all.</p> <p>2 MS. SCHIFFER: Are your objections the</p> <p>3 same arguments with respect to the current Excelsior</p> <p>4 list requirements?</p> <p>5 MR. MESSENGER: I believe they've made</p> <p>6 similar objections, the identity theft issue</p> <p>7 somewhat lower. But the true value of the current</p> <p>8 Excelsior list isn't the address and contact</p> <p>9 information. It's really finding out who is</p> <p>10 employed at a particular facility. It's not that</p> <p>11 hard to find out where somebody's address is once</p> <p>12 you know their name.</p> <p>13 The true value of an Excelsior list to a</p> <p>14 union is now they know who the 200 people are who</p> <p>15 work at that particular facility. Without that list</p> <p>16 they don't know who the person is.</p> <p>17 MS. SCHIFFER: You don't think the unions</p> <p>18 need the addresses? Is that what you're saying?</p> <p>19 You don't think the unions are interested in getting</p> <p>20 the addresses?</p> <p>21 MR. MESSENGER: It probably makes life</p> <p>22 easier for the unions, but the privacy interests</p> <p>23 aren't quite as powerful as when you're talking</p> <p>24 about phone numbers and e-mail addresses. As some</p> <p>25 speakers have talked about before, you know, to go</p>
<p style="text-align: right;">Page 592</p> <p>1 employees will have a very short time frame to make</p> <p>2 the decision. And then of course there's the</p> <p>3 question of who provides the notice. I believe, as</p> <p>4 Chairman Pearce mentioned, having the employer doing</p> <p>5 that creates polling issues.</p> <p>6 If the employer can go around saying,</p> <p>7 "Who wants to opt out," and then if the agency does</p> <p>8 it you have a speed issue. When the petition is</p> <p>9 filed the agency would have to send out by mail a</p> <p>10 notice almost instantly to everyone involved,</p> <p>11 besides just the cost of having to do that every</p> <p>12 time an election was done. Even if the agency did</p> <p>13 that, the employees would have what, two or three</p> <p>14 business days to respond to that before the</p> <p>15 information goes out, because once that list is</p> <p>16 given the cat's out of the bag. You can't take it</p> <p>17 back.</p> <p>18 MR. JOHNSON: If the timing was a bit</p> <p>19 different, would you find any length of time for an</p> <p>20 employee to consider an opt-out to be acceptable?</p> <p>21 MR. MESSENGER: Not acceptable, but</p> <p>22 obviously better. The longer the length of time the</p> <p>23 better it would be, as opposed to the alternative of</p> <p>24 having no option at all. So as opposed to worse</p> <p>25 options, you know, that's better than not having any</p>	<p style="text-align: right;">Page 594</p> <p>1 to someone's home it's easier to shut the door. You</p> <p>2 know that someone is there, and also, quite frankly,</p> <p>3 it's easy to find. Once they have your personal</p> <p>4 telephone number and e-mail it's much easier to be</p> <p>5 contacted and much harder to stop it.</p> <p>6 MS. SCHIFFER: So would you have an</p> <p>7 objection to codifying the Excelsior requirements,</p> <p>8 then?</p> <p>9 MR. MESSENGER: I don't see the need for</p> <p>10 it. I believe it's been what, 50 years?</p> <p>11 MS. SCHIFFER: But you wouldn't object to</p> <p>12 doing it.</p> <p>13 MR. MESSENGER: Not offhand. I mean,</p> <p>14 it's been there for a long time. I don't think it's</p> <p>15 going anywhere.</p> <p>16 MS. SCHIFFER: And the evidence of misuse</p> <p>17 with that information, do you have that for us?</p> <p>18 MR. MESSENGER: There has been misuse of</p> <p>19 information. The Fisher case is mentioned here.</p> <p>20 Another example in our comments, and this wasn't</p> <p>21 from the Excelsior list but from other information,</p> <p>22 is the Pelletier case out of Connecticut, where the</p> <p>23 unions retaliated against an individual who filed a</p> <p>24 decertification petition by signing her up to every</p> <p>25 magazine known to man, which created huge amounts of</p>

<p style="text-align: right;">Page 595</p> <p>1 difficulties for her.</p> <p>2 MS. SCHIFFER: But that wasn't an</p> <p>3 Excelsior list issue.</p> <p>4 MR. MESSENGER: But it was information</p> <p>5 provided to the union. You know, the more</p> <p>6 information the union has or the individuals have,</p> <p>7 the more it could be used for identify theft</p> <p>8 purposes and harassment purposes. So can an address</p> <p>9 be used for harassment? Yes. An address and</p> <p>10 telephone number? More potential. The address,</p> <p>11 telephone number, work schedule and e-mail? It</p> <p>12 keeps adding. So the Excelsior list in and itself</p> <p>13 today does contemplate an invasion of employees'</p> <p>14 personal privacy, but that's not a justification for</p> <p>15 saying it's not worse to require even more</p> <p>16 disclosure.</p> <p>17 MR. PEARCE: Thank you, Mr. Messenger.</p> <p>18 Dr. Murray.</p> <p>19 MR. MURRAY: Chairman Pearce and Board</p> <p>20 members, thank you for the opportunity again. I'm</p> <p>21 Darrin Murray with Loyola Marymount University. I'm</p> <p>22 adjunct faculty there. I'm here representing SEIU</p> <p>23 and providing some additional information from a</p> <p>24 worker involved in a recent campaign.</p> <p>25 It's not part of my prepared comments,</p>	<p style="text-align: right;">Page 597</p> <p>1 university was truly interested in encouraging us to</p> <p>2 make a good, fair decision, then I don't think they</p> <p>3 would have needed to take advantage of the current</p> <p>4 rules, manipulate the process, and keep that list</p> <p>5 from us as long as possible.</p> <p>6 They obviously knew who these fieldwork</p> <p>7 supervisors were, and they could have supplied that</p> <p>8 information for us to also participate in the</p> <p>9 process that they had free and unabated access to</p> <p>10 while we didn't. They knew who the fieldwork</p> <p>11 supervisors were from the beginning.</p> <p>12 LMU had been using work e-mails to send</p> <p>13 anti-union messages to employees right from the</p> <p>14 beginning, even before the hearing and the petition</p> <p>15 was filed. I've given you a copy of one of the</p> <p>16 first e-mails that our provost sent and then</p> <p>17 subsequent e-mails directing employees to an</p> <p>18 anti-union website ironically called "conversations"</p> <p>19 when there was nothing but an anonymous box to write</p> <p>20 comments. It may have been answered on a frequently</p> <p>21 asked questions page site in the website, but it was</p> <p>22 a website that explicitly said, "We urge you to vote</p> <p>23 no," and presented the anti-union message.</p> <p>24 My contention is that I couldn't contact</p> <p>25 my co-workers to give my side of this and my</p>
<p style="text-align: right;">Page 596</p> <p>1 but I'm beginning to wonder if I'm the only person</p> <p>2 in the room who finds it really easy to get rid of</p> <p>3 an unwanted e-mail with a single click and doesn't</p> <p>4 find it a whole lot of effort to actually do that.</p> <p>5 It's just something I'm sitting here wondering</p> <p>6 about.</p> <p>7 This morning I discussed LMU's inclusion</p> <p>8 of fieldwork supervisors in the bargaining unit, and</p> <p>9 I talked about how that decision I thought was</p> <p>10 problematic, not based on a clear and complete</p> <p>11 understanding of the facts, and how it resulted in</p> <p>12 limiting my ability to speak freely and openly with</p> <p>13 my colleagues about the benefits of forming a union.</p> <p>14 After that hearing the university</p> <p>15 provided the Excelsior list, which was due on a</p> <p>16 Friday. They filed it with the region</p> <p>17 electronically a minute before midnight when the</p> <p>18 region was closed. This meant that the union didn't</p> <p>19 get the list until Monday, and this interfered with</p> <p>20 my ability to speak with my co-workers about the</p> <p>21 union.</p> <p>22 Under the new rule, the employer would</p> <p>23 have been required to serve the Excelsior list to</p> <p>24 the union at the same time as the region so they</p> <p>25 would have had the weekend to campaign. If the</p>	<p style="text-align: right;">Page 598</p> <p>1 experiences, and that isn't fair. Employees trying</p> <p>2 to form a union should have the same ability to</p> <p>3 contact our co-workers and speak to our peers by</p> <p>4 e-mail. The university has numerous ways to contact</p> <p>5 its individual divisions, individual schools,</p> <p>6 individual departments, and frequently collects</p> <p>7 alternate e-mail addresses for adjuncts that don't</p> <p>8 regularly check their university e-mail account. If</p> <p>9 the voter list at least included phone numbers and</p> <p>10 e-mail addresses, I could have e-mailed them to</p> <p>11 contact them and tell them how I felt about the</p> <p>12 bargaining unit.</p> <p>13 Adjunct faculty are often pulled in</p> <p>14 multiple directions. We either have multiple</p> <p>15 positions or teach on multiple campuses. Some of us</p> <p>16 come to class, teach our classes, hold office hours,</p> <p>17 and may spend four to eight hours total on campus,</p> <p>18 and obviously a lot more time in other places</p> <p>19 grading and answering e-mails and those sorts of</p> <p>20 things, but our hours on campus are extraordinarily</p> <p>21 limited most of the time.</p> <p>22 I want to bring my colleagues together.</p> <p>23 I want to contact them. I want to create a stronger</p> <p>24 sense of community. I need to be able to do this.</p> <p>25 I don't have the resources to do that on my own. I</p>

<p style="text-align: right;">Page 599</p> <p>1 need the support of a union and other folks. The 2 university has worked real hard at creating a 3 third-party message. I want to tell my co-workers 4 that we are the union, we are the ones organizing, 5 but I feel limited in getting that message out 6 there. I can't do that if I can't contact my 7 colleagues. We're still trying to cobble together 8 accurate contact information for our unit and 9 especially for the fieldwork supervisors. 10 Oddly enough, and I'll let you draw your 11 own conclusions on this, one of my colleagues who 12 was against forming a union somehow or another had a 13 complete list of every e-mail address for every 14 adjunct in the entire university and was able to 15 send out his e-mail message to everyone. I have to 16 wonder how he got that list when we're going so many 17 more difficulties in accomplishing that. 18 It's not fair that the employer can 19 bombard us with anti-union messages and information 20 and e-mails and websites, and we're stuck with a 21 paltry list of home addresses, a few phone numbers 22 and e-mail addresses that we're trying to gather 23 ourselves. I believe that I am entitled to the same 24 access to my co-workers that my employer has, no 25 more and no less. The proposed amendments would</p>	<p style="text-align: right;">Page 601</p> <p>1 worker, an employee involved in this campaign, what 2 the impact would be on you to have your phone number 3 and e-mail available to the union? 4 MR. MURRAY: I've met any number of union 5 organizers, and I found them perfectly pleasant 6 folks. I am fascinated and may get a paper out of 7 the rhetoric of kind of casting union organizers as 8 kind of this nefarious organization, and that if 9 they just get one personal e-mail something tragic 10 is going to happen. 11 I find them perfectly lovely folks and 12 would be happy to have a conversation with them. 13 I'm sure not everybody feels that way, but I 14 believe they can be dealt with the same way that we 15 deal with telephone solicitors or junk e-mail: by 16 simply deleting it and not responding. 17 MR. JOHNSON: One quick follow-up, 18 though. If we're talking about work e-mail and it's 19 actually sent to the employer's premises where 20 somebody may or may want be on working time, they're 21 going to have a tendency to open at least the first 22 few e-mails, I assume. 23 MR. MURRAY: Well, the line between 24 personal and private e-mail, I think, is already 25 pretty blurred. I think that's a blurred line</p>
<p style="text-align: right;">Page 600</p> <p>1 help me as an employee have more of a voice to speak 2 to my co-workers about the benefits of joining a 3 union. Thank you. 4 MR. PEARCE: Your employer during this 5 campaign, were they sending out an anti-union 6 message via e-mail? 7 MR. MURRAY: Absolutely. It was even 8 more so in the website that we were directed to by 9 e-mail, and it was in the meetings that were held by 10 each of the deans, these small group meetings that 11 were coordinated and publicized by e-mail. 12 MR. MISCIMARRA: Dr. Murray, were the 13 e-mails that were issued by the university in the 14 case that you described sent to home e-mail 15 addresses or university e-mail addresses or both? 16 MR. MURRAY: I don't have access to that 17 list, so I don't know exactly what they're using. 18 This is a blind e-mail list. It's a mailing list 19 they have that if I was to try to e-mail it, I'll 20 get a message back saying that I'm not authorized to 21 e-mail to that particular list. I received it at my 22 university e-mail address. There may or may not be 23 personal e-mail addresses in there. I have no way 24 of knowing. I can't access the list. 25 MS. SCHIFFER: Can you tell me, as a</p>	<p style="text-align: right;">Page 602</p> <p>1 anyhow. So sure, somebody may open one or two and 2 realize, "Okay, this is not an organization I want 3 to hear from," but I still don't think it makes it 4 all that difficult to just click on delete. 5 MR. JOHNSON: Right. But at the end of 6 the day that might all be occurring on working time, 7 so if there's 600 e-mails coming in to the 8 employer's e-mail accounts and 600 people open up a 9 message that's five pages long and start reading it, 10 that's going to take some time. Right? 11 MR. MURRAY: The e-mails from the 12 university that are telling us to go to this website 13 are occurring on work time potentially as well. 14 MR. JOHNSON: Right. And you are getting 15 paid for that. Right? 16 MR. MURRAY: My situation is a little 17 unique. I'm definitely not checking e-mail while 18 I'm teaching a class. I may have students that text 19 during class, and I tend to call them on that. I'm 20 not going to do the same thing while I'm teaching a 21 class. 22 MR. JOHNSON: I understand. Probably 23 even you can't multitask that well. You study 24 communications. Right? When people get e-mails 25 they tend to open them. And if they're at work and</p>

<p style="text-align: right;">Page 603</p> <p>1 they happen to get one while they're standing at 2 their desk during working time, they may open that 3 when it comes in. 4 MR. MURRAY: And also from the prince who 5 has \$5 million that they want you to deposit in 6 their account free of charge as well, and we just 7 delete those phishing e-mails as well. 8 MR. JOHNSON: But let's just talk 9 about -- 10 MR. MURRAY: And there's far more of 11 those than union messages. 12 MR. JOHNSON: Well, let's just talk about 13 the exhibits that you've handed out to us. You 14 would expect the normal person to spend more time on 15 this material than you would on the "I am a prince 16 who has been disinherited from my rightful royal 17 largesse, and if you send me your Social Security 18 number and bank account we can split \$10 million." 19 MR. MURRAY: Yeah. And certainly these 20 letters from our provost and the website are 21 multiple pages and very complex and an interesting 22 rhetorical artifact on its own in terms of how it's 23 attempting to third-party the whole union thing and 24 just walk that close to the line of threatening to 25 reduce our wages by saying, "Well, look, these</p>	<p style="text-align: right;">Page 605</p> <p>1 allow it to be published in the state bar directory 2 or disseminated in the many ways in which e-mail 3 addresses and telephone numbers are disseminated. 4 The only other things I wanted to talk 5 about were the inclusion of the job classification 6 shift and work locations on the Excelsior list. I 7 just wanted to comment on how we think it will 8 reduce potential litigation. Unions would have a 9 better idea of who the workers are on the list and 10 who they don't recognize. Many workers work in 11 locations where they don't interact with all of 12 their co-workers. Bus drivers are a good example. 13 They might get a list with names that they just 14 don't recognize. That information would allow them 15 to not have to challenge those voters in some other 16 way, and it will allow them to understand who those 17 voters are and to recognize them. That's really all 18 I've got. Thanks. 19 MR. PEARCE: Thank you. Mr. Baskin. 20 MR. BASKIN: Thank you for having me back 21 to talk about this important issue on behalf of 22 Associated Builders and Contractors. I'm also not 23 going to repeat what you've heard from a number of 24 witnesses already, except to say that this is one of 25 the most burdensome and one-sided proposals of the</p>
<p style="text-align: right;">Page 604</p> <p>1 people didn't get as good of a contract, they're 2 making less than you," without getting the whole 3 story and which could take up a substantial amount 4 of time. So yeah. I mean, if that's what the 5 university feels is an appropriate use of our time, 6 I would hope I make my message more efficient than 7 theirs, but I think I deserve the same access that 8 they have to my co-workers. 9 MR. JOHNSON: And that would be an 10 involved back and forth discussion. Right? 11 MR. MURRAY: I don't know how involved it 12 would be. There would be some discussion, yes. 13 MR. PEARCE: Thank you all very much. 14 Maneesh Sharma, Maury Baskin and Elizabeth Milito, 15 you can proceed. 16 MR. SHARMA: I don't think there's much 17 for me to add to what's already been said as far as 18 e-mail addresses and telephone numbers go except for 19 the one idea that it could lead to identity theft. 20 I'm not a technological expert, but I don't 21 understand how possessing an e-mail address or a 22 phone number can lead to identity theft. If I 23 thought that was a major concern, I don't think most 24 of the attorneys in here right now would publish 25 their e-mail addresses on their firms' websites or</p>	<p style="text-align: right;">Page 606</p> <p>1 many burdensome and one-sided proposals that you are 2 considering and have been considering for two days. 3 On behalf of ABC, we object strongly to both the 4 shortening of the time for employers to issue the 5 voter eligibility list and the added burden and 6 invasion of employee privacy of the newly required 7 and deeply personal information you want employers 8 to include for the first time. 9 But the construction industry has a 10 special concern, which is really the focus of my 11 testimony today, because construction is unique. We 12 have the Steiny/Daniel formula to deal with, unlike 13 other industries in which the contractors are 14 supposed to provide a list not only of the people 15 who are working for them at the time of the 16 petition, but everyone who's worked for them 30 days 17 in the past year and 45 days over the past two 18 years. And having worked with contractors, first, 19 many of them don't have electronic recordkeeping, 20 which may seem strange to some, and many are quite 21 sophisticated and have all kinds of electronic 22 recordkeeping, but none of them seem to have the 23 Excelsior button in their payroll system. It 24 doesn't just spit out these kinds of records. 25 In fact, of elections I've had using the</p>

<p style="text-align: right;">Page 607</p> <p>1 Excelsior lists in the industry, I can't recall one 2 where they provided it to me to provide to the Board 3 early. The full seven days seemed to be needed. 4 Now we're telling them that they have to do it in 5 two days, which is clearly going to not be easy to 6 put together, adds a new burden to them, and for 7 what reason other than to speed up the process and 8 give the unions more information faster and make for 9 faster elections, which should not be an end in 10 itself. 11 That's really our concern about it. We 12 certainly also object to the notion that it should 13 be provided in advance of the petition, which we 14 heard in some respects yesterday and today. That's 15 in a way worse. We don't even know who the eligible 16 voters are in that situation. We heard some of this 17 earlier about the problem with omissions and 18 inaccuracies on the list by forcing them to put it 19 together faster and really in great haste. You're 20 increasing the chances that they're going to make 21 mistakes and omit people. There is a case in 2012, 22 Automatic Fire Systems, a construction contractor 23 who left some names off the list, a small number of 24 names. They went through the election, the union 25 had not gotten a single vote, but the Board threw</p>	<p style="text-align: right;">Page 609</p> <p>1 get an injunction even though the court did say that 2 they had shown a violation of various serious issues 3 that had arisen and really should not be 4 countenanced. 5 I think what it really boils down to is 6 that there is the notion that the employers should 7 be at the ready to turn themselves upside down over 8 this type of thing and that it's just another cost 9 of doing business. That's what the Board said in 10 the notice poster case, really. It seemed like a 11 minor thing to folks on the Board. I'm not speaking 12 to all of you personally. Most of you were not 13 present. 14 But it really affected the business 15 community, and they came back strong and went to 16 court because it was yet another intrusion of the 17 government into the workplace that had no 18 justification. It was not necessary and it was not 19 supported. I've said my piece, and I'll happy to 20 answer any questions. 21 MR. PEARCE: Wasn't Automatic Fire System 22 a case dealing with the employer unilaterally 23 omitting names after those names were in existence 24 on another list? 25 MR. BASKIN: Yes. It was an omission as</p>
<p style="text-align: right;">Page 608</p> <p>1 out the election because a few names were left off 2 the list. That kind of thing is bound to happen 3 more often with this sort of speeded up process in 4 the construction industry in particular. 5 We think it's grossly unfair of the Board 6 to put that kind of time pressure on employers that 7 you're proposing here and then punishing them for 8 the errors that are caused by, with respect, your 9 unreasonable deadlines, so it's no wonder that many 10 employers certainly in the construction industry are 11 outraged by this proposal. I think there were nine 12 times as many opposition comments filed by 13 individual contractors this time as opposed to last 14 time, even though they were told that the comments 15 they've already filed still count. 16 There were a few other points that were 17 brought up that I do want to respond to. There was 18 a question about abuse by unions of this 19 information, that we shouldn't worry about it. I 20 want to mention another case that was not mentioned 21 earlier, the Pulte Homes case against the laborers 22 union in which the union hacked into and assaulted 23 the company's e-mail system as well as home e-mail 24 systems. The Computer Fraud Act was brought up. 25 The company filed a lawsuit. They were not able to</p>	<p style="text-align: right;">Page 610</p> <p>1 opposed to an error, but of course both are subject 2 to the same general standard. They cited cases 3 involving errors. The Board hasn't said what it's 4 going to do. If you're going to do something like, 5 you certainly should be modifying or making clear 6 what's going to happen with the increased likelihood 7 of errors, though the correct answer is not to do it 8 at all. 9 MR. PEARCE: But you would say that if we 10 did do it that we should be sensitive to errors. 11 MR. BASKIN: Yes. Absolutely. 12 MR. JOHNSON: Do you have a problem with 13 the job classification piece? 14 MR. BASKIN: Yes. I'm glad you brought 15 that up, because in the construction industry people 16 change jobs all the time, even within a day. They 17 change jobs, they change job sites. The type of 18 work that they're doing makes it even more 19 challenging to identify and certainly more likely 20 that there are going to be errors. 21 MR. PEARCE: With respect to the 22 Steiny/Daniel formula, if a petition is filed in a 23 situation where they're seeking a 9(a) certification 24 as opposed to an 8(f) and the employer decides that 25 they want to campaign, they're going to have to</p>

<p style="text-align: right;">Page 611</p> <p>1 utilize the formula to find the people anyway, 2 aren't they?</p> <p>3 MR. BASKIN: Not necessarily. If the 4 petition is filed, eventually there is going to have 5 to be an eligibility list created. We're talking 6 about the Board's rule to accelerate the list. Yes, 7 a list will have to be created. We're not asking 8 you, although we wouldn't object to your revisiting 9 the Steiny/Daniel formula, but assuming that's 10 settled, that's what the contractors have to deal 11 with.</p> <p>12 So yes, they would have to do it anyway, 13 but they don't have to do it before the petition, 14 and they don't have to do it within two days after 15 the decision. That's what your proposed rule is 16 changing, and that's what we object to.</p> <p>17 MR. PEARCE: Thank you. Ms. Milito.</p> <p>18 MS. MILITO: Thank you very much for 19 inviting me to speak on this topic. You've heard 20 from many other eloquent representatives of the 21 employer community, most recently Mr. Baskin here, 22 so I'm not going to repeat but will just state that 23 NFIB shares the concerns of those representatives.</p> <p>24 I would just this afternoon like to 25 highlight NFIB's particular objection with a</p>	<p style="text-align: right;">Page 613</p> <p>1 of the information as required by the Board that's 2 different, and of course if you're requiring that 3 employers provide new information, that's an 4 additional burden, too.</p> <p>5 MR. JOHNSON: Can I just ask? I seem to 6 remember that in your introductory comments it 7 sounded like the NFIB average numbers about ten 8 employees. Is that correct?</p> <p>9 MS. MILITO: That is correct.</p> <p>10 MR. JOHNSON: So I assume, in terms of 11 the burden, you're talking about not the ten 12 employee employer but some other kind of employer.</p> <p>13 MS. MILITO: Correct. Our average member 14 is ten employees, but we certainly have thousands of 15 members that have more than ten employees.</p> <p>16 MR. JOHNSON: In terms of the burden, 17 based on your experience and the your members' 18 experience, where does it start to become onerous in 19 terms of the number of employees and number of 20 facilities that might be at issue?</p> <p>21 MS. MILITO: I don't have any hard data, 22 so it's going to be more anecdotal. I think when 23 you're talking about the 50 to 100 range, in that 24 range, you still have businesses that don't have, as 25 I said before, a professional HR representative, but</p>
<p style="text-align: right;">Page 612</p> <p>1 proposal that will require that the voter 2 eligibility list be turned over within two days, 3 which for a small business owner would, quite 4 frankly, be almost impossible.</p> <p>5 I spoke in my earlier testimony about the 6 administrative handicaps that small business faces, 7 and I've spoken with small business owners faced 8 with an election petition. And producing the list, 9 the compilation of the information, really brings 10 everything in the office to almost a grinding halt 11 while they do this. And as Mr. Baskin said, it 12 really does take them the full seven days as it is 13 now, so two days would really be just impossible. 14 I'm happy to answer any questions, and thank you 15 again for asking me to speak.</p> <p>16 MR. PEARCE: Don't employers have to keep 17 track of overtime, and don't they have reporting 18 requirements to other government agencies relative 19 to the number of employees and which employees are 20 working how many hours and things like that?</p> <p>21 MS. MILITO: Well, certainly they do have 22 lists. But as Mr. Baskin testified, they don't have 23 it in the format required by the Board right now. 24 There's not a button they can push where the 25 Excelsior list just comes out. It's the compilation</p>	<p style="text-align: right;">Page 614</p> <p>1 there's somebody in there that's kind of doing the 2 multi-function thing. I'd say anywhere around the 3 50 range. It falls on the business owner more times 4 than not. I mentioned before that I've talked to 5 business owners who are kind of helping their office 6 managers, their HR people pull all this together.</p> <p>7 MR. JOHNSON: So that's kind of the donut 8 hole.</p> <p>9 MS. MILITO: Yes.</p> <p>10 MR. JOHNSON: And once you get up to how 11 many employees do you actually have in your members' 12 experiences do they have an independent HR 13 department?</p> <p>14 MS. MILITO: It's usually around 50 to 15 100, somewhere in there, when they kind of decide 16 they need some professional help.</p> <p>17 MR. PEARCE: Thank you all. We're now at 18 the bonus round, Specific Questions: Whether or how 19 the NLRB could provide assistance to unrepresented 20 local unions in complying with election procedures, 21 Gina Cooper.</p> <p>22 Next is: Whether or how the NLRB should 23 provide assistance to unrepresented small businesses 24 in compliance with election procedures, Elizabeth 25 Milito.</p>

<p style="text-align: right;">Page 615</p> <p>1 Next is: Whether the procedure used by 2 the Board in this rulemaking demonstrates that the 3 Board values the comments of the public, Curt 4 Kirschner. 5 Next is: Whether the petition bar to 6 election should be changed from six months to twelve 7 months if the petition is withdrawn shortly before 8 the election, Joseph Torres. 9 And finally: Whether non-parties should 10 be served with Board filings, J. Aloysius Hogan. 11 Ms. Cooper, please proceed. 12 MS. COOPER: Well, once again thank you 13 for allowing me to be here to speak with all of you 14 today. My name is Gina Cooper, and I'm still the 15 director of organizing for the Industrial and 16 Professional Industries of the International 17 Brotherhood of Electrical Workers AFL-CIO. 18 When I testified yesterday I addressed 19 the 63 percent union win number and talked about how 20 little that number meant in reality. Today I'd like 21 to address another number, the percentage of time 22 that the parties enter into a stipulated or consent 23 election agreement, which is done in 90 percent of 24 the cases. 25 As a very experienced organizer, I know</p>	<p style="text-align: right;">Page 617</p> <p>1 wall to wall it. The IBEW had initially sought a 2 production and maintenance unit, a unit that is 3 presumptively appropriate in the utility industry. 4 So I do have substantial reason to be skeptical of 5 what the 90 percent figure really stands for. 6 I was also asked yesterday how the Board 7 could improve processes, so I brought a couple of 8 suggestions along today. First, the IBEW believes 9 that the Board could diminish employer domination of 10 R-Case proceedings by taking control of the process. 11 Accordingly, we recommend that the Board take an 12 active role in this fact-finding process. 13 Thus, the hearing officer could subpoena 14 witnesses and documents and question witnesses on 15 the appropriateness of the petition for unit. The 16 parties can cross-examine the witnesses after the 17 hearing officer questions them, but the employer 18 would not control the proceedings, as it does now, 19 by presenting the case against the petition for unit 20 from the start. 21 If it appears appropriate after the 22 hearing officers and the parties' questioning, the 23 employer's case against the unit could be deferred 24 until after the election and its due process rights 25 therefore preserved. Additionally, the hearing</p>
<p style="text-align: right;">Page 616</p> <p>1 that that number does not necessarily prove that the 2 process is balanced or fair. In my experience, 3 employers wield as much power in these negotiations 4 as they wield in an actual hearing. Again, the 5 threat of delay and mounting expenses from prolonged 6 hearing pressures many petitioners into agreeing 7 into almost anything to get to a timely election. 8 Delay, as I testified yesterday, always works 9 against the petitioner. And the expense of lengthy 10 proceedings also puts added pressure on the 11 petitioner to agree to inappropriate units. 12 For example, many petitioners cannot 13 afford to have an attorney present throughout a 14 lengthy hearing, and local unions often cannot even 15 afford the cost of a transcript. Here are just two 16 examples of these time and expense pressures on 17 petitioners in the negotiation process. 18 First, in the El Super case the 19 petitioner, under pressure from the employer, 20 recently agreed to include supervisors in the unit 21 just to get to a timely election, and in the 2010 22 BG&E case the employer threatened its employees that 23 it would drag the hearing out for over a year. 24 After ten weeks of aimless hearing, the IBEW 25 reluctantly agreed to a unit that was virtually a</p>	<p style="text-align: right;">Page 618</p> <p>1 officer could also preside over the negotiation 2 process. He or she could insist that the employer 3 present legitimate proposals to alter the petitio 4 for unit. He or she could prevent the employer from 5 dragging out the process by pretending to consider 6 the petitioner's proposals during lengthy breaks 7 only to return and reject them. The hearing officer 8 could also cut short any employer attempt to include 9 inappropriate employees such as supervisors into the 10 unit. 11 Second, the IBEW also proposes the Board 12 help cut the cost of hearings to petitioners who 13 cannot afford them. One way the Board could do this 14 would be to renegotiate agreements with reporting 15 services. As we detailed in our written comments, 16 transcript costs of \$1.95 per page add up rapidly to 17 \$12,000 in one case and \$20,000 to \$30,000 in a 18 couple of others. Thus, we ask that the Board 19 negotiate a reporting service agreement that would 20 permit it to provide a free copy of the transcript 21 to any unrepresented petitioner who can attest that 22 it cannot otherwise afford a copy of the transcript. 23 We feel these measures could help in creating a fair 24 and balanced election process. Thank you. 25 MR. MISCIMARRA: Does that last</p>

<p style="text-align: right;">Page 619</p> <p>1 suggestion presume post-hearing briefing? That's</p> <p>2 another part of the proposed rule. Or are you</p> <p>3 suggesting that we provide the transcripts just so</p> <p>4 the local union would have a copy of the record?</p> <p>5 MS. COOPER: For post-briefing, yes.</p> <p>6 MR. JOHNSON: It sort of seems like your</p> <p>7 proposal breaks down or your suggestions break down</p> <p>8 into two categories. One is to stop employers from</p> <p>9 doing inappropriate things, and the other is some</p> <p>10 sort of financial aid for petitioning unions that</p> <p>11 don't have legal advice, that don't have anything</p> <p>12 along those lines. They don't have enough money to</p> <p>13 pay for the transcript. Obviously, as a neutral</p> <p>14 government agency we can't start, A, giving legal</p> <p>15 advice, or, B, aligning ourselves with any</p> <p>16 particular party.</p> <p>17 What I would be interested in is to the</p> <p>18 extent that there are IBEW locals that you would</p> <p>19 know of or other unions that you would know of, what</p> <p>20 sort of the equal access to representation of</p> <p>21 justice proposal would look like. Would somebody</p> <p>22 have to attest at the beginning of a representation</p> <p>23 hearing or process essentially that this union is</p> <p>24 indigent, it's independent, we're not affiliated</p> <p>25 with an international, and then the transcript would</p>	<p style="text-align: right;">Page 621</p> <p>1 a concrete proposal in terms of what you're thinking</p> <p>2 about.</p> <p>3 MS. COOPER: We would not be opposed if a</p> <p>4 copy of the transcript was provided to both parties</p> <p>5 equally.</p> <p>6 MR. PEARCE: But I take it that your</p> <p>7 point is that there is an inherent disadvantage</p> <p>8 where you have a union that may not be affiliated</p> <p>9 with an international or may be an independent union</p> <p>10 started at a plant having to try to manage a</p> <p>11 representation proceeding. Oftentimes I have</p> <p>12 experienced that they're not represented by counsel.</p> <p>13 MS. COOPER: Absolutely.</p> <p>14 MS. SCHIFFER: Your suggestion about</p> <p>15 having the hearing officer monitor the stip</p> <p>16 discussions, how exactly do you envision that that</p> <p>17 would work?</p> <p>18 MS. COOPER: I do believe that the</p> <p>19 hearing officer in the pre-hearing could certainly</p> <p>20 subpoena the witnesses. It would certainly keep</p> <p>21 things on a more neutral basis. They could subpoena</p> <p>22 the witnesses, they could ask questions, and of</p> <p>23 course both parties would then have the right to</p> <p>24 cross and talk back and forth and ask questions</p> <p>25 afterwards. Right now as it sits, the company has</p>
<p style="text-align: right;">Page 620</p> <p>1 be free? I don't know exactly what financial</p> <p>2 component of this you're talking about. That's one</p> <p>3 thing.</p> <p>4 The second thing is: Do you know we have</p> <p>5 an app? There is a lot on here about the National</p> <p>6 Labor Relations Act that I have been told by various</p> <p>7 parties is of immense value to understanding how the</p> <p>8 law works. I don't think it goes down to the</p> <p>9 granular level of covering stipulated election</p> <p>10 agreements, but it's certainly something that any</p> <p>11 party, be they a small employer or small union, that</p> <p>12 anybody can avail themselves of and that the agency</p> <p>13 already has.</p> <p>14 To the extent we need to have better</p> <p>15 materials on the website, and this doesn't have to</p> <p>16 be subject to the public comment process, you can</p> <p>17 certainly send a letter, for example, saying, "Can</p> <p>18 you address X Y and Z." And that's free. All that</p> <p>19 stuff is freely accessible.</p> <p>20 And vis-a-vis the financial aid piece,</p> <p>21 obviously in this sort of venue we can't discuss</p> <p>22 that. That probably would be the subject of --</p> <p>23 there is no part of the NPRM I think that even</p> <p>24 addresses that, and I can certainly talk it over</p> <p>25 with my colleagues, but I would need to know more of</p>	<p style="text-align: right;">Page 622</p> <p>1 control over that process, and we just think it</p> <p>2 would be a much more fair process to the workers to</p> <p>3 be able to have the neutral party be the one that's</p> <p>4 talking through the unit.</p> <p>5 MS. SCHIFFER: I think I understood that,</p> <p>6 but the part about having the hearing officer</p> <p>7 monitor the discussions around the stip, how would</p> <p>8 that work?</p> <p>9 MS. COOPER: Well, I think I would leave</p> <p>10 that to the Board to decide, but I do think that</p> <p>11 having the initial conversations where they were not</p> <p>12 talking directly but they were talking through the</p> <p>13 hearing officer and that the hearing officer would</p> <p>14 require them to give concrete proposals back on unit</p> <p>15 identification would be very helpful in this</p> <p>16 situation.</p> <p>17 MR. PEARCE: Thank you very much. Ms.</p> <p>18 Milito.</p> <p>19 MS. MILITO: Thank you very much for</p> <p>20 asking me to speak about this topic. Let me start</p> <p>21 off by saying that for a small business owner</p> <p>22 nothing is a substitute for more time. And while we</p> <p>23 appreciate the Board's willingness to consider ways</p> <p>24 in which it might provide assistance to small</p> <p>25 businesses, I respectfully suggest that the NLRB</p>

<p style="text-align: right;">Page 623</p> <p>1 might likely be the last place where a small 2 business owner would turn to for help in the midst 3 of a labor organizing drive. 4 Small business owners are legally bound 5 to follow, and therefore to know and understand, 6 every rule and regulation that impacts them. That 7 includes the differing requirements promulgated by 8 every jurisdiction in which they operate. As a 9 practical matter, this presumption is fiction. No 10 small business owner, let alone a reasonably large 11 staff of experts, can recognize, understand and 12 implement the thousands of pages of rules that they 13 must obey. Further, this continuing task must be 14 undertaken while operating a business well enough to 15 make its continuation worthwhile. 16 Despite a legal presumption that is 17 impossible, most small business owners make a good 18 faith effort to comply with all regulations and 19 laws. That means they must frequently seek 20 information about government rules and how to comply 21 with them. But a poll conducted by the NFIB 22 Research Foundation on contacting government showed 23 that small business owners prefer to get information 24 about government rules from private sources such as 25 another business owner or trade association, not a</p>	<p style="text-align: right;">Page 625</p> <p>1 I've been working at NFIB now for over 2 ten years, I have the pleasure of speaking with 3 small business owners every day, and very frequently 4 the owner is calling because of an employment, HR or 5 labor. As you can imagine, and for the reasons I've 6 stated in my earlier testimony, it can be a 7 significant challenge for small business owners when 8 it comes to dealing with labor and employment 9 matters. 10 And without in-house expertise small 11 firms will need outside help, but finding that help, 12 that outside source, will take time. I have already 13 noted in my earlier remarks why time is important, 14 and there is simply no substitute for time. It is 15 for these reasons that NFIB urges the Board to 16 withdraw the proposed rule. Thank you very much, 17 and I'm happy to answer any questions. 18 MR. PEARCE: As Member Johnson had 19 indicated previously, you know we have an app for 20 that. Right? Do you know if members of your 21 association are aware that there is an app and that 22 there is information contained in that app that is 23 geared towards employers as well? 24 MS. MILITO: I can tell you that I have 25 studied your website and that on some few occasions</p>
<p style="text-align: right;">Page 624</p> <p>1 government agency. 2 Why the lack of contact? The reason is 3 simple. Small business owners are considerably more 4 likely to see the demanding or negative face of 5 government than the collaborative or positive side 6 even when the owners initiate contact. They are not 7 comfortable asking for help from an entity that has 8 the ability to fine, penalize and prosecute them. 9 The interface between small business and government 10 is far more personal than with larger businesses and 11 arguably far less satisfying since the very 12 resources for rules and permits, let alone that the 13 different agencies within the government can be a 14 source of great frustration to small business 15 owners. 16 In our poll, overall 38 percent of owners 17 reported no contact with a government agency within 18 the last three years, and 20 percent reported 19 contacting a government agency only once or twice. 20 Another 17 percent reported that they had initiated 21 contact many times, but those contacts were 22 primarily for permits or licenses from a state or 23 local government agencies. Federal government is 24 the level of government least contacted by small 25 business owners.</p>	<p style="text-align: right;">Page 626</p> <p>1 I have actually referred members to your website to 2 find a number for a regional office. I have studied 3 your fact sheets in great detail. I like your chart 4 that shows the election process and the ULP process, 5 the flow chart. I'm a big fan of flow charts. 6 I can tell you with regards to the 7 employer information that there are bullets on what 8 an employer can't say. There is nothing on there -- 9 it talks about, you know, what an employer can't do. 10 There's nothing about employer rights on there. 11 There is some information. I'm not denying that 12 there's information available, and some of it is 13 helpful. 14 MR. MISCIMARRA: Ms. Milito, let's assume 15 hypothetically that the Board elects not to make any 16 changes in our current election rules. We have an 17 interest in trying to ensure that elections take 18 place in a lawful way, and small business owners, I 19 take it from your testimony, have difficulty just 20 understanding the rules of the road. 21 And I'm wondering: Do you have any 22 specific suggestions apart from potential changes in 23 anything that the Board could do that would make it 24 easier for small businesses as employers to 25 understand the rules of the road in a way that they</p>

<p style="text-align: right;">Page 627</p> <p>1 would perceive to be neutral so that they can just 2 remain lawful?</p> <p>3 MS. MILITO: Absolutely. I follow. I 4 think just making it clear on there that employers 5 can contact the Board. I'll be honest with you. I 6 spent time in preparing my testimony studying your 7 website. And as I said, I did find that there is 8 some very helpful information on there. I've gone 9 to your website before, obviously. But just making 10 it clear on there that employers are also free to 11 call the Board.</p> <p>12 I mean, one of the members I spoke with 13 wasn't even sure that he could call with a question 14 to get -- I can't remember what the form was that he 15 needed, but it wasn't even clear on there. For 16 instance, the Department of Labor makes it pretty 17 clear that employers, employees, you know, that both 18 can call, that both sides can call. As you said, 19 you can't offer legal advice to either side, but the 20 public can call.</p> <p>21 MS. SCHIFFER: Any other suggestions that 22 you would have that you think would provide 23 assistance to small businesses?</p> <p>24 MS. MILITO: I think their comfort zone 25 is going to be with outside help, that ultimately</p>	<p style="text-align: right;">Page 629</p> <p>1 meeting is a significantly more thoughtful approach 2 and more orderly than the process used in the 3 previous round. What's been particularly gratifying 4 to me, and I'm sure to many others who have been 5 participating in this process, is the significant 6 engagement that each of the Board members has had 7 with the panelists. I think, as someone who's 8 appearing on behalf of an association, having that 9 interchange with the Board members is extremely 10 valuable. It's certainly been productive for us, 11 and we hope it is as well for the Board members.</p> <p>12 We do have a significant concern, 13 however, about the Board's overall approach to this 14 notice of proposed rulemaking. In our view, the 15 2014 NPRM, which essentially replicates the 2011 16 NPRM, is inconsistent with President Obama's 17 executive order and the Board's own prior practices 18 and does not adequately engage with the affected 19 communities about what changes this particular Board 20 feels should be made to its election procedures.</p> <p>21 In Executive Order 13563, President Obama 22 stressed that rulemaking, quote, "must allow for 23 public participation and an open exchange of ideas." 24 Executive Order 13563 requires that, quote, "before 25 issuing a notice of proposed rulemaking, each</p>
<p style="text-align: right;">Page 628</p> <p>1 they're going to need outside help in responding. 2 They're going to need legal help.</p> <p>3 MR. JOHNSON: Well, would you want us to 4 have a referral service or a referral to a referral 5 service?</p> <p>6 MS. MILITO: I think as a practical 7 matter that would be difficult. It would be 8 difficult just because of the logistics, and coming 9 up with a list in all geographic areas of the 10 country would be hard to do.</p> <p>11 MR. PEARCE: And I think we'd have other 12 problems as well. Thank you. Mr. Kirschner.</p> <p>13 MR. KIRSCHNER: Good afternoon, Chairman 14 Pearce and members of the Board. I'm appearing 15 again on behalf of AHA, ASHHRA and AONE, and this 16 afternoon I'm accompanied by Lawrence Hughes of the 17 AHA.</p> <p>18 For this final panel -- and 19 congratulations on that -- we appreciate the 20 opportunity to speak on the topic of whether the 21 process being used by the Board reflects that the 22 Board values the comments of the public.</p> <p>23 First of all, I want to commend the Board 24 on this public hearing process. As someone who 25 participated in the 2011 oral public meeting, this</p>	<p style="text-align: right;">Page 630</p> <p>1 agency, where feasible and appropriate, shall seek 2 the views of those who are likely to be affected," 3 close quote, by the rulemaking.</p> <p>4 While this executive order is not 5 technically binding on the Board, and, as is noted 6 by the Board in footnote 34 of the NPRM, while it's 7 not technically applicable, we believe that the 8 order should inform the Board's general process, and 9 we think that has not occurred here.</p> <p>10 Except for a couple of discrete issues, 11 the Board has not followed this path. Instead of 12 seeking to obtain the views of those who would be 13 affected, the Board has issued a detailed, 14 complicated and extremely lengthy rewrite of many of 15 its representation procedures from start to finish. 16 The compounding effect of so many simultaneous 17 changes is unknown, leaving many in the employer 18 community to fear that the impact of these proposed 19 changes will raise concerns about both their 20 efficacy and legality.</p> <p>21 Beyond the overly prescriptive nature of 22 the NPRM, we also have a concern that the 2014 NPRM 23 does not incorporate a single suggestion from the 24 over 65,000 comments that were submitted with 25 respect to the 2011 NPRM. As a dissent to the</p>

<p style="text-align: right;">Page 631</p> <p>1 current NPRM has noted, there was apparently no 2 significant qualitative evaluation of the 3 information received from the prior public comments 4 that were received in 2011. We are concerned that 5 this signals a reluctance by the Board to engage in 6 real dialogue over proposed rule changes, especially 7 since the Board has already responded to these 8 thousands of comments when it submitted its revised 9 final rules in December 2011.</p> <p>10 The 2014 NPRM, however, ignores the 11 December 2011 revisions, reverting to the rules as 12 first submitted in June 2011. An attempt to 13 incorporate or at least respond to the prior 14 comments would lessen the fear of the employer 15 community that the public comment process is from 16 the Board's perspective largely perfunctory.</p> <p>17 As my partner Roger King noted in his 18 remarks yesterday, the Board's NPRM process here is 19 in stark contrast to the process used by the Board 20 when it promulgated rules regarding bargaining units 21 in the acute healthcare field in 1988 and 1989. 22 Those are detailed in our written comments.</p> <p>23 But I would like to note that the U.S. 24 Supreme Court, in affirming the Board's rules there, 25 relied upon the extensive notice and comment</p>	<p style="text-align: right;">Page 633</p> <p>1 Board regarding the appropriate time period that 2 should exist between the filing of a petition and an 3 election, balancing the interests of employees, 4 laborers and employers while complying with the Act.</p> <p>5 You've already received significant input 6 on this issue, and we think that if the Board could 7 resolve this single matter, that single issue, that 8 that would be the key to developing a consensus by 9 many parties regarding other appropriate rule 10 changes regarding the Board's representation 11 process.</p> <p>12 On behalf of AHA and myself, thank you 13 very much for the opportunity to provide these 14 comments.</p> <p>15 MR. PEARCE: Do you think that we're 16 acting in contrast to what is required under the 17 Administrative Procedure Act?</p> <p>18 MR. KIRSCHNER: Not currently.</p> <p>19 MR. PEARCE: Well, that's nice to know. 20 And you also are cognizant of the fact that the 21 representation rules as they currently exist are a 22 refinement of rules that had existed 20, 30, 40 23 years ago.</p> <p>24 MR. KIRSCHNER: Correct. The current 25 rules, I don't know that anyone would step forward</p>
<p style="text-align: right;">Page 632</p> <p>1 rulemaking conducted by the Board and the Board's 2 careful analysis of the comments it received, which 3 we think are an important component that should be 4 included in this current round of rulemaking.</p> <p>5 As evidenced by the sheer volume of 6 written comments received in reaction to the NPRM, 7 the proposed rule changes obviously affect parties 8 throughout the country. We believe that the Board 9 would demonstrate that it values the input of the 10 public, including the employer community and 11 employees themselves by adopting an alternative 12 approach.</p> <p>13 We suggest that the Board should put on 14 hold its currently proposed rule changes and instead 15 adopt the approach for all of its proposed changes 16 that it is conducting with respect to its policy 17 regarding blocking charges.</p> <p>18 By presenting open-ended questions 19 regarding what changes would work to make the 20 representation process faster and fairer, the Board 21 could develop a record on which it could have a 22 consensus regarding the ways in which it should 23 modernize and streamline its rules. As has been 24 expressed by others, the key component of this 25 approach would be to develop a consensus by this</p>	<p style="text-align: right;">Page 634</p> <p>1 and say that the manner in which the current rules 2 are drafted are a hallmark of clarity or a modern 3 approach, as has been noted. There are concerns, 4 though, with changes where it is not clear where the 5 board is headed with those changes, and I think 6 that's why the Board is hearing so many concerns 7 being raised by the employer community to all sorts 8 of changes, because there is not an indication from 9 the Board about where it's really headed with 10 respect to the length of the election period.</p> <p>11 MR. PEARCE: But I guess the point that 12 I'm making is that there have been incremental 13 modifications to the representation rule over the 14 course of decades, none of which were done pursuant 15 to -- with the exception with the healthcare rules. 16 Any of those incremental modifications with respect 17 to the representation procedure were done within the 18 notice and comment period. It was just done.</p> <p>19 Wouldn't you say that pursuing these 20 rules and modifications that are focused on 21 procedure and providing a notice and comment period 22 is much more engaging than what our history has 23 shown in the past?</p> <p>24 MR. KIRSCHNER: The Board's current 25 representation procedure is a combination of both</p>

<p style="text-align: right;">Page 635</p> <p>1 the articulated written rules as well as various 2 internal Board procedures and protocols. Obviously 3 the Board has evolved over time its protocols, for 4 example the target date for an election, and the 5 Board is free to do that. However, where the Board 6 has a written regulation, it would need to follow 7 the appropriate process for modifying those. 8 And so I think that, yes, if you are 9 changing your written regulations about the 10 representation process you need to go through a 11 notice of proposed rulemaking. What we're 12 suggesting, though, is that rather than start with a 13 very detailed set of prescriptive changes where it's 14 unclear where the Board is really heading that it 15 would be better to follow the path of what you're 16 doing with blocking charges, receiving input. 17 We think that if a consensus could be 18 developed on the Board with respect to what the 19 target date should be on an election, then I think 20 you would see far less objection from the employer 21 community about refinements to other process within 22 the representation process so that it actually could 23 be modernized and more clear for everyone concerned, 24 employees, labor unions and employers. 25 MR. PEARCE: The current rules don't have</p>	<p style="text-align: right;">Page 637</p> <p>1 MR. PEARCE: Well, I think we're obliged 2 to acknowledge all of the comments and address those 3 in a final rule. Wouldn't that criticism be a 4 little premature at this point? This is an open 5 comment period. 6 MR. KIRSCHNER: Yes, it is, and if the 7 Board is going to come out with a new proposed rule 8 rather than the final rule which allows greater 9 iteration, then perhaps my concern is not well 10 taken. But if the Board is going to follow the same 11 process as it did last time, which is the notice of 12 proposed rule, which has itself in a way a very 13 defined rule included with it, and then a final 14 rule, there is no further give and take between the 15 Board and the public with respect to the contents of 16 that. 17 MR. JOHNSON: Let me throw some ideas 18 out. 19 MR. PEARCE: Can we have Member Hirozawa 20 first. 21 MR. HIROZAWA: I was just gong to say, 22 Curt, if it makes you feel any better, we don't know 23 where we're headed, either. There are a lot of 24 difficult decisions that are going to have to be 25 made, a lot of questions where there are significant</p>
<p style="text-align: right;">Page 636</p> <p>1 a target date for elections. 2 MR. KIRSCHNER: They don't. 3 MR. PEARCE: Now, with respect to the 4 65,000 notice comments, that was all provided to the 5 NPRM that was issued in 2011, a different Board. We 6 have a new Board, new eyes and so forth. Wouldn't 7 you say there is value to be able to utilize the 8 ability to observe and absorb the 65,000 comments 9 that were previously submitted? 10 MR. KIRSCHNER: Yes. In our view, 11 however, it would have been helpful for the Board 12 when issued its new notice of proposed rulemaking to 13 give some indication of which of those prior 14 comments had an impact on the particulars of the 15 rules. If we assume that the Board's going to 16 follow the same process now that it did in 2011, the 17 next step for the Board would be a final rule that 18 is issued. 19 If that is what occurs, then we will have 20 no indication in the public what this Board thinks 21 of with respect to either the 65,000 prior comments 22 or the 9,000 new comments that you've received. It 23 would have been helpful from our perspective to get 24 some indication of where this Board is headed with 25 respect to the input that it's already received.</p>	<p style="text-align: right;">Page 638</p> <p>1 considerations on both sides, and there will be a 2 lot of discussion among the members during the 3 coming period of time. 4 We got a lot of extremely thoughtful and 5 helpful comments three years ago and we've received 6 more this time, so we have a lot to work with. We 7 have five members who I think you can tell are all 8 very fully engaged. And I think that it's clear 9 that none of us and obviously no members of the 10 public will know where this is going to come out 11 until there has been some decision first on whether 12 there will be a final rule and then on what exactly 13 what will and won't be addressed and how it will be 14 addressed. 15 But in terms of the views of the public, 16 I think that I speak for all five of the members 17 here that we all consider them very important and an 18 essential part of this process. 19 MR. JOHNSON: I always love talking about 20 process improvement, and that's basically what your 21 comment was about. The way that I view it is that 22 the regulated community is somewhat unsettled 23 because there is not really a discernible trajectory 24 at this point and so you're basically looking at a 25 giant mosaic of all these potential changes without,</p>

<p style="text-align: right;">Page 639</p> <p>1 from your point of view, kind of an iterative input 2 from stage to stage. 3 What if -- and I'm saying this with the 4 full expectation that heavy objects will be thrown 5 at me from my fellow members -- but what if there 6 was another stage where we essentially narrowed down 7 whatever the issues were, the inflection points 8 were, to certain key ones? You mentioned your point 9 of view, that you think from a process point of view 10 that if we just got the one time frame settled or 11 discussed, that that would focus the discussion in 12 the sense that the regulated community could very 13 quickly come to some conclusion on where we're going 14 on this and perhaps some mass agreement. 15 But leaving that all aside, that's your 16 view of what would be helpful. If we narrowed 17 things down to a more limited set of issues and it 18 was consistent with the Administrative Procedure 19 Act, because I don't want to be speaking out of 20 school about what we could or couldn't do, and then 21 had another request to speak type thing, not 22 necessarily another comment period because we've 23 already gotten back to you on your FOIA request on 24 that in terms of where the Board ended up ultimately 25 coming out, would that being more helpful?</p>	<p style="text-align: right;">Page 641</p> <p>1 procedural issue. Several of the components of the 2 current NPRM do raise legal concerns, and so if 3 those are addressed in the next stage, then I think 4 many in the employer community might have a 5 different level of concern, particularly if the 6 target date for the election is identified. 7 MR. PEARCE: Thank you very much. Mr. 8 Torres. 9 MR. TORRES: Thank you, Chairman Pearce. 10 I wanted to briefly outline the reasons why I think 11 the Board should consider revisiting its policy 12 permitting the refiling of election petitions within 13 six months of voluntary withdrawal. 14 The current Board precedent, if you look 15 back to the origins in Sears Roebuck, offers little 16 substantive reasoning about why the Board drew a 17 distinction between voluntary withdrawals and 18 election bars, and more fundamentally there is 19 little guidance as to whether that reasoning is 20 still valid given current practices. In my 21 experience and in the experience of other 22 practitioners with whom I've discussed many of these 23 withdrawals, at least in recent times they have 24 occurred much closer to the time of the actual 25 election.</p>
<p style="text-align: right;">Page 640</p> <p>1 MR. KIRSCHNER: Yes. I mean, it would be 2 helpful. It depends on what it's narrowed to. In 3 terms of the future process of the proposed rule, my 4 guess is that in the end any compromise that 5 reflects a consensus of this Board is going to 6 probably leave some members of the employer 7 community and/or some members of labor unhappy. It 8 would be difficult to have some final world that has 9 a consensus on this Board that would make everyone a 10 hundred percent happy. 11 Nonetheless, I think that having this 12 Board achieve a consensus would be a huge step 13 forward. And if that would be reflected in part by 14 a narrowed set of requirements or regulatory changes 15 plus a target deadline and then having some public 16 comment period, personally I think that would be a 17 major step forward and a better process, because 18 people would know then when they're providing 19 comments where this particular Board is headed with 20 the regulatory changes. 21 If you are able to do that type of 22 process, I think it would be a significant 23 improvement than, say, what we saw in 2011. There 24 were various legal concerns raised with respect to 25 that. It ended up being set aside because of a</p>	<p style="text-align: right;">Page 642</p> <p>1 As we all know, elections can be 2 disruptive. They are costly and they are time 3 consuming, especially as they progress, and one 4 stated purpose of the NPRM is to promote greater 5 certainty in the election process. And so it seems 6 to us that to the extent that the employees or union 7 in the course of an election elect to keep their 8 powder dry and await another day, that is obviously 9 their prerogative. 10 I'm not suggesting that we task the 11 regional directors with embarking upon examining the 12 reasons in every instance why that may occur, but I 13 would submit that to the extent that they elect to 14 withdraw the petition voluntarily on the eve of the 15 election or close to the election, that should bear 16 greater consequence for electing to wait so long to 17 do so in the interest of promoting some greater 18 certainty to this process. 19 In terms of what that time period would 20 be, I think it probably needs to wait in part to get 21 an answer to some of the other questions that the 22 Board is grappling here with in terms of what the 23 timing of elections should be. But it seems to me 24 that the shorter the time period the earlier in the 25 process that bar should apply, so that the</p>

<p style="text-align: right;">Page 643</p> <p>1 withdrawal of the petition should result in a one 2 year bar, the same way that the outcome of an 3 election would arguably apply to the entire time 4 period if in fact it ends up being as short as some 5 people have surmised here.</p> <p>6 I think that to the extent that the labor 7 organizations are looking for greater certainty and 8 greater speed in these elections and that they occur 9 more quickly, it seems to me that a corresponding 10 consideration should be given to whether, if they 11 choose to withdraw from that process, whether there 12 should be a consequence that more parallels the 13 outcome of an election rather than giving them some 14 greater ability to reengage in some shorter time 15 frame.</p> <p>16 Employers obviously want certainty, too, 17 and I think employees want certainty as much as 18 possible, and so it seems to meet that a fairer 19 process, especially if the Board is going to 20 consider some shortening of these time periods, 21 would be to take the voluntary bar and run it 22 co-extensive with the election bar.</p> <p>23 I appreciate your letting me have the 24 opportunity to address you on these and other 25 matters over the last two days.</p>	<p style="text-align: right;">Page 645</p> <p>1 process. And to the extent that we are having 2 elections run up to the eve of an election, these 3 are very time consuming, they're very disruptive, 4 and they can be very emotional matters.</p> <p>5 It seems to me that if unions are going 6 to embark upon this process at a time of their 7 choosing we're entitled as employers to see some 8 certainty to that process. I don't see any 9 fundamental reason why, especially in a shorter 10 election period, that that certainty shouldn't 11 co-extensive with the bars that Board has put in 12 place for other elections.</p> <p>13 MS. SCHIFFER: But are you suggesting 14 that there would be more withdrawals now under the 15 new rules, or are you suggesting that this should be 16 a change that should be made no matter what the 17 process is?</p> <p>18 MR. TORRES: I think it should be made no 19 matter what. What I suggested in my remarks, and 20 I'm sorry if I wasn't clear about it, is that, to 21 the extent that the time periods become compressed, 22 it seems to me that the line that the Board elects 23 to draw as to when perhaps it would be appropriate 24 to impose a one year bar perhaps would be --</p> <p>25 MS. SCHIFFER: But you're not really</p>
<p style="text-align: right;">Page 644</p> <p>1 MR. JOHNSON: What impact, if any, do you 2 think that would have on the parties' willingness to 3 enter into the stipulated election agreement if 4 simply once they start negotiating about it they 5 might be stuck with a longer bar?</p> <p>6 MR. TORRES: Well, again, it seems to me 7 that if the outcome of this process is a more 8 streamlined process where there's fewer 9 opportunities for there to be issues contested 10 before the election is held, it seems to me that, if 11 you've put yourself in that process, and I think 12 that unions are looking for fewer barriers to get to 13 an election, so it would seem to me that they would 14 not necessarily have less incentive to reach a 15 stipulated election because all of this is 16 purportedly about getting to the election sooner 17 rather than later, and I don't think that would 18 result in fewer stipulated elections.</p> <p>19 MS. SCHIFFER: And what concerns does 20 this address?</p> <p>21 MR. TORRES: I think it addresses the 22 question of whether or not there is greater 23 certainty in the outcome of holding elections. I 24 think that is certainly part of what the Board is 25 required to ensure, that there is a finality to this</p>	<p style="text-align: right;">Page 646</p> <p>1 linking this with the proposed rules.</p> <p>2 MR. TORRES: Only to the extent that I 3 was suggesting there may be a decision that has to 4 be made as to where the line might be drawn.</p> <p>5 MR. PEARCE: Thank you, Mr. Torres. Mr. 6 Hogan.</p> <p>7 MR. HOGAN: Again, I'm Aloysius Hogan 8 with the Competitive Enterprise Institute. I wanted 9 to address the problem of whether a non-party should 10 be served with Board filings in any circumstances. 11 I posed earlier the problem of increasing the 12 understanding of the workers in a neutrality 13 agreement situation.</p> <p>14 Dr. Murray earlier had phrased, "We are 15 the union, we are the ones organizing." You've got 16 somebody -- and this is all triggered by 17 definition -- somebody is organizing, somebody is 18 pushing the union agenda, and the workers normally 19 in this situation are getting the other side of the 20 story from the employer not getting it. In such 21 situations I think it militates toward affording the 22 non-parties an opportunity to be educated.</p> <p>23 How do we get these workers educated by 24 the company? I'm not talking about a right for 25 these people or a need to educate these people. As</p>

<p style="text-align: right;">Page 647</p> <p>1 Chairman Pearce had begun to allude to, there is no 2 duty of the Board to educate these people in the 3 absence of the employer doing the education but, 4 rather, allowing a notice to outside groups. And 5 here I'm talking about the groups that would be 6 notified would be doing the job of correcting the 7 imbalance in information of giving the side of the 8 story that normally the corporation does. 9 What you would run into quickly is the 10 worker centers, that they'd say, "Hey, we want to 11 join in here and we're happy to give our 12 information, too," but that side of the story is 13 already being handled. I'm talking about the other 14 side of the story that's not in the scenario. 15 And so there's kind of a trigger if there 16 is nobody taking care of that side of the story, of 17 the neutrality agreement. However, it can't be 18 limited to that scenario, because let's say that 19 were the situation, that if there is a neutrality 20 agreement and nobody giving that side of the story, 21 then the union and the business that are working 22 together would know, "Well, then you're going to get 23 the other side of the story from somebody else, so 24 we better not have a neutrality agreement, we'll 25 phone it in and we'll really give you the</p>	<p style="text-align: right;">Page 649</p> <p>1 thing, charities. 2 MR. PEARCE: Specifically what are you 3 talking about them doing, these charities? What 4 would they be doing? 5 MR. HOGAN: For example, one of the 6 things that is very complex that we haven't even 7 discussed too much is labor economics. Forget the 8 law. 9 MR. JOHNSON: We can't employ economists, 10 but keep going. 11 MR. HOGAN: We're not talking about 12 employing economists but trying to get people to 13 understand a lot of complex stuff that they have to 14 get in a quick period of time, and they need to 15 learn this so that they can make an informed 16 decision. In fact, I did want to make a point on 17 the time that it would take to learn this stuff by 18 analogy to the McCain-Feingold Bipartisan Finance 19 Reform Act, which of course was overturned. 20 But the point I'm making there is that 21 the legislators had in mind a 60 day window before 22 the general election that would be a minimum of 60 23 days when you could educate the people about the 24 issues in the election and the people involved in 25 the election. So it's going to take some time. If</p>
<p style="text-align: right;">Page 648</p> <p>1 information," and they'll just half-hearted 2 quarter-hearted give you the information just so 3 that no third party could come in. 4 What I'm talking about is that I believe 5 the objective can be achieved by making the 6 opportunity known to outside groups that want to 7 help, not a referral service, but there are outside 8 groups, as we saw in Tennessee, in Chattanooga, that 9 are willing to serve that role, non-profits, 10 institutes, foundations and charities that are happy 11 to help do the education. 12 In that scenario, is it right that they 13 would be notified of that situation, of that 14 opportunity to fill that void in the process, which 15 is in that case kind of broken down and not served by 16 that group of people? I'm throwing that out there 17 as something to chew on, and I don't have all the 18 answers on that, but I think it is a concern that 19 the Board should consider. 20 MR. PEARCE: So you're talking about like 21 a labor version of the League of Women Voters being 22 brought in to kind of educate everybody? 23 MR. HOGAN: Well, it would be a voluntary 24 thing. There would be no government expense. And 25 there are groups out there that do this sort of</p>	<p style="text-align: right;">Page 650</p> <p>1 you've got nobody helping the workers learn about 2 this other side of the story, I would say you'd need 3 a little extra time, and that's just a window of 4 time that you could look to. 5 MR. JOHNSON: A few things. One is that 6 you know under our proposal a notice is going to go 7 up at the time the petition is filed, so everybody's 8 going to see that in the workplace. And there are 9 companies that see our petitions that come in. They 10 get them through FOIA requests and then just put 11 them out there. Any such charity could subscribe to 12 that list if it wanted to. You're suggesting that 13 we regulate the entry in the neutrality agreements 14 between unions and employers with some sort of 15 notice? 16 MR. HOGAN: No, not at all. I am 17 considering more like an opt-in situation where it 18 would be permissible to allow these groups to serve 19 the role of educating these people. 20 MR. JOHNSON: But who's doing the opting 21 and who determines who the groups are? 22 MR. HOGAN: Well, that's it. The groups 23 are essentially volunteers. They'd be opting in. 24 It would be the groups themselves, the educators, if 25 you will.</p>

<p style="text-align: right;">Page 651</p> <p>1 MR. JOHNSON: But who's going to be 2 checking the box saying, I'D like to inform Southern 3 Momentum of this proposed election? I don't 4 understand that. 5 MR. HOGAN: Well, once they're informed 6 of the scenario that we're talking about where there 7 is a disserved population, that's what would trigger 8 it. And that's what would take some discernment. 9 It's not just, as I went through in my scenario, 10 it's not just when there is a neutrality agreement, 11 but it's also when there is any hint of a wink-wink 12 shall we say. 13 MR. JOHNSON: But that would be 14 impossible to monitor. I guess also that neutrality 15 agreements, some people think of those as a social 16 good because essentially they might secure them 17 labor peace, and some people may say, "Well, the 18 NLRA is built around labor peace." It just seems 19 like, even if we wanted to regulate this, it would 20 be incredibly difficult to do. 21 MR. HOGAN: Well, again, I'm not saying 22 to regulate it but to afford the opportunity. In 23 fact, you said you were interested in process and 24 process breakdowns, and it seems here that there is 25 a disserved population increasingly depending on</p>	<p style="text-align: right;">Page 653</p> <p>1 I hope that you've been comfortable with 2 how this process went. I at least got one 3 compliment on how it was done, and I hope everybody 4 shares that. I thank you again for traveling from 5 your distances to do this. We appreciate your 6 efforts. This hearing is now closed. 7 (Proceedings concluded at 6:24 p.m.) 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>
<p style="text-align: right;">Page 652</p> <p>1 what happens with neutrality agreements ultimately. 2 MR. JOHNSON: Well, folks can get the 3 app, and I also think if there's any organization 4 that wants to see if there's an election coming 5 around there are petition monitoring services. 6 MR. MISCIMARRA: Mr. Hogan, the one thing 7 I do gather from your comments, and I would guess 8 that others would agree, that there certainly are a 9 variety of interests, not just those of the employer 10 and those of the employees or those of unions that 11 are involved in representation cases, that are both 12 affected and also have an interest in what happens 13 with respect to these types of issues and disputes. 14 Would you agree with that? 15 MR. HOGAN: Very much so. 16 MR. PEARCE: Well, I'd like to thank the 17 seating and the patience of all of you to wait to 18 get your statements in and your presentations. I'd 19 like to thank all participants in this public 20 hearing. It was comprehensive, very educational and 21 useful to us in our deliberations. I commend the 22 commitment that all of you have demonstrated, your 23 knowledge of the circumstances, the data that you've 24 provided, and the well thought out arguments and 25 points that are definitely worthy of reflection.</p>	<p style="text-align: right;">Page 654</p> <p>1 District of Columbia. 2 To wit: 3 I, Keith A. Wilkerson, a Notary Public of 4 the District of Columbia, do hereby certify that the 5 that these proceedings were recorded 6 stenographically by me and that this transcript is a 7 true record of the proceedings. 8 I further certify that I am not of 9 Counsel to any of the parties, nor an employee of 10 Counsel, nor related to any of the parties, nor in 11 any way interested in the outcome of this action. 12 As witness my hand and Notarial Seal this 13 28th of April 2014. 14 15 Keith A. Wilkerson, 16 Notary Public 17 My commission expires: 18 November 12, 2014 19 20 21 22 23 24 25</p>

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