

# Union Lawyers and Employment Law

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I.	INTRODUCTION .....	58
II.	UNIONS, THE ENFORCEMENT OF EMPLOYMENT LAW, AND THE PROBLEM OF CERTIFICATION ELECTIONS.....	63
	A. <i>The NLRA Protects the Rights of Employees to Obtain Union Assistance in the Enforcement of Employment Law in Non-Union Workplaces</i> .....	63
	B. <i>The Permissibility of Providing Legal Representation During an Organizing Campaign</i> .....	65
	1. <i>NLRB Regulation of Elections and the Prohibition of Pre-Election Benefits</i> .....	66
	2. <i>Legal Representation Is Not an Impermissible Pre- Election Benefit</i> .....	73
	3. <i>Legal Representation Is Not Vote-Buying</i> .....	75
III.	THE FIRST AMENDMENT AND THE REGULATION OF CERTIFICATION ELECTIONS .....	79
	A. <i>The First Amendment Protects Legal Representation and Litigation</i> .....	80
	B. <i>The Nestle-Freund Rule is a Content-Based Restriction</i> .....	85
	C. <i>The Nestle-Freund Restriction Fails Strict Scrutiny</i> .....	90
IV.	ETHICAL RESTRICTIONS ON UNION LAWYERS REPRESENTING NONUNION EMPLOYEES.....	92
	A. <i>There Is No Conflict of Interest Between Union Lawyers and the Non-Member Employees Whom They Represent</i> .....	93
	1. <i>The Interests of Employees, the Lawyer, and the Union Are Not in Conflict</i> .....	93
	2. <i>The Ethical Rules Allow Union Lawyers to Represent Non-Member Employees</i> .....	95
	B. <i>Any Conflict of Interest Would Be Waivable</i> .....	98

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C.	<i>Disqualification Is Not an Appropriate Response to a Possible Conflict of Interest</i> .....	100
V.	CONCLUSION .....	104

## I.

## INTRODUCTION

The reality of law in the modern American workplace is that most protections for employees stem from statutes and common law, not from collective bargaining agreements. Unfortunately, many employment laws are not adequately enforced. The lower the wages, the more likely that fundamental employment laws, including safety, health, and wage and hour laws, will be violated.<sup>1</sup> Low-wage employees are apt to lack the knowledge and the resources to enforce their rights, and there simply are too few government inspectors to ensure compliance with basic safety, health, and wage and hour laws in workplaces all over the country.<sup>2</sup>

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1. See, e.g., Philip Dine, *Rep. Talent Backs Bill to Overhaul OSHA*, ST. LOUIS POST DISPATCH, Sept. 30, 1997, at 6A (Congressional sponsors of bill to amend OSHA contend that “with a ratio of one inspector to every 3000 worksites, OSHA officials can inspect workplaces only once every 167 years.”); Elaine Dodge & Terri Shuck, *Q. Two Years After North Carolina Poultry Fire, What’s Changed? A. Not Much*, LAB. NOTES, Feb. 1994, at 11 (describing fire in North Carolina poultry plant that killed twenty-five workers and injured fifty-six others; hazards contributing to high death toll included locked exit doors, frequent fires, and grease and water on the floor. Employees did not report conditions to government agencies because of fear of retaliation.); William Glaberson, *Is OSHA Falling Down on the Job?* N.Y. TIMES, Aug. 2, 1987, at section 3, p. 1 (noting OSHA’s low fines, management problems, and inadequate number of inspectors); James Hansen, *Congress Puts Spotlight on Workplace Safety Issues*, DENV. ROCKY MOUNTAIN NEWS, Mar. 29, 1994, at 42A (“OSHA is so understaffed that it would take 120 years for the agency to inspect every work site in Colorado at least once. For dangerous manufacturing plants with a high priority for inspection, OSHA only inspects an average of once every 13 years.”); Jon Jefferson, *Dying for Work: A Weak OSHA and Declining Unions Means Danger on the Job*, A.B.A. J., Jan. 1993, at 46 (describing media accounts of workplace dangers); Joan Fleischer Tamen, *As Workplace Deaths Grow, Safety Measures Don’t Keep Up; OSHA Prepares to Add Inspectors in South Florida*, SUN SENTINEL, Sept. 24, 2000, at 25A (“The Occupational Safety and Health Administration has 48 inspectors in Florida responsible for monitoring 5.9 million workers. By comparison, Massachusetts has 51 OSHA inspectors, and 2.8 million workers under the agency’s jurisdiction.”); Henry Weinstein, *Federal Commitment to Worker Safety Criticized by Institute*, L.A. TIMES, Sept. 7, 1987, at B1 (National Safe Workplace Institute and the National Institute for Occupational Safety and Health criticized federal Occupational Safety and Health Administration for low fines, long delays, failure to verify whether identified hazards are corrected).

One Service Employees International Union organizer familiar with working conditions of janitors in Los Angeles stated that she had never seen a non-union employer in the building services industry that fully complied with wage and hour, safety, and other employment laws. Interview with Triana Silton, Coordinator of the Building Services Division, SEIU, in Los Angeles, Cal. (Aug. 8, 2000).

2. See sources cited *supra* note 1; see also Louise Sadowsky Brock, *Overcoming Collective Action Problems: Enforcement of Worker Rights*, 30 U. MICH. J.L. REFORM 781, 789-92 (1997) (argues that mobilization problems, because of free-rider problem, are one likely reason for inadequate enforcement of OSHA, WARN Act, and FLSA); Thomas O. McGarity, *Reforming OSHA: Some Thoughts for the Current Legislative Agenda*, 31 HOUS. L. REV. 99, 101, 110, 116 (1994); Clyde

Unions can and increasingly do play a significant role in addressing this most conspicuous failure of employment law in the nonunion workplace. The President of the AFL-CIO recently summed up the reasons for this new initiative in remarks to the American Bar Association: "The fact is that with 7 million workplaces in our country, our government has not been and will not be able to effectively enforce employment laws . . . [L]imited resources, lack of legal sophistication and fear limit the effectiveness of private enforcement."<sup>3</sup> Unions have the knowledge and resources to determine when the law has been violated and to seek enforcement, and unlike individual employees, union representatives need not fear retaliation for invoking statutory protections.<sup>4</sup>

In a world in which organizing is difficult and ninety percent of private-sector employees are unorganized, some unions have embraced the enforcement of employment law in nonunion workplaces both as an organizing strategy and as a matter of philosophical commitment.<sup>5</sup> As the AFL-CIO President put it, unions are seeking "to institutionalize worker advocacy programs [by] . . . training their organizers and field representatives to recognize and address violations of key federal and state employment laws."<sup>6</sup> This, for most employees, is the most significant role that unions play today. Unions and their lawyers have represented store clerks seeking back wages for uncompensated overtime work;<sup>7</sup> Thai garment workers who were held in virtual slavery in an El Monte, California sweatshop;<sup>8</sup> employees suffering unsafe working conditions at poultry processing plants;<sup>9</sup> and janitors seeking minimum wages.<sup>10</sup>

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Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 491-96, 504-10 (1992) (explaining reasons for underenforcement of FLSA and OSHA in non-union workplaces).

3. Remarks by AFL-CIO President John J. Sweeney to ABA Labor and Employment Section July 11, 2000, 134 Daily Lab Rep. (BNA) E-44 (July 12, 2000) [hereinafter *Sweeney Remarks*].

4. On the role of unions in enforcing employment law, see generally Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. REV. 169 (1991); Charles B. Craver, *Why Labor Unions Must [and Can] Survive*, 1 U. PENN. J. LAB. & EMP. L. 15 (1998). On the future role of unions in a world in which employees are not organized, see Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 640-51 (2001) (discussing the "citizen union").

5. See, e.g., <http://www.aflcio.org> (last visited March 29, 2001) (describing an array of workplace protections having no connection to union membership).

6. *Sweeney Remarks*, *supra* note 3.

7. See, e.g., *In re Food Lion, Inc.*, "Effective Scheduling" Litigation, 73 F.3d 528 (4th Cir. 1996), 151 F.3d 1029 (4th Cir. 1998); *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union*, No. 6:93-0582-1AJ, 1993 U.S. Dist. LEXIS 14669 (D.S.C. 1993); *Pfarr v. Food Lion, Inc.*, 851 F.2d 106 (4th Cir. 1988).

8. *Bureerong v. Uvawas*, 922 F. Supp. 1450 (C.D. Cal. 1996).

9. See, e.g., *Case Farms v. NLRB*, 128 F.3d 841 (4th Cir. 1997).

10. See, e.g., *Chicago ACORN v. Metro. Pier & Exposition Auth.*, 150 F.3d 695 (7th Cir. 1998); Harold Myerson, *A Clean Sweep: The SEIU's Organizing Drive for Janitors Shows How Unionization Can Raise Wages*, THE AMERICAN PROSPECT, June 19, 2000, at 24.

Of course, unions and their lawyers have for years litigated and lobbied for legislation affording statutory protections to all workers. Much of the legislation they sought and the litigation they won benefited non-union workers as well—many of the significant OSHA cases were brought by unions, as were cases fighting for equal rights for women and others.<sup>11</sup> The question is whether the law will allow unions to fight directly on behalf of non-union workers, instead of doing so only indirectly.

The decision to provide legal services to enforce statutory or common law employment rights comes at a potentially serious cost, however, for nonunion workers and the unions that seek to represent them. Under current law, they face the possibility that if the union wins a representation election while union-supported employment litigation is pending, the employer can have the election set aside on the ground that the legal services constituted an effort to buy votes.<sup>12</sup> The National Labor Relations Act (NLRA) has been interpreted to prohibit employers and unions from conferring benefits on employees during the critical period prior to a union certification election. The provision of legal representation (except assistance in filing unfair labor practice charges with the National Labor Relations Board (NLRB)) has been deemed to be an unlawful pre-election benefit. The Sixth Circuit in *Nestle Ice Cream Co. v. NLRB*,<sup>13</sup> and the D.C. Circuit in *Freund Baking v. NLRB*,<sup>14</sup> held that a union violates the NLRA's requirements for a fair election by offering free legal representation to the employees who will vote in the union election. Both courts concluded that free legal representation is in an unlawful pre-election benefit. The NLRB stuck to its view that such legal representation is not grounds for setting aside an election and refused, after *Nestle*, in a case called *Novotel New York*, to follow the *Nestle* rule.<sup>15</sup> However, the D.C. Circuit's decision in *Freund Baking* makes it virtually impossible for the NLRB to continue to adhere to its view because employers may seek review of any union election in the D.C. Circuit by refusing to bargain with the certified union and then seeking review of the NLRB's subsequent section 8(a)(5) bargaining order in the D.C. Circuit.<sup>16</sup> Therefore, no union can confidently

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11. See, e.g., *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (fetal protection policies); *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607 (1980) (The Benzene Case); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) (affirmative action); *AFL-CIO v. OSHA*, 965 F.2d 962 (11th Cir. 1992) (the air contaminants standard); *International Union, UAW v. Gen. Dynamics Land Sys. Division*, 815 F.2d 1570 (D.C. Cir. 1987) (scope of the OSHA general duty clause).

12. *Freund Baking Co. v. NLRB*, 165 F.3d 928 (D.C. Cir. 1999); *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578 (6th Cir. 1995).

13. *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578 (6th Cir. 1995).

14. *Freund Baking Co. v. NLRB*, 165 F.3d 928 (D.C. Cir. 1999).

15. *Novotel New York*, 321 N.L.R.B. 624 (1996).

16. Under section 10(f) of the NLRA, a respondent in an unfair labor practice proceeding may obtain review of a final order of the NLRB in the circuit court of appeals in which the unfair labor

provide pre-election legal representation.

Given the failure of the Board and the courts to provide a coherent standard or consistent rationales for assessing the permissibility of pre-election benefits, and the Board's own determination that other, more modest benefits are not permissible, it is not surprising that the Board's lawyers had difficulty convincing the courts of appeals that free legal representation is permissible.<sup>17</sup> In this Article, I argue that if the Board wished to improve its success in this particular type of pre-election benefits case, it might do well to reconsider, in light of recent scholarship in the field of election law, its reflexive and unjustified assumption that most benefits that might influence votes are wrong. Even absent such a thorough re-evaluation of the law, however, I argue that employment law litigation is permissible under current labor law and that the courts of appeals' decisions are wrong.

The Supreme Court's recent decisions in the area of free expression under the First Amendment make clear that *all* content-based restrictions on speech are subject to strict scrutiny.<sup>18</sup> To prohibit unions from providing legal assistance to non-member employees in employment law matters while allowing them to do so for unfair labor practice charges is an unconstitutional content-based restriction on First Amendment activity. In addition, forcing employees to choose between exercising their right to union representation for collective bargaining and their right to union lawyers' representation for employment litigation impermissibly requires

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practice occurred, or where the respondent resides, or in the D.C. Circuit. 29 U.S.C. § 160(f). The D.C. Circuit, therefore, has jurisdiction over petitions for review of all decisions of the NLRB, and the D.C. Circuit is one of the two that has held that union lawyers providing employment law representation is grounds for setting aside an election. See *Freund Baking Co. v. NLRB*, 165 F.3d 928 (D.C. Cir. 1999).

17. Readers familiar with labor law will note that I join a 35-year-long chorus of disapproval of most or parts of existing doctrine regulating union election campaigns from commentators of all perspectives, including those known to be sympathetic to unions: Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495 (1993); Julius Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MO. L. REV. 4 (1984); Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLR Act*, 96 HARV. L. REV. 1769 (1983); those of an arguably centrist position: Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964); and those who articulate a management perspective: Charles C. Jackson & Jeffrey S. Heller, *Promises and Grants of Benefits Under the National Labor Relations Act*, 131 U. PA. L. REV. 1 (1982).

18. See, e.g., *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000); *Turner Broad. Sys., Inc. v. Fed. Communications Comm'n*, 512 U.S. 622 (1994); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991); *Boos v. Barry*, 485 U.S. 312 (1988). See generally ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 756-63 (1997). There are some categories of speech that receive less First Amendment protection, including incitement, obscenity, and defamation, and these are by definition content-based categories. "But apart from these categories, content-based discrimination must meet strict scrutiny, and the Court has recently indicated that content-based distinctions within these categories also must pass strict scrutiny." *Id.* at 759 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)).

employees to sacrifice important First Amendment rights as a condition of obtaining an NLRB-sponsored election. Neither of these infringements on First Amendment rights can withstand strict judicial scrutiny. Nor, I argue, can this doctrine pass muster under any other constitutional standard applicable to speech in labor cases. Whatever the viability under the First Amendment of the relaxed scrutiny that courts have traditionally given to restrictions on labor picketing and secondary boycotts,<sup>19</sup> the prohibition on union lawyers representing nonunion employees cannot be justified.

Another problem union lawyers face in providing legal representation for non-union members is disqualification on the grounds of a conflict of interest. Some courts have determined that union lawyers face an unacceptable conflict of interest when representing individual employees who are not union members.<sup>20</sup> Disqualification of union counsel would make it very difficult for individual employees to pursue potentially meritorious cases because the likely damages are too small to attract willing counsel. This Article explains why there are no ethical obstacles to union lawyers representing nonunion employees: the possibility that a conflict of interest would arise is highly speculative; even if a conflict arose, it would be waivable by the employees and the union; and employers lack standing to move to disqualify their opponents' counsel on the basis of the possible conflict.

Part I of this Article begins by outlining the important role unions play in the enforcement of employment law in both union and non-union workplaces and demonstrates that enforcement of workplace rights is activity that is protected by section 7 of the NLRA. It then discusses the NLRB's rules for regulating union elections and demonstrates that providing free legal representation is entirely consistent with the conduct of a fair election. Part II examines the several First Amendment issues raised by the prohibition on union sponsorship of workplace rights advocacy during the pre-election period. Part III addresses the ethical issues confronting union lawyers who represent non-members and concludes that such representation is permissible under every applicable ethical rule.

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19. See Getman, *supra* note 17.

20. Brooks v. Farm Fresh, Inc., 759 F. Supp. 1185 (E.D. Va. 1991), *rev'd sub nom.* Shaffer v. Farm Fresh, Inc., 966 F.2d 142 (4th Cir. 1992).

## II.

## UNIONS, THE ENFORCEMENT OF EMPLOYMENT LAW, AND THE PROBLEM OF CERTIFICATION ELECTIONS

*A. The NLRA Protects the Rights of Employees to Obtain Union Assistance in the Enforcement of Employment Law in Non-Union Workplaces*

Unions do much more to ensure adequate working conditions than simply make and enforce collective bargaining agreements and enforce rights available to unionized employees under the NLRA. They also ensure that the employers of their members comply with statutory employment laws.<sup>21</sup> It is widely believed that wage and hour and occupational safety violations are less common in unionized workplaces than in nonunion workplaces because unions have the knowledge and resources to require that employers comply with the Fair Labor Standards Act, the Occupational Safety and Health Act, and other safety and wage and hour laws. The reason for greater employment law compliance in unionized workplaces is that unions have the knowledge and resources to identify and remedy violations. Individual employees lack comparable knowledge and resources to ensure employment law compliance. Many fear retribution even when they know of their rights. And, as noted above, there are far too few government inspectors to detect even the most egregious violations.<sup>22</sup>

It is in the interest of employees, unions, and the public to allow unions to play the vital role of ensuring compliance with workplace laws for all employees. Employees obviously benefit from safer workplaces and from adequate wages. The public does as well, for tax revenues need not support as many government inspectors. Even employers might enjoy some benefits of union enforcement of employment law: unions provide a source of information about how to comply with law, and they reduce the need for burdensome and invasive government inspections of the workplace and payroll records.

In evaluating the benefits of union enforcement of employment law against the risk that such union involvement will unfairly sway employees to vote for a union in a later organizing effort,<sup>23</sup> the Board and the courts

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21. Rabin, *supra* note 4, at 200-03.

22. *Supra* notes 1 and 2; see also <http://www.aflcio.org/safety> (last visited March 29, 2001).

23. Under section 9 of the NLRA, employees choose whether to be represented by a union in a secret ballot election administered by the NLRB. The Board's election procedures contemplate that a union will, after gathering signed union authorization cards from at least 30 percent of the relevant workforce, file a petition requesting the NLRB to conduct an election. During the several-week period between the filing of the petition and the conduct of the election, employers vigorously campaign against unionization, and employers enjoy considerably greater access to employees for campaigning than unions do. Although the law prohibits employers from threatening or coercing employees, the remedies for violations of the law are weak, and the vastly unequal access to the employees makes it

should bear in mind that a union desiring to avoid the legal restrictions on pre-election conduct could decide simply to forego the NLRB-sponsored election. Many unions have lately done exactly that, concluding that the supposed “protections” the law offers for union organizing are in fact tools the employer can use to defeat an organizing campaign.<sup>24</sup>

Sixty-five years of legal regulation of union elections has produced the ironic consequence that unions have incentives to avoid the secret-ballot election that the Board has long favored as the preferred method for employees to express their desire for union recognition. If unions cannot provide legal assistance to employees they seek to organize, they have yet another reason to avoid the NLRB election process. Judges of all political stripes should wonder at the wisdom of such an incentive, inasmuch as they are relying on labor law doctrines that have been criticized persistently from all points on the political spectrum.<sup>25</sup> The analogy between union elections and political elections creates more problems than it solves.<sup>26</sup> Whatever one’s view on that issue, however, the administration of the election process is complex and consumes a significant quantity of the Board’s resources.<sup>27</sup> The courts should seriously reconsider whether the legal doctrines discussed here—which provide an additional and powerful incentive for unions to eschew the NLRB process—serve the interests of employees whom they are designed to protect.

Federal labor law protects the rights of employees and their unions to engage in litigation, lobbying, or other activities to obtain or enforce rights both under the NLRA and under state and federal employment laws. Section 7 gives employees the right “to form, join, or assist labor organizations,” or “to engage in other concerted activities for the purpose of . . . mutual aid or protection.”<sup>28</sup> The concerted activity protected under section 7 includes seeking legislation,<sup>29</sup> filing unfair labor practice charges under the NLRA,<sup>30</sup> and filing suit for wages or other remedies under state or

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difficult for a union to respond even to the employer’s lawful persuasion.

24. See Roger Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements*, 22 BERKELEY J. EMP. & LAB. L. 369 (2001); see also Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495 (1993).

25. The dominant criticisms are summarized and elaborated in Becker, *supra* note 24. See also JULIUS GETMAN, ET AL., *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* (1976); Bok, *supra* note 17; Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

26. The argument that the analogy is inapt is most fully developed by Becker, *supra* note 24.

27. See, e.g., Sixty-Third Annual Report of the National Labor Relations Board (1998) (representation petitions constituted 20 percent of the NLRB’s annual filings).

28. 29 U.S.C. § 157 (2001).

29. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

30. See, e.g., 29 U.S.C. § 158(a)(4) (unfair labor practice “to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act”).



federal employment laws,<sup>31</sup> and even opposing unsafe workplace practices.<sup>32</sup> So long as the activity is concerted, section 7 protects it whether or not a union represents the employees or is even on the scene.<sup>33</sup>

In determining that concerted activity for mutual aid and protection is protected by section 7 irrespective of union membership, the courts have emphasized both the plain language and the purposes of the NLRA. Nothing in the language of section 7 conditions legal protection on the involvement of a union. The statute protects concerted activity “for mutual aid and protection,” not merely the forming, joining, or assisting of labor organizations.<sup>34</sup> The purposes of the NLRA also were quite clearly to enable non-members of unions to act in concert with unions to improve working conditions.<sup>35</sup>

### *B. The Permissibility of Providing Legal Representation During an Organizing Campaign*

That section 7 protects legal representation for the purpose of filing suit regarding workplace conditions does not necessarily mean that such a suit can occur during a union organizing campaign. Thus, for example, the Board prohibits electioneering near polling places while voting is underway,<sup>36</sup> even though electioneering is protected activity. Nevertheless, the fact that conduct is statutorily protected is relevant in determining whether it should be prohibited during the critical period. As explained below, to preserve the fairness of the election process, labor law sharply restricts the ability of either employers or unions to promise or to confer benefits to employees during the pre-election period. The Board and the courts have recognized the possibility that an employer or a union may

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31. *NLRB v. Moss Planing Mill Co.*, 206 F.2d 557, 560 (4th Cir. 1953) (a union-initiated suit for back wages under state law is protected under section 7); *M.F.A. Milling Co.*, 26 N.L.R.B. 614, 626 (1940).

32. *Blue Circle Cement Co. v. NLRB*, 41 F.3d 203 (5th Cir. 1994) (cement company employee was engaged in protected concerted activity when he used company photocopier to duplicate article concerning “sham recycling” of hazardous waste by cement plants).

33. *E.g.*, *In re Epilepsy Foundation*, 331 N.L.R.B. No. 92 (2000); *Timekeeping Sys., Inc.*, 323 N.L.R.B. 244 (1997).

34. 29 U.S.C. § 157 (2001).

35. *See, e.g.*, 29 U.S.C. § 151 (2001) (“The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.”).

36. *NLRB v. Hudson Oxygen Therapy Sales Co.*, 764 F.2d 729 (9th Cir. 1984); *NLRB v. Carroll Contracting & Ready-Mix, Inc.*, 636 F.2d 111 (5th Cir. 1981); *Milchem, Inc.*, 170 N.L.R.B. 362 (1968); *Claussen Baking Co.*, 134 N.L.R.B. 111 (1961); *cf. Burson v. Freeman*, 504 U.S. 191 (1992) (upholding a law that prohibited distribution of campaign literature within 100 feet of the entrance to a polling place during political election).

persuade employees to vote against or for union representation by promising things of value during the pre-election period. The question is whether legal representation is such an impermissible effort to buy votes.

For reasons explained below, there is little or no risk that employees who receive legal services from lawyers retained by unions will be persuaded to vote, simply out of a feeling of obligation, for a union that they would otherwise oppose. Even if the union's efforts to enforce the employment law rights of nonunion employees did cause the latter to vote for the union, this is an entirely legitimate basis for choosing a collective bargaining representative. Accordingly, there is no reason why federal labor law should be an obstacle, and every reason why the Board is correct that unions are free to take on this role.

### *1. NLRB Regulation of Elections and the Prohibition of Pre-Election Benefits*

The NLRB regulates the conduct of elections in a variety of ways under the authority of several different sections of the NLRA. First, it is an unfair labor practice under section 8(a)(1) for an employer "to interfere with, restrain, or coerce employees" in the selection of their bargaining representative.<sup>37</sup> Under section 8(c), an employer may express its opinions about unionization, but it cannot promise benefits or threaten reprisal to sway employees' choices.<sup>38</sup> Employer campaign speech that is not an unfair labor practice under 8(a)(1), because it is sheltered under section 8(c), may be grounds for setting aside an election. The NLRB has determined that section 9, which directs the Board to conduct elections for the selection of bargaining representatives, authorizes it to decline to certify the results of an election if it determines that the election does not represent the free choice of the employees.<sup>39</sup> Using the metaphor that an election is like a scientific experiment to test the sympathies of the employees, the Board will set aside an election when it determines that pre-election conduct improperly polluted the "laboratory conditions."<sup>40</sup> Therefore, it is impermissible even to grant benefits that are understood to be permanent and unconditional.<sup>41</sup>

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37. 29 U.S.C. § 158(a)(1) (2001).

38. 29 U.S.C. § 158(c) (2001). Section 8(c) provides: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

39. 29 U.S.C. § 159(c) (B) (the Board "shall direct an election by secret ballot and shall certify the results thereof").

40. *Gen. Shoe Corp.*, 77 N.L.R.B. 124 (1948).

41. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

Generally speaking, the same standards of pre-election conduct apply to employers and to unions. Unions are prohibited by section 8(b)(1) from restraining or coercing employees in the exercise of their rights to form or join unions or to refrain from doing so.<sup>42</sup> Union conduct that interferes with “laboratory conditions” is grounds for setting aside an election even if it is not an unfair labor practice.<sup>43</sup>

However, there are significant differences between the promises or benefits that unions can confer and those that employers can confer. Because unions, unlike employers, lack unilateral control over the livelihood and employment prospects of workers, the Board will not set aside an election simply because the union promised benefits unless the benefit is within the union’s unilateral power to confer.<sup>44</sup> Thus, a union is free to promise that employees will earn higher wages or benefits if they vote for the union, but the union cannot offer to waive initiation fees or dues for employees who join the union before the election.<sup>45</sup> The Board has also recognized that a union organizing campaign often will prompt an employer to discriminate against union supporters or to otherwise interfere with employees’ section 7 rights. The union often will provide legal assistance in filing unfair labor practice charges. The Board and the courts have never doubted that a union is perfectly free to file unfair labor practice charges on behalf of employees in election campaigns.

The prohibition on promising or granting benefits lasts from the time the union files a petition seeking a representation election until the NLRB certifies the election results. This so-called “critical period”<sup>46</sup> often lasts for several months.<sup>47</sup> Significantly, however, the Board has also set aside elections based on promises of benefits that were made *prior* to the filing of the election petition.<sup>48</sup> Because of the possibility that legal representation,

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42. 29 U.S.C. §158(b)(1) (2001). *See, e.g.*, Int’l Union of Elevator Constructors Local Union No. 8 v. NLRB, 665 F.2d 376 (D.C. Cir. 1981) (union rules coerced employees who were not union members); NLRB v. Union Nacional de Trabajadores, 611 F.2d 926 (1st Cir. 1979) (union committed unfair labor practices in threatening physical harm to employees who worked during a strike or who opposed union, threatening an employee to prevent him from testifying in an unfair labor practice hearing).

43. Gen. Shoe Corp., 77 N.L.R.B. 124 (1948).

44. NLRB v. Savair Mfg. Co., 414 U.S. 270, 278 (1973).

45. *Id.*

46. Ideal Elec., 134 N.L.R.B. 1275 (1961).

47. *See, e.g.*, Gen. Elec. Co., 321 N.L.R.B. 662 (1996) (critical period lasted five and a half months); Reno Hilton Resorts Corp., 319 N.L.R.B. 1154 (1995) (critical period lasted four months); Schoolman Transp. Sys., Inc., 319 N.L.R.B. 701 (1995) (critical period lasted two months but Board considered pre-petition conduct as well); *cf.* J.P. Stevens & Co., 167 N.L.R.B. 258 (1967) (in ruling on objections to runoff election, conduct may be considered back at least as far as date of first election, even if it occurred before Regional Director’s order and direction of second election).

48. Royal Packaging Corp., 284 N.L.R.B. 317 (1987) (setting aside election based on pre-petition promise of benefits); Gibson’s Discount Ctr., 214 N.L.R.B. 221 (1974) (holding that where union made promises outside critical period to waive initiation fees as prohibited in *Savair*, it will set aside election

once an employment suit is filed, might last months or years, a union must consider whether to delay seeking a certification election for a very long time once its lawyers undertake to represent employees whom the union is seeking to organize.

Neither the NLRB nor the courts have settled on a single rationale for prohibiting promises or benefits by unions or employers. Four dominant concerns appear.<sup>49</sup> First, there is the concern with free choice.<sup>50</sup> If employees vote because of threats of physical violence or drastic economic retribution, their votes are in some sense not their own free choice. However, a grant of benefits in anticipation of an election is not necessarily a form of economic duress, particularly if the benefit is unconditional. The Supreme Court nevertheless pointed out that:

The danger inherent in well-timed increases in benefits is the suggestion of a fist inside a velvet glove. The employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.<sup>51</sup>

The Court was concerned that an employer's grant of benefits during the critical period might interfere with free choice because it conveys the implicit message that benefits will dry up if the employees elect a union.<sup>52</sup> In applying the rule, the Board distinguishes between grants of benefits that employees likely would infer to be "the fist inside the velvet glove" and those—like regularly scheduled annual raises or bonuses—that are not likely to be interpreted as promises or threats.

The second rationale for prohibiting the conferral of benefits is that an employee choice should be reasoned as well as free. An employee who votes for or against a union because he or she has been promised or given money may be exercising a free choice, just one that is more directly affected by economic concerns than the Board and the courts consider seemly. Of course, all union elections are affected in part by the employees' perception of what is going to be in their economic best interest—will unionization lead to higher wages and better working conditions or not? As one court had noted, however, employees should choose unionization based on a reasoned "consideration of the advantages

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because the effects of the pre-petition promises lingers on through election); *see generally* Nat'l League of Prof'l Baseball Clubs, 330 N.L.R.B. No. 112 (2000) (discussing when effects of pre-petition conduct linger on through election so as to be basis for setting aside election and finding no reason to set aside election).

49. The first three were identified by Derek Bok in his influential article, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, *supra* note 17. The fourth was identified by the Supreme Court in *Savair*, 414 U.S. at 277.

50. *See* Bok, *supra* note 17, at 46.

51. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409-10 (1964).

52. *Id.* at 410 ("The beneficence of an employer is likely to be ephemeral if prompted by a threat of unionization which is subsequently removed.").

and disadvantages of unionization in his or her work environment” and not “any extraneous inducements of pecuniary value.”<sup>53</sup> Thus, the prohibition is on *extraneous* economic inducements, not on voting one’s own pocketbook interests. In more recent cases, the NLRB has elaborated on this notion, asserting that expenditures that a union or employer make that are germane to the issues (wages and working conditions) are permissible because they appeal to employees’ reasoned vision of their economic self-interest; gifts of money or things are impermissible because they are not germane to the issues of wages and working conditions.<sup>54</sup>

A third concern might loosely be described as concern with the unseemliness of crass economic inducements to vote.<sup>55</sup> Anything that feels too much like an exchange of money for votes simply feels inappropriate. This rationale explains why gifts that are so small as to make one doubt that an employee would vote for a union solely because of the payment are considered wrong.<sup>56</sup> The problem with this rationale is its resistance to categorization. It functions for the Board and the courts like the “I know it when I see it” standard for obscenity,<sup>57</sup> or like a miscellaneous file, allowing them to dispose of cases without explaining why the election should or should not be set aside.

The final rationale for prohibiting pre-election benefits is that some benefits may create a false picture of substantial support that might induce other employees to vote one way or another simply because their co-workers would.<sup>58</sup> In *NLRB v. Savair Manufacturing Company*, the Court disapproved a union offer to waive initiation fees for employees who joined the union prior to the election on the ground that some employees would accept the offer simply because of its monetary value, not out of sympathy for the union. Other employees might be misled about the extent of the genuine support for the union and would decide to vote for the union on the

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53. *NLRB v. L & J Equip. Co.*, 745 F.2d 224, 231 (3d Cir. 1984).

54. *See, e.g., Novotel New York*, 321 N.L.R.B. 624 (1996).

55. *See Bok, supra* note 17, at 56-57.

56. A gift of a \$5 gift certificate is impermissible, *Gen. Cable Corp.*, 170 N.L.R.B. 1682 (1968), whereas giving away T-shirts (which might be worth more than \$5) or turkeys is okay, *R.W. White Co.*, 262 N.L.R.B. 575 (1982) (T-shirts); *Jacqueline Cochran*, 242 N.L.R.B. 1326 (1979). Paying employees to come to work to vote is wrong, *Broward County Health Corp.*, 320 N.L.R.B. 212 (1995); *Winn-Dixie Stores, Inc.*, 224 N.L.R.B. 1418 (1976); as is granting a paid day off, *B & D Plastics*, 302 N.L.R.B. 245 (1991); but providing transportation to vote, *Heintz Mfg. Co.*, 103 N.L.R.B. 768 (1953); or giving employees money to buy gas to drive to union meetings or to vote is permissible even if there is no proof that the amount of money given to buy gas bore any relation to the amount of gas used, *Gulf States Cannery, Inc.*, 242 N.L.R.B. 1326 (1979).

57. *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of obscenity]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”).

58. *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973).

erroneous impression that their colleagues favored it.<sup>59</sup> The problem with this rationale is that it is overbroad. For example, in combination with the Board's belief that some employees will accept T-shirts or union jackets simply because of their monetary value and not because they genuinely support the union, the Board would have grounds to set aside almost every election, since unions routinely give away T-shirts, buttons, or bumper stickers.

Inspired by these rationales, but seldom actually reasoning from them, and giving greater or lesser weight to each depending on the case, the NLRB has evolved a multifactor standard for evaluating whether benefits are impermissible.<sup>60</sup> The Board considers the size of the benefit conferred in relation to the stated purpose for granting it (even a small benefit is bad if it serves no purpose except to curry favor, whereas a larger outlay of money may be acceptable if necessary to address a legitimate issue), the number of beneficiaries, how a reasonable employee would view the benefit (is the employee likely to feel obligated, or to feel concern that an unfavorable vote will jeopardize the benefit in the future), and the timing of the benefit in relation to the election (the closer the election, the worse it looks).<sup>61</sup>

The most important factors by far are the size and timing of the benefit. Although the Supreme Court's *Exchange Parts* decision suggested that the employer's intent to affect the election in granting benefits was crucial,<sup>62</sup> the NLRB has not focused on subjective intent, but rather presumes that a grant of benefits during the critical period is improperly motivated and therefore objectionable, "unless the Employer establishes that the timing of the action was governed by factors other than the pendency of the election."<sup>63</sup>

Although the Board presumptively will not set aside an election if the benefits are conferred before the critical period, the presumption is rebuttable.<sup>64</sup> The presumption may be rebutted if the Board finds, upon considering all the circumstances, that the provision of benefits before the critical period "likely" exerted "undue" influence on employees' votes.<sup>65</sup> This standardless inquiry poses a serious problem for any union contemplating the provision of legal services even well in advance of filing a lawsuit.

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59. *Id.*

60. *B & D Plastics, Inc.*, 302 N.L.R.B. 245 (1991).

61. *Id.*; see also *Conn. Health Care Partners*, 325 N.L.R.B. 351 (1998); *Cooking Good Div. of Purdue Farms, Inc.*, 323 N.L.R.B. 345 (1997); *Gulf States Cannery, Inc.*, 242 N.L.R.B. 1326 (1979).

62. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

63. *American Sunroof Corp.*, 248 N.L.R.B. 748 (1980), *enfd in part*, 667 F.2d 20 (6th Cir. 1981); see also *NLRB v. WKR-TV, Inc.*, 470 F.2d 1302, 1308 (5th Cir. 1973).

64. *Ideal Elec.*, 134 N.L.R.B. 1275 (1961); see also *NLRB v. L & J Equip. Co.*, 745 F.2d 224, 237 (3d Cir. 1984).

65. See cases cited *supra* note 48.

One of the many difficulties inherent in applying the prohibition against pre-election conferral of benefits is that, as the Board has recognized, the union's principal and perfectly legitimate task in the election is to convince the employees that the benefits of unionization outweigh the costs.<sup>66</sup> Union election campaigns are expensive. They require the expenditure of money on "economic analysis, education, safety advice, and the like" during the campaign.<sup>67</sup> The employer usually tries to convince employees that unionization lowers profitability, thus posing a risk of wage stagnation and job loss, that wages and working conditions are a function of profitability rather than union strength, and that the employees receive no benefit for their union dues. The union's task is to convince the employees that union dues support the valuable union services of collective bargaining and grievance adjustment. Some unions will waive the requirement that employees pay dues or initiation fees in order to demonstrate to employees that the union will only charge dues if it can produce results.<sup>68</sup> Often, unions argue that they will force the employer to obey safety or wage and hour laws and make good on that promise by providing lawyers to explain what the law requires and why the employer violated it. The employer will often produce its own lawyers or other experts to explain why unions are bad and the employees' working conditions are good.<sup>69</sup>

Recognizing this, the NLRB distinguishes between money expended on things relevant to the merits of the election, or to the employees' actual costs in getting out support for the union (e.g., money for gas to drive to union meetings or the cost of transportation to vote) and those that generate support simply from a feeling of obligation.<sup>70</sup> Unions and employers can spend large amounts of money, provided it is on research and presenting the campaign issues, or, in the case of the union, in filing unfair labor practice charges on behalf of the employees.

It must be noted, however, that the Board has not consistently adhered to the distinction between expenditures that are germane to the issues and those that are not. It has held that some substantively irrelevant, but nominal, expenditures are permissible and others are not. Thus, giving away union jackets costing \$16 each, or \$5 gift certificates, is not permissible,<sup>71</sup> but giving away T-shirts is.<sup>72</sup> Hosting a modest party on or

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66. *Novotel New York*, 321 N.L.R.B. 624 (1996).

67. *Id.*

68. *See NLRB v. Wabash Transformer Corp.*, 509 F.2d 647 (8th Cir. 1975) (union's promise to waive payment of dues and initiation fees until it secured collective bargaining agreement is not buying pre-election support but is removing one basis for voting against union).

69. *See generally* MARTIN JAY LEVITT & TERRY CONROW, *CONFESSIONS OF A UNION BUSTER* (1993).

70. *See, e.g., Broward County Health Corp.*, 320 N.L.R.B. 212 (1995).

71. *Owens-Illinois, Inc.*, 271 N.L.R.B. 1235 (1984) (\$16 jackets); *Gen. Cable Corp.*, 170 N.L.R.B.

about election day is permissible; hosting a lavish party is not.<sup>73</sup> A competent lawyer can distinguish a \$5 gift certificate from a union T-shirt costing as much, on the ground that a gift certificate would be more valuable to many employees and it has less of a communicative message than a union T-shirt. But what of the difference between a jacket and a T-shirt? The Board evidently believes that no employee would sell his vote on something as momentous as union representation for the cost of a T-shirt.<sup>74</sup> One is hard pressed to imagine that any employee, even one who did not have a jacket on a very cold day, would decide to vote for a union that she otherwise might oppose simply because she received a jacket. The small difference in cost reveals something depressing about the Board's view of the equilibrium price of an employee's conscience. Moreover, if giving away clothes that communicate a message is a permissible form of advertising support, but the Board believes that nonunion employees will take clothes from a union they oppose, why isn't distributing T-shirts painting a false picture of support condemned by *Savair*?

Similarly, although it is permissible to provide transportation to vote,<sup>75</sup> or to pay the costs of transportation,<sup>76</sup> an employer's offer of two hours show-up pay to employees not scheduled to work who came to work on election day was held impermissible.<sup>77</sup> On the same rationale, the Board recently announced a new rule condemning election-day raffles, overruling prior cases.<sup>78</sup> In these cases the Board rejected the contention that the financial inducements were permissible efforts to encourage voting rather

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1682 (1968) (\$5 gift certificate); R.L. White Co., 262 N.L.R.B. 575 (1982) (union may distribute inexpensive campaign propaganda including buttons, stickers, or T-shirts); NLRB v. Coca-Cola Bottling Co., 132 F.3d 1001, 1005 (4th Cir. 1997) (“[T]he Board has carved out a niche for grants of benefit which, although of some economic value, are intended as mere propaganda and do not threaten to create a sense of obligation on the part of employees. The paradigm example of this is the distribution of . . . buttons and bumper stickers . . .”).

72. R.L. White Co., Inc., 262 N.L.R.B. 575, 576 (1982) (“[T]he distribution of T-shirts is no different than the distribution of buttons, stickers, or other items bearing a message or insignia. A T-shirt has no intrinsic value sufficient to necessitate our treating it differently than other types of campaign propaganda, which we do not find objectionable or coercive.”).

73. Compare Chicagoland Television News, 328 N.L.R.B. 48 (1999) (party permissible); Jacqueline Cochran, Inc., 177 N.L.R.B. 837 (1969) (gift of Thanksgiving turkey and Christmas party permissible); Wagner Elec. Corp., 167 N.L.R.B. 532 (1967) (cocktail party permissible), with Chicago Tribune, 326 N.L.R.B. 1057 (1998) (“lavish” party impermissible); B & D Plastics, Inc., 302 N.L.R.B. 245 (1991) (paid day off and cookout impermissible); Preston Products Co., 158 N.L.R.B. 322 (1966) (party impermissible), *enf’d* 392 F.2d 801 (D.C. Cir. 1967).

74. R.L. White Co., Inc., 262 N.L.R.B. 575 (1982).

75. Heintz Mfg. Co., 103 N.L.R.B. 768 (1953).

76. Gulf States Cannery, Inc., 242 N.L.R.B. 1326 (1979).

77. Broward County Health Corp., d/b/a Sunrise Rehab. Hosp., 320 N.L.R.B. 212 (1995) (employer granted two hours pay for employees not scheduled to work on the day of election); B & D Plastics, Inc., 302 N.L.R.B. 245 (1991) (employer announced creation of two new paid holidays).

78. Atlantic Limousine, Inc., Case 4-RC-18132 (Aug. 14, 2000), reported in Daily Lab. Rep. (BNA) 164 (Aug. 23, 2000).



than impermissible inducements to vote in a particular way. The Board also disapproved an employer's providing child-care for employees who came in to vote.<sup>79</sup> Why is it permissible to provide transportation costs but not child-care or the costs of the time spent? Cases like these suggest that the whole body of law about pre-election benefits is, at best, fraught with difficulty and, at worst, an incoherent trap for the unwary.

## 2. *Legal Representation Is Not an Impermissible Pre-Election Benefit*

The distinction between expenditures germane to the issues and those that are thought to be irrelevant was the foundation of the NLRB's determination in *Nestle* and *Novotel New York* that providing free legal services in employment law cases ought not to be considered an impermissible conferral of benefits. In declining to adopt the Board's rule or reasoning without confronting the germane vs. irrelevant rationale, the D.C. Circuit and Sixth Circuit raised a host of problems, for they failed to suggest how a large variety of pre-election expenditures are not unlawful benefits.

In *Freund Baking Company*, the court of appeals considered the NLRB's refusal to set aside an election in a case in which lawyers affiliated with the union seeking to represent the employees had also represented the employees in a wage and hour suit. Four Freund employees had sued their employer on behalf of all employees in the proposed bargaining unit seeking unpaid overtime pay. They were represented by the same prominent union lawyer who represented the union in the unfair labor practice proceeding challenging the employer's refusal to recognize the union.<sup>80</sup> The D.C. Circuit held that the provision of free legal services was the equivalent of the union giving away "free samples" of the benefits it would attempt to secure through negotiation.<sup>81</sup> In addition, the court deemed the filing of the lawsuit "hardly probative" on the merits of the election because the suit "may be meritless, even frivolous" (although the court later said it expressed no view about the merits of the wage suit at issue in that case).<sup>82</sup> The court distinguished the provision of legal representation in NLRB proceedings on the ground that such representation was necessary to ensure a fair election, whereas the suit for unpaid wages was not. The court concluded that the First Amendment did not protect the representation because "the parties to a representation election do not retain

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79. *Broward County Health Corp.*, 320 N.L.R.B. at 213.

80. *Freund Baking Co. v. NLRB*, 165 F.3d 928, 930 (D.C. Cir. 1999).

81. *Id.* at 933.

82. *Id.*

their full panoply of rights during the critical period.”<sup>83</sup>

In *Nestle*, the union filed a RICO suit against the employer alleging that the employer had unlawfully recognized another union so as to obtain a sweetheart contract that provided lower wages than if there had been a truly independent union and good faith bargaining.<sup>84</sup> The union later withdrew the suit. The union won the election and the employer refused to bargain. The Sixth Circuit determined that the legal services were “sufficiently valuable to influence the employee’s vote.”<sup>85</sup> The union’s promise that it would recover substantial back-pay awards “made it clear to the employees that they were receiving ‘something for nothing,’ and the ‘something’ was quite valuable.”<sup>86</sup> The court of appeals rejected the contention that the First Amendment protected the union’s right to support the suit, holding that the union lacked standing to assert the employees’ First Amendment rights.<sup>87</sup> Although the NLRB expressed its disagreement with the Sixth Circuit’s decision, since the D.C. Circuit agreed with the Sixth Circuit, it is evident that the Board can no longer adhere to its own views.<sup>88</sup>

Should unions be permitted to employ the services of accountants and lawyers even to advise employees about their rights under various federal and state employment laws? It might be valuable to an employee to know what OSHA requires and how to alert the agency to problems, even if the union’s lawyers do not undertake to represent the individual employees. Conversely, it might be valuable to employees to learn the results of the legal or accounting analysis the employer might prepare in an effort to defeat the unionization campaign and to convince the employees that they are not owed back wages and that their working conditions are above average. Enforcement of employment laws is germane to the issues in the election. Moreover, the most effective response to the employer’s antiunion campaign is to demonstrate, through legal research and litigation if necessary, that the employer has deprived employees of wages or safe

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83. *Id.* at 935.

84. *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578, 580 (6th Cir. 1995).

85. *Id.* at 584.

86. *Id.* The problem with the *Nestle* standard was made clear in a later Sixth Circuit case which held that the union did not violate laboratory conditions when it distributed mock retail store discount “coupons” promising that the union would not strike without approval of the employees and that if there were a strike employees would receive \$150 per week in strike pay and would be free to cross the picket line. *Detroit Auto Action, Inc. v. NLRB*, 182 F.3d 916 (6th Cir. 1999) (unpublished disposition). The Sixth Circuit panel distinguished *Nestle* and *Freund Baking* on the ground that these coupons were simply promises of future benefits rather than benefits themselves, but the court candidly confessed that “[t]he distinction between legitimate campaign promises and illegitimate vote-buying may at times be subtle and problematic.”

87. 46 F.3d at 586.

88. See *Novotel*, 321 N.L.R.B. 624. Nor can it be assumed that a new Board, with members appointed by President George W. Bush, would choose to even if it could.

working conditions to which the law entitles them.<sup>89</sup>

It might be argued that providing free legal services in a suit that will actually produce a valuable economic remedy to employees is likely to sway more votes than legal advice that provides only information and relies on the employees to enforce their own rights. The difference would be one of degree. The problem is that unions are permitted to provide free legal services in enforcing the protections of the NLRA, which might lead to valuable economic benefits such as back pay and reinstatement to a job.<sup>90</sup>

### 3. *Legal Representation Is Not Vote-Buying*

The absence of a consistent rationale for prohibiting grants of benefits underlies the difficulty the Board and the courts have in assessing the permissibility of providing legal advice or representation during the critical period. Part of the problem is the malleability of the “vote-buying-smells-bad” rationale. Exchanging things of value for voting is almost universally condemned, although certain forms are common (introducing legislation sought by major campaign contributors and log-rolling among legislators are two of the most notorious). Election law scholars have begun to probe whether all vote-buying is bad and have argued for more careful consideration of the circumstances when offering inducements to vote should be prohibited.<sup>91</sup> As we will see, whatever the merits of banning all vote-buying in political elections, the analogy between political and union elections fails in certain areas. The inapplicability to union elections of the

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89. See, e.g., RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 153 (1984) (reporting that many unionization drives fail when the union fails to convince employees that the union would achieve better working conditions than the employees already had).

90. For example:

Three former Tyson Foods workers late last month received settlements resolving unfair labor practice charges filed last year during the United Food and Commercial Workers unsuccessful organizing drive at the Tyson poultry processing plant in Vienna, Ga. . . . In its charges against Tyson, UFCW alleged that the company had singled out the three workers because of their support of the union, unlawfully intimidating and then firing them. The payment to the workers was part of an informal settlement brokered by the Atlanta NLRB regional office, resolving a complaint the office had issued in April. The settlement was signed by the parties July 5 and resolves both UFCW's original ULP charges against Tyson as well as objections filed by the union following the Aug. 27, 1999, election. In that election, production and maintenance employees at the Vienna plant voted 611-219 against representation by the UFCW. . . . Following the settlement, the Atlanta NLRB office July 7 certified the results of the August 1999 election. . . . The union is committed to protecting workers at the Vienna plant and will continue to organize workers at Tyson Foods, the union said in an Aug. 3 statement.

*Tyson Foods Pays Workers in Settlement of UFCW Charges in 1999 Georgia Election*, 156 Daily Lab. Rep. (BNA) A-1 (August 11, 2000).

91. Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323, 1325 (2000) (the three reasons are equality, efficiency, and inalienability); Saul Levmore, *Voting with Intensity*, 53 STAN. L. REV. 111, 113 (2000) (suggesting that some market-like mechanisms for voting may achieve a desirable goal of allowing intensity of preferences to be registered in elections).

rationales for banning vote-buying suggests that the courts and the Board should rethink their intuitive opposition to grants of benefits during the critical period. At a minimum, there is no basis for prohibiting unions from providing employment law representation.

The three rationales for prohibiting vote-buying are that it increases inequality (the rich can buy more votes than the poor which will allow rich candidates and campaigns to disproportionately influence elections); it is inefficient (those who buy votes do so in order to capture government subsidies that are a net social loss); and the franchise is an inalienable aspect of citizenship.<sup>92</sup>

Analysis of vote-buying, as recent scholarship suggests, should begin by asking what voting is *for*. Voting in political elections is arguably supposed to be the opportunity for each citizen to act on his or her assessment of the common good. Voting in corporate governance elections is often regarded as the chance for each shareholder to maximize his or her own profit. Voting in union elections may be more akin to voting in corporate elections, in that voting may be more for self-interest than voting in political elections should be. To the extent that the choice about union representation is *supposed* to be based on the economic (or other) self-interest of the worker, there seems nothing objectionable in allowing the employer and the union to invest resources in appealing to that interest. Of course, one might argue that voting in union (and corporate) elections should be informed by the voter's sense of the common good rather than his or her narrow self-interest. Even to the extent that voting in union elections should be based on each worker's assessment of what is in the best interest of the workers, the firm, and society as a whole, it however still seems legitimate for unions to attempt to influence those votes by providing legal assistance in improving working conditions. Presumably full compliance with safety and wage and hour laws—so that there will be fewer illnesses, and injuries, and families will have an adequate standard of living—is a good for all the workers and, perhaps, for society, not just for individual workers.

The equality rationale may militate against buying employee votes for cash. If an employer were to determine that unionization would cost \$100,000 over three years in increased labor costs, it might wish to pay its employees \$25,000 to vote against union representation. If employees lacked information to know that they would benefit more than \$25,000 from unionization, they might take the money. To the extent that the union could not pay more than \$25,000 or provide the information to convince employees that they would lose by accepting the employer's payment,

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92. Hasen, *supra* note 91, at 1329-37. I am grateful to my colleague, Rick Hasen, for suggesting the arguments in the next two paragraphs.

buying votes in union elections would raise inequality concerns. But the promise of legal representation is not the same as a cash payment. The benefit being conferred is not money, but assistance in asserting statutory rights where the assistance itself is constitutionally protected.<sup>93</sup> The ability of the union to provide the assistance seems necessary to remedy the information asymmetry that renders employer vote-buying suspect, for it is necessary to enable unions to explain why unionization would benefit employees.<sup>94</sup> Thus, the equality rationale suggests that legal representation should be permitted rather than prohibited.<sup>95</sup>

The *inalienability* rationale is the one that most often appears in the Board's cases and requires the most careful thought in the union election context, particularly when union benefits rather than employer benefits are at issue.<sup>96</sup> When a union provides legal representation, it of course is not technically buying the employees' votes. They remain free to vote against the union, and the law of professional ethics (plus, importantly, the threat of reputational injury) restricts the ability of the union to retaliate for negative votes by dropping support for the suit. The employees remain absolutely free to vote as their judgment of the common good dictates. Nor does the provision of legal advice threaten to harm the employees' ability to assess the common good: any employee who believes that employment law enforcement is unnecessary or harmful to the firm remains free to decline to join the suit. Finally, to the extent that the Board fears that employees' votes will be irrationally swayed by the items (or services) of value, the provision of legal representation is entirely different from the lavish parties, paid days off, or free clothing that the Board has condemned. In sum, the

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93. See *infra* Part II.

94. Labor law offers employers vastly greater opportunity to explain the harms of unionization than it offers unions to explain the benefits—employers can speak to employees at length, during working time; unions cannot. See, e.g., *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). In my view, employers can more persuasively argue to employees that unionization would render the firm unprofitable; unions often struggle to rebut this argument since they lack access to the firm's balance sheets.

95. It is not enough for the union to point out that the employer violates the law and then leave the employees to fend for themselves in enforcing their rights. It is often difficult for employees to find competent lawyers willing to do wage and hour cases and the union makes a much more credible argument that the employer violates the law if they follow their accusations of unlawful conduct with a lawsuit.

96. See, e.g., *Atlantic Limousine, Inc.*, 331 N.L.R.B. No. 134 (2000) (election-day raffles, whether conducted by employer or by union, are impermissible because they may “condition participation on how the employees voted or on the results of the election,” or “divert the attention of the employees away from the election and its purposes or . . . inherently induce employees to vote in favor of the party sponsoring the raffle”); *Gen. Cable Corp.*, 170 N.L.R.B. 1682 (1968) (giving \$5 gift certificates was improper because it was to induce employees to support union rather than to induce them to attend an informational meeting); *Wagner Elec. Corp.*, 167 N.L.R.B. 532 (1967) (free life insurance “destroyed the atmosphere which the Board seeks to preserve for its elections in order that employees may exercise freedom of choice on representation questions” but hosting a cocktail party in the week before the election was not an effort “to buy votes with canapés and unlimited liquor.”).

case against legal representation as a form of vote-buying is quite weak.

The ban on legal representation may even increase the likelihood of coercion of employees in their choice of union representative, rather than decrease it. In determining that giving free legal services poses an unacceptable risk of persuading non-union employees to vote for the union, the courts of appeals have neglected to consider the incentives that their rule creates. In particular, it gives unions additional reasons to organize outside the protections of the NLRA.<sup>97</sup> A union that decides to provide legal representation and that fears doing so will lead the courts to set aside an election victory might conclude that a better strategy is simply to seek recognition without an election. The union gains the leverage to force the employer to recognize the union without an election by imposing sufficient economic, political, or social pressure to convince the firm that it has more to lose by resisting unionization than it has to gain. Depending on your point of view, this form of organizing is either a necessary antidote to the union-unfriendly labor law (as in the Service Employees International Union's (SEIU's) "Justice for Janitors" campaign<sup>98</sup>) or coercive "top-down" organizing (as in the method used by the Teamsters to organize employees who allegedly would rather not have been Teamsters members<sup>99</sup>).

An election and certification under 9(c) of the NLRA is not the only route to union recognition.<sup>100</sup> An employer is free to recognize a union upon a showing of support (usually signed authorization cards) from a majority of the employees in an appropriate bargaining unit.<sup>101</sup> Moreover, "in the absence of any bona fide dispute as to the existence of the required majority of eligible employees, the employer's denial of recognition of the union" would violate the employer's obligation under section 8(a)(5) of the Act to bargain in good faith with the union.<sup>102</sup> An employer that wishes to test whether the union's showing of majority support actually reflects the

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97. There are many reasons why unions choose to organize "outside the Act." See, e.g., Richard Hurd & William Rouse, *Progressive Union Organizing: The SEIU Justice for Janitors Campaign*, REV. RADICAL POLITICAL ECON., Fall 1989, 71-72; Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 45, 69 (2000); Howard Wial, *The Emerging Organizational Structure of Unionism in Low-Wage Services*, 45 RUTGERS L. REV. 671, 681-82 (1993).

98. The SEIU's very prominent (and successful) campaign to organize janitors in major cities around the U.S. has not rested on the election machinery administered by the Board, but rather has depended on drumming up so much support from janitors and the public that the employer chooses to recognize the union based on a showing of authorization cards and without a Board supervised election. See generally Catherine Fisk, et al., *Union Representation of Immigrant Janitors in Southern California: Economic and Legal Challenges*, in ORGANIZING IMMIGRANTS (Ruth Milkman ed., 2000).

99. See JULIUS GETMAN, BERTRAND B. POGEBRING, & DAVID L. GREGORY, LABOR MANAGEMENT RELATIONS AND THE LAW 266 (2d ed. 1999) (describing Teamsters' use of picketing as an organizing tactic).

100. 29 U.S.C. § 159(c).

101. Cf. *ILGW v. NLRB*, 366 U.S. 731 (1961) (*Bernhard-Altmann Texas Corp.*)

102. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 597 (1969).

desires of employees may file a petition for an election to be held, but if it fails to do so, or if it commits unfair labor practices that the Board determines likely to have destroyed the union's majority or to impede the results of the election, the Board can order the employer to bargain even without conducting, or the union winning, an election.<sup>103</sup>

Nevertheless, the Board and the courts have often expressed a preference for union representation to be determined through a secret-ballot election rather than through a showing of cards and voluntary recognition or a NLRB bargaining order under section 8(a)(5).<sup>104</sup> The reason for the preference is that a secret ballot election is supposed to reflect the true desires of the employees free from the risk that they signed authorization cards under pressure from the union or the employer. Many unions dispute this, believing that the pre-election campaign gives the employer too much time to intimidate the employees to vote against the union.<sup>105</sup> Regardless of whether the Board or the unions are right about where the greatest risk of compulsion lies, the Board and the courts should be concerned about the incentives their rule creates. If the courts of appeals regard union assistance in the enforcement of employment law as a basis for setting aside the election, it is simply another reason for the union to organize outside the Act rather than seek an election. To the extent that courts are concerned about the possibility that free legal services will coerce employees' choice of a union, surely they would be concerned about the possibility that employees will be coerced into unionization without a secret-ballot election at all.

The absence of a clear rationale for prohibiting unions from providing legal services to employees during the critical period is troubling in itself. The uncertainty surrounding the prohibition on filing suit is additionally troubling. It is especially troubling because employees and unions have a section 7 right to bring legal action. The *Nestle-Freund* doctrine forces employees to sacrifice one important section 7 right in order to assert another. The doctrine rests on unsound empirical assumptions, untenable reasoning, and is not compelled by existing labor law.

### III.

#### THE FIRST AMENDMENT AND THE REGULATION OF CERTIFICATION ELECTIONS

As shown above, employees and unions have a right under section 7 of the NLRA to institute legal proceedings challenging working conditions both under the NLRA and under employment statutes. As I shall explain,

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103. *Id.* at 599-600.

104. *Id.* at 596, n.8 (citing cases in which the NLRB expressed the preference for elections).

105. See generally Weiler, *Promises to Keep*, *supra* note 17.

that conduct is also protected by the First Amendment. Although it is well settled that union lawyers can provide legal representation in NLRB proceedings during the critical period, some courts have held that union lawyers cannot provide legal representation in employment law litigation. Thus, the permissibility of the legal representation depends on the content of the litigation. That is plainly a content-based regulation of protected First Amendment activity. As explained below, the regulation does not meet strict scrutiny.

#### *A. The First Amendment Protects Legal Representation and Litigation*

Unions, union lawyers, and the employees whom the union lawyers represent have a First Amendment right to file employment law litigation. The First Amendment protects the right both as an aspect of the right to petition the government for the redress of grievances and as freedom of expression and association.<sup>106</sup> The Supreme Court has held that “the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances.”<sup>107</sup> In addition, in *NAACP v. Button*, the Court held that bringing and financing litigation for the purpose of effecting social change are “modes of expression and association protected by the First . . . Amendment[.],” and struck down state laws restricting such legal representation.<sup>108</sup> The union’s employee advocacy is indistinguishable from the NAACP’s litigation directed at eliminating racial segregation in employment; both are expressive activity protected by the First Amendment.<sup>109</sup>

The Court recently reaffirmed the principle that content-based restrictions on legal representation violate the First Amendment. In *Legal Services Corp. v. Velazquez*, the Court invalidated a legislative prohibition on “legal representation funded by recipients of LSC moneys if the representation involves an effort to amend or otherwise challenge existing welfare law.”<sup>110</sup> The Court emphasized that the ban on such legal representation would result in lawyers being unable to properly advise clients and the courts. The Court dismissed the argument that the problem could be avoided if LSC lawyers withdrew from any case that might be aided by challenging existing law, noting that withdrawal was not a realistic option, since such clients would likely find no substitute counsel.<sup>111</sup> The

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106. The First Amendment provides: “Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

107. *Bill Johnson’s Rests., Inc. v. NLRB*, 461 U.S. 731, 741 (1983).

108. *NAACP v. Button*, 371 U.S. 415, 428 (1963).

109. *Id.*

110. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 536-37 (2001).

111. *Id.* at 547.



*Nestle-Freund* doctrine operates almost exactly like the restriction that the Court struck down in *Legal Services Corp.* It prevents certain lawyers from advocating certain positions on behalf of some clients. As such, there is no question that the law burdens protected First Amendment activity.

The Court recognized a different facet of the First Amendment that protects the expressive activity of associations in the 2000 Term. In *Dale v. Boy Scouts of America*, the Court held that private organizations have a First Amendment interest in deciding with whom they wish to associate. In upholding the right of the Boy Scouts to ban gays from becoming Scout leaders, the Court emphasized that a group can assert an expressive message through determining who shall represent it.<sup>112</sup> Thus, if unions wish to represent nonunion employees because they believe that eradicating low wages or dangerous working conditions is part of their mission, their right to associate together for that purpose is expressive activity protected by the First Amendment.<sup>113</sup>

In some cases, and in some respects, unions' systematic efforts to provide counsel and fund the costs of employment law litigation is exactly the sort of expressive and associational activity that the Supreme Court found protected in *NAACP v. Button*. To the extent that lawyers affiliated with the United Food and Commercial Workers (UFCW), the SEIU, or the Union of Needletrades, Industrial and Textile Employees (UNITE) have brought or aided large suits aiming systematically to challenge wage and hour violations in certain industries, there is no question that the employment law litigation is expressive activity directed at social change, just as the NAACP litigation at issue in *Button* was directed at eliminating racial segregation in education. The Court has expressly noted that the expressive aspects of litigation are a First Amendment right to which the NLRB must be sensitive in construing the NLRA.<sup>114</sup>

It is equally clear that both the union *and* the employees have a First Amendment right to associate together to engage in the litigation. The Supreme Court held in *Hunt v. Washington State Apple Advertising Commission* that an association has standing to bring suit on behalf of its

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112. *Dale v. Boy Scouts of America*, 530 U.S. 640, 648 (2000) ("Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express"); see Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WILLIAM & MARY BILL OF RTS. J. 595 (2001).

113. A harder case would be the suit at issue in *Nestle*, which was a RICO suit challenging a single employer's alleged conspiracy to recognize another union so that the company could pay lower wages than it would pay if the company recognized an independent union. 46 F.3d at 580. But even that individual suit is indistinguishable for First Amendment purposes from the sort of litigation that the Supreme Court considered to be constitutionally protected in *Bill Johnson's Restaurants*: a single suit aiming to end or to seek compensation for a particular, allegedly unlawful practice or course of conduct. See *Bill Johnson's Rests.*, 461 U.S. at 734 (suit for libel and to enjoin mass picketing).

114. See *Bill Johnson's Rests.*, 461 U.S. at 734.

members when “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires participation of individual members in the suit.”<sup>115</sup> A union certainly would have standing to bring employment law litigation challenging substandard working conditions in its industry. The union seeks to eliminate low-wage and substandard competition; the improvement of working conditions is germane to the union’s purpose; and the individual union members need not be parties to the suit in order to obtain the relief requested. Moreover, the union may not even be a party; in many circumstances the non-members would be the parties and the union would do no more than provide legal or financial support.

In *Nestle*, the Sixth Circuit rejected the applicability of the First Amendment on the ground that the employees were not union members. Without citation to authority, the court held that the union had no First Amendment right to file employment-related litigation on behalf of employees who were not members of the union because their working conditions were not the union’s “own” grievance.<sup>116</sup> That conclusion is inconsistent with the holding of *Button*, in which the NAACP was held to have a First Amendment interest in litigating desegregation cases on behalf of parents and children who were not members of the NAACP.<sup>117</sup> Moreover, the Sixth Circuit’s decision is inconsistent with the standard established in *Hunt*. There is no question that the union had standing in the case, on the ground that it was trying to organize the Nestle employees in order to improve their working conditions and those of existing union members whose living standard is threatened by nonunion competition. The Supreme Court recognized in *Eastex, Inc. v. NLRB*, that union members have an interest in protecting their own working conditions by seeking to organize other employees.<sup>118</sup>

The D.C. Circuit in *Freund Baking* took a different approach to distinguishing *NAACP v. Button* and found that the First Amendment did not protect the right to litigate. It held that, “because of the need for an atmosphere amenable to rational decisionmaking, the parties to a representation election do not retain their full panoply of rights during the critical period.”<sup>119</sup> The court then pointed out that the NLRB prohibits employers from making inflammatory appeals to racial attitudes during election campaigns<sup>120</sup> and prohibits union organizers from electioneering at

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115. *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977).

116. *Nestle*, 46 F.3d at 586.

117. *NAACP v. Button*, 371 U.S. 415 (1963).

118. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

119. *Freund Baking Co. v. NLRB*, 165 F.3d 928, 935 (D.C. Cir. 1999).

120. *Sewell Mfg. Co.*, 138 N.L.R.B. 66, 69-72 (1962).

polling places.<sup>121</sup> Because the Board allows these infringements on otherwise protected First Amendment speech, the court concluded, the prohibition on filing non-NLRA litigation must be permissible too.

The court's reasoning is flawed in two respects. First, there is no basis for the conclusion that the First Amendment does not apply to pre-election advocacy. The court relied on *NLRB v. Gissel Packing Co.*, in which the Supreme Court held that a labor law rule prohibiting employers from making predictions of dire consequences of unionization unless the prediction is premised on the basis of fact and concerns a demonstrably probable outcome not within the employer's unilateral control. The Supreme Court's treatment of the First Amendment issue in *Gissel* simply recognized that threats to inflict harm are not protected speech under the First Amendment,<sup>122</sup> and that an employer's "prediction" is likely intended as, and will be understood as, a threat unless it is based on facts concerning events beyond the employer's control.<sup>123</sup> Nothing in *Gissel* supports the general proposition that otherwise protected speech becomes unprotected simply because it is uttered in the context of a union campaign. Unless the union context makes speech so threatening as to make it unprotected even under ordinary First Amendment analysis, unions and employers retain First Amendment rights.

Moreover, the D.C. Circuit recognized, in a pre-election speech case decided subsequent to *Freund Baking*, that the First Amendment protects pre-election speech. In *US Airways, Inc. v. National Mediation Board*, the court invalidated on First Amendment grounds a National Mediation Board order restricting an employer from making pre-election statements that the Board had deemed to be threats.<sup>124</sup> Without citation to *Freund Baking*, Judge Silberman's opinion for the court held that, under *Gissel*, the employer had a First Amendment right to state that its employee committees were better than union representation and that union representation would lead to a termination of the pre-existing method of establishing employment terms through a committee system.<sup>125</sup> The court was also interestingly dismissive of the lower court's view that the First Amendment rights of the airline employer might differ from the free speech

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121. *Id.* (citing *Milchem, Inc.*, 170 N.L.R.B. 362, 362-63 (1968)).

122. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). See generally *CHEMERINSKY*, *supra* note 18, at § 11.3.3 (delineating the Court's "less protected speech" analysis for expression tending either to provoke violence or to inflict emotional harm).

123. *Gissel* also suggested that the statute can validly proscribe promises of benefits as well as threats. 395 U.S. 575 (1969). A prohibition on promises of benefits can withstand First Amendment scrutiny for the same reason a threat can. A promise to provide a pay increase is simply the flip side of threatening a pay decrease – both are the kind of coercive speech that receives less First Amendment protection even outside the context of labor law.

124. *US Airways, Inc. v. Nat'l Mediation Bd.*, 177 F.3d 985 (D.C. Cir. 1999).

125. *Id.* at 992-93.

rights of other employers, remarking that “the First Amendment does not ebb and flow with the legislative will.”<sup>126</sup> Even in the D.C. Circuit, therefore, the First Amendment protects pre-election expression in a labor context. What remains uncertain, because the court did not bother to reconcile its decision with *Freund Baking*, is whether employees and unions have the same free speech rights as employers.

*Freund Baking* also failed to recognize that its rule burdens protected First Amendment conduct. It forces employees to choose between union representation and receiving legal services from union lawyers. Thus, they must sacrifice one statutorily-guaranteed right (to seek union representation through an election) for another (to obtain the financial and legal assistance of the union and its counsel in employment law litigation). This is a far greater burden than others that the Supreme Court has found unconstitutional in any of its recent First Amendment decisions.<sup>127</sup> Moreover, in conditioning the right to invoke the NLRA’s election procedures on the sacrifice of the First Amendment right to bring employment law claims, the *Nestle-Freund* rule imposes an unconstitutional condition of the sort the Court has frequently invalidated.<sup>128</sup>

The fact that the employees could accept representation from union lawyers *after* the election is no answer. The delay could be months or years. Since the statute of limitations in FLSA actions is two or three years from the date suit is filed, any delay comes at the expense of unpaid wages the employees could otherwise collect.<sup>129</sup> As the Court recently said in invalidating a statute restricting the broadcasting of indecent television programs, “when the purpose and design of a statute is to regulate speech by reason of its content, special consideration or latitude is not accorded to the Government merely because the law can somehow be described as a

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126. *Id.* at 991.

127. *See generally* United States v. Playboy Entm’t Group, Inc., 529 U.S. 803 (2000) (pre-10 p.m. broadcast moratorium on sexually oriented material not least restrictive means); Buckley v. American Constit. Law Fund, 525 U.S. 182 (1999) (restriction on political speech requiring that those who circulate petitions be registered voters and wear name tags, and that paid circulators be reported by initiative proponents is unconstitutional); Reno v. ACLU, 521 U.S. 844 (1997) (Communications Decency Act of 1996 overbroad because it covered both protected indecent speech and unprotected obscenity); Schenk v. Pro-Choice Network, 519 U.S. 357 (1997) (floating buffer zones around people and cars accessing clinic burdened more speech than necessary); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (prohibition on printing alcohol content on labels more restrictive than necessary); McIntyre v. Ohio Elections Comm’n, 514 U.S. 334 (1995) (restriction on anonymous campaign literature invalid because not narrowly tailored).

128. *See, e.g.*, Speiser v. Randall, 357 U.S. 513 (1958) (invalidating a state property tax exemption law that conditioned the exemption on the disavowal of overthrow of U.S. government); Perry v. Sindermann, 408 U.S. 593 (1972) (government cannot deny employment to person for exercising First Amendment rights). *See generally* Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989); Richard Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1989).

129. 29 U.S.C. § 255. The NLRB recognized this in *Novotel*, 321 N.L.R.B. 624 (1996).

burden rather than outright suppression.”<sup>130</sup> Moreover, the Court held unacceptable the far more modest burden of waiting until after 10 p.m. to watch indecent television programming.<sup>131</sup> If waiting an hour to watch smutty TV is an unconstitutional burden on First Amendment rights, waiting months to invoke statutory rights to minimum wage and safe working conditions surely is too much.

*B. The Nestle-Freund Rule is a Content-Based Restriction*

Having established that First Amendment conduct is significantly burdened by the rules in the Sixth and D.C. Circuits, it is necessary to determine by what standard to judge the constitutionality of the burden. The *Nestle-Freund* doctrine is, on its face, a content-based regulation. It prohibits union lawyers from advocating only certain kinds of claims (employment law claims) on behalf of certain parties (non-members). It is well settled that unions can bring employment law claims on behalf of members and unfair labor practice claims on behalf of nonmembers. During the critical period, however, the permissibility of the legal representation depends on the content of the litigation. Unions are allowed to bring claims under the NLRA during this period. Some circuits, however, preclude unions from offering legal services in employment litigation during the critical period. The content-based nature of the regulation is indisputable.

Over the last two decades, the Court has indicated that all content-based regulations on speech are subject to strict scrutiny. In *R.A.V. v. City of St. Paul*, Justice Scalia, writing for the majority, stated “the government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed.”<sup>132</sup> For this reason, “all content-based restrictions on speech” are scrutinized with care.<sup>133</sup> Any content-based restriction on speech, even unprotected speech, is governed by strict scrutiny.<sup>134</sup>

It must be recognized, however, that the Court refused in the past to apply the content-based vs. content-neutral distinction to speech in labor cases. In *Police Department of Chicago v. Mosley*, the Court held that a content-based regulation of peaceful picketing (allowing picketing in labor disputes but prohibiting picketing challenging race discrimination) was unconstitutional because it was a content-based restriction on speech.<sup>135</sup>

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130. *Playboy Entm't Group*, 529 U.S. at 826.

131. *Id.*

132. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992).

133. *Playboy Entm't Group*, 529 U.S. at 826.

134. *Id.*

135. 408 U.S. 92, 95-96 (1972).

However, the plurality opinion in *Retail Store Employees (Safeco Title Insurance)* declined to apply the *Mosley* analysis where the Court upheld the application of section 8(b)(4) to peaceful consumer picketing in circumstances in which a successful consumer boycott would cause serious harm to a neutral business.<sup>136</sup>

In *Safeco*, a union peacefully picketed title companies with signs criticizing the labor practices of the Safeco insurance company whose insurance the title companies sold. Over ninety percent of the title companies' gross income derived from the sale of Safeco insurance.<sup>137</sup> The union contended that the picketing was directed only at the struck product and was therefore protected by the statute and by the First Amendment. The plurality, however, determined that, because of the title companies' economic dependence in the struck product, the picketing had the same effect as a secondary boycott against the title companies themselves and was therefore prohibited under section 8(b)(4).<sup>138</sup> The entirety of the plurality's discussion of the First Amendment was a few sentences in which the Court observed that the First Amendment allows the prohibition of picketing that "spreads labor discord by coercing a neutral party to join the fray," and that this picketing could be prohibited because it "predictably encourages consumers to boycott a secondary business."<sup>139</sup>

Despite the unique concerns of picketing and the complicated provisions of the Taft-Hartley Act, however, some members of the *Safeco* Court thought the *Mosely* analysis should have been applied in that case. Both Justice Blackmun and Justice Stevens in separate concurring opinions in *Safeco* noted that the *Mosley* analysis should have been applied and that the First Amendment issues were harder than the plurality acknowledged. Justice Blackmun concurred in the result on the ground that Congress struck a "delicate balance between union freedom of expression and the ability of neutral employers, employees and consumers to remain free from coerced participation in industrial strife," which he termed a "substantial governmental interest."<sup>140</sup> Justice Stevens concurred on the ground that the statute prohibited "only that aspect of the union's efforts to communicate its views that calls for an automatic response to a signal, rather than a reasoned response to an idea," and the restriction was "limited in geographic scope to sites of neutrals in a labor dispute," which would allow the union to communicate its message elsewhere.<sup>141</sup>

Putting the plurality and the two concurring opinions together, the

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136. 447 U.S. 607, 616-17 (1980).

137. *Id.* at 609.

138. *Id.* at 614.

139. *Id.* at 616.

140. *Id.* at 617 (Blackmun, J., concurring).

141. *Id.* at 619 (Stevens, J., concurring).

Court's refusal to extend the content-discrimination analysis to the NLRA's prohibitions in *Safeco* rested on two things: (1) the Court's special unwillingness to hold unconstitutional the complex secondary boycott provisions of Taft-Hartley and (2) its longstanding view that labor picketing is not speech and therefore is entitled to less First Amendment protection. Neither of those rationales would sustain the prohibition on union lawyers filing employment suits. The first is inapposite because the *Nestle-Freund* doctrine is not part of the "delicate balance" of competing interests in the use of picketing. Second, the special treatment of labor picketing as a form of speech is inapplicable.

The larger question is whether there is a relaxed First Amendment standard for all labor speech apart from the particular problems of picketing and secondary boycotts. In many labor law cases over the last 50 years, the Supreme Court and the Board have been rather dismissive of employers', unions', and scholars' concerns that the NLRA as interpreted unduly infringes First Amendment rights.<sup>142</sup> Basically, the Court has treated First Amendment speech claims in labor cases in two ways. First, with regard to picketing, the Court has found it not to be pure speech at all. Rather, the Court said, "[p]icketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated."<sup>143</sup> The conclusion that peaceful picketing is not pure speech underlies the broad prohibitions on recognitional picketing and secondary boycotts.<sup>144</sup>

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142. On the First Amendment and labor protest, see Archibald Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 36-39 (1980); Archibald Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574 (1951); Julius Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4 (1984); Charles O. Gregory, *Constitutional Limitations on the Regulation of Union and Employer Conduct*, 49 MICH. L. REV. 191, 206-08 (1950); James Gray Pope, *The First Amendment, the Thirteenth Amendment, and the Right to Organize in the Twenty-First Century*, 51 RUTGERS L. REV. 941 (1999); James Gray Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189 (1984); Theodore St. Antoine, *Free Speech or Economic Weapon? The Persisting Problem of Picketing*, 16 SUFFOLK L. REV. 883 (1982); Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938 (1982).

143. *Int'l Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284 (1957) (a single picketer with a sign reading "The men on this job are not 100% affiliated with the A.F.L." whose picketing caused several drivers to refuse to deliver and haul goods to and from a work site was not protected by the First Amendment) (quoting *Bakery & Pastry Drivers Local v. Wohl*, 315 U.S. 769, 776 (1942) (Douglas, J., concurring) (peaceful picketing of two nonunion bakery drivers advising the public and businesses that drivers were nonunion is protected speech)).

Under ordinary First Amendment standards picketing should be entirely protected, as it is a combination of speech and expressive conduct. That it involves patrolling conduct as well as speech does not make it any less persuasive, as the whole point of the conduct is expressive, just as wearing black arm bands is a form of expressive conduct. See *Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503 (1969).

144. Although in *NLRB v. Drivers, Chauffeurs, Helpers Local Union No. 639*, 362 U.S. 274 (1960),

Second, the Court has focused on the coercive nature of the speech/conduct in the context of labor cases. In *International Longshoremen's Ass'n v. Allied International, Inc.*, a concerted refusal to handle certain goods was not regarded as symbolic speech protected by the First Amendment when the longshore workers refused to handle goods bound to or from the Soviet Union to protest the Soviet invasion of Afghanistan. The Court rejected the contention that application of the secondary boycott prohibition to them violated their First Amendment rights of expression and association. The Court deemed that the work stoppage to be "conduct designed not to communicate but to coerce." As such it merited little or no protection under the First Amendment.<sup>145</sup> The Court has made clear, however, that labor picketing that seeks a boycott by consumers rather than a work stoppage by employees is protected under the First Amendment because it is not coercive.<sup>146</sup> The fundamental question is whether the speech is likely to be unduly coercive.<sup>147</sup>

That the coerciveness of speech in the labor context is the *sine qua non* of reduced First Amendment protection was also made clear in the Court's cases on consumer handbilling and from *Gissel's* treatment of threats. In concluding that the First Amendment protects handbilling in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, the Court reasoned that handbilling is only persuasive, whereas picketing is coercive. "The loss of customers because they read a handbill urging them not to patronize a business, and not because they are intimidated by a line of picketers, is the result of mere persuasion, and the neutral who reacts is doing no more than what its customers honestly want it to do."<sup>148</sup> Whatever might be said of the Court's judgment that labor picketing is so coercive as to be entitled to reduced First Amendment protection, the provision of legal services is, as explained below, entirely

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the Court held that § 8(b)(1) does not proscribe peaceful recognitional picketing (without reaching the constitutional question whether it could prohibit such picketing), the Court recognized that section 8(b)(7), enacted after the events in that case, would regulate such picketing. The Court later upheld the constitutionality of section 8(b)(7)'s prohibition of recognitional and organizational picketing.

145. *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 227 (1982).

146. *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58 (1964). However, in circumstances when a successful product boycott would cause significant economic harm to a business other than the one whose policies are objectionable, the boycott is not protected. *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607, 616 (1980). The Court condemned the picketing on the ground that the threat of significant harm "spreads labor discord by coercing a neutral party to join the fray," thus making clear that coercion is the justification for restricting speech.

147. Other restrictions on labor-related speech that the Court has entertained would have been upheld under the same standards applied to similar forms of speech in the non-labor law context. Thus, for example, the ban on electioneering at union polling places would be constitutional for the same reason that electioneering may constitutionally be banned at polling places in state and federal political elections.

148. 485 U.S. 568, 580 (1988).



distinguishable.<sup>149</sup>

The Court's analysis of union campaign speech also leave no doubt that it is the coerciveness of speech in the workplace context that explains the relaxed constitutional protection.<sup>150</sup> Employer speech that predicts dire consequences of union representation, without articulating a factual basis for the prediction, is considered to be unprotected threats to inflict the consequences, rather than simply a statement that such consequences might come about irrespective of the employer's conduct. This type of speech is a threat and is therefore unprotected just as all forms of threat are unprotected.

The filing of employment law cases cannot be said to be threatening or coercive of employees' votes or sympathies in the way that picketing, secondary boycotts, or employer campaign speech is thought to be. The rationale for prohibiting picketing targeted at employees is that employees feel coerced to honor picket lines for fear of social, physical, or economic retaliation by their fellow workers or union members. The rationale for prohibiting unwarranted predictions about the adverse consequences of unionization is that they are likely to cause fear and anxiety among employees. Employment law litigation is not comparably coercive and thus is entitled to full protection under the First Amendment.

Even if employment litigation were subject to less constitutional protection than ordinary speech, the *Nestle-Freund* doctrine is still a content-based restriction that must be judged by strict scrutiny. The Court recently made clear in *R.A.V.* that the prohibitions on content-based restrictions of speech apply even to categories of speech that are unprotected by the First Amendment. The *R.A.V.* Court held that a hate crime ordinance punishing a cross-burning more severely than other forms of expressive conduct was unconstitutional because it imposed harsher punishment for certain expressive conduct that contained a racist message. If the Court is willing to give hate speech this kind of protection, surely filing a suit ought to be given greater protection than it has. *R.A.V.* makes clear that all content-based restrictions on expression are judged by strict scrutiny; the *Nestle-Freund* doctrine should be no exception.

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149. The dubious constitutional analysis in the Court's cases prohibiting labor boycotts and protecting consumer boycotts is thoroughly and critically examined in James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEX. L. REV. 889, 921-42 (1991). The important point for present purposes is that the Court's labor cases are entirely distinguishable. One need not be persuaded by Pope's critique of the labor cases in order to conclude that union lawyers' efforts on behalf of non-union members are entitled to First Amendment protection.

150. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

### C. *The Nestle-Freund Restriction Fails Strict Scrutiny*

Having established that the rule prohibiting union-financed employment law litigation during the critical period is a content-based restriction on First Amendment activity, the Supreme Court's recent cases leave no doubt that the rule fails to pass strict scrutiny.

Under strict scrutiny the burden of proof is on the government to prove: (a) a compelling interest in regulating the speech, and (b) that all less restrictive alternatives "will be ineffective to achieve its goals."<sup>151</sup> The *Nestle* and *Freund* decisions cannot withstand this scrutiny. In the first place, the government does not defend the rule; indeed, the NLRB has repeatedly taken the position that the prohibition is both unconstitutional and unnecessary under the statute.<sup>152</sup> Given that the burden of proof is on the government, it would appear that the NLRB's view that the restriction is both unnecessary to a fair election and unconstitutional would alone be enough to invalidate the rule.

Even if a more conservative Bush Administration NLRB were to change its position, however, the *Nestle-Freund* doctrine should still be struck down. The interest in conducting fair union elections is no doubt compelling.<sup>153</sup> The problem is the dearth of evidence that a prohibition on union lawyers filing employment litigation is necessary to achieve the interest. Given the Court's requirement that the government adduce factual evidence rather than speculation to prove the necessity of a restriction, the absence of evidence alone would be ground to invalidate the rule.<sup>154</sup> But even if one were to speculate, it seems quite probable that the rule is not necessary. In adopting the rule, the Sixth and D.C. Circuits both assumed that free legal representation will buy votes because employees will either feel obligated to reward the union or will fear that voting against the union will prompt the lawyers to drop the suit as soon as the union loses the election.<sup>155</sup> As the NLRB explained in reaffirming its rule in the face of the Sixth Circuit's disapproval, however, both assumptions are questionable.<sup>156</sup>

As to the first, to the extent employees feel gratitude to the union for enforcing their statutory rights, that is precisely the sort of sentiment that legitimately should influence votes in union elections. Constituents re-elect

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151. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000).

152. *Nestle Dairy Sys., Inc.*, 311 N.L.R.B. 987, 988 (1993) (no interference with right to choose); *Novotel New York*, 321 N.L.R.B. 624, 634 (1996) (union representation is protected by the Constitution and "blessed by the Act").

153. *Cf. Buckley v. Valeo*, 424 U.S. 1 (1976).

154. *See, e.g., Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000); *Turner Broadcasting Corp. v. FCC*, 520 U.S. 180 (1997); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 311 (1999) (Souter, J., dissenting) (collecting cases).

155. *Nestle*, 46 F.3d 528, 585 (6th Cir. 1995); *Freund*, 65 F.3d 928, 933-35 (D.C. Cir. 1999) (finding freedom of electoral choice the pertinent consideration).

156. *Novotel*, 321 N.L.R.B. at 636.

their legislators in part because of what they have done for them. It would be impermissible for legislators to buy votes for cash, but certainly it is not wrong for the legislators to offer assistance with government agencies or other forms of constituent service (as long as the legislator of course does not abuse her power in doing so).

The prohibition on employers conferring benefits has been justified on the ground that it is simply a gentler form of threat—"the fist inside the velvet glove."<sup>157</sup> But, as the Court recognized, the union that confers benefits has no fist, for it lacks the employer's ability unilaterally to confer wage or benefit increases or to impose cuts.<sup>158</sup> Employees understand that unions can change employees' working conditions only through collective bargaining and resort to the NLRB or other agencies to enforce statutory rights. The question is whether conferring the benefit of legal representation suggests to employees that a vote against union representation would mean the end of the benefit. The government has offered no such evidence; indeed, the NLRB sees no risk of concern of employees who are offered free legal services from a union during the critical period.

The second rationale, that union lawyers will drop the suit if the union loses the election, rests on the unwarranted assumption that the lawyers will disregard their ethical obligations to their clients. There is no reason to believe that lawyers—even those firms whose clients are principally unions—would decide to abandon a meritorious wage and hour suit on behalf of a group of employees simply because a majority of the employees in the bargaining unit voted against union representation. Even if the union decided not to finance the litigation, the lawyers could proceed with the lawsuit with the expectation that they would recover attorneys' fees and costs. The lawyers, the union, and the clients could also agree in advance that the union would continue to fund the litigation irrespective of the outcome of the election. In any event, to the extent (as explained below), that a conflict of interest might arise between the lawyers and the individual employees in the event of an election defeat, the proper form of regulation is through the state law of attorney ethics. The possibility of a conflict of interest, which rests on a variety of contingencies and speculation, is not a sufficient basis for infringing a First Amendment right of speech, petition, and association.

In sum, the doctrine articulated by the courts of appeals in *Nestle* and *Freund Baking* violates the First Amendment. It is a content-based restriction on the protected First Amendment freedoms of speech, petition, and association. The historical judicial solicitude toward laws restricting

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157. NLRB v. Exchange Parts, 375 U.S. 405, 410 (1964).

158. NLRB v. Savair Mfg. Co., 414 U.S. 270 (1973).

labor-related speech is inapplicable because the speech at issue here is not coercive. But even if the speech were entitled to less extensive First Amendment protection, the law is still a content-based restriction that must pass strict scrutiny. Inasmuch as the government refuses to defend the category, it is also quite apparent that the restriction on speech fails strict scrutiny. Moreover, it is neither necessary nor narrowly tailored to ensure that employees support unions freely and only for legitimate reasons.

#### IV.

#### ETHICAL RESTRICTIONS ON UNION LAWYERS REPRESENTING NONUNION EMPLOYEES

It has been argued that union lawyers are prohibited by rules of professional ethics from representing non-members in employment matters. The contention is that union lawyers have a conflict of interest in representing workers whom the union does not yet represent, particularly if the union is funding the cost of the litigation. The alleged conflict is that the union is supporting the suit for its own reasons – to pressure the employer, to publicize the working conditions, to curry favor with the employees – and that the union's motives may dilute the undivided loyalty the lawyer owes the client. A few of district courts have disqualified union counsel from representing nonmembers.<sup>159</sup> The only court of appeals to rule on the issue, however, overturned a district court disqualification order on the ground that disqualification of counsel prior to any showing of an actual conflict of interest was both unnecessary and detrimental to the employees' interests.<sup>160</sup> The viability of disqualification motions is of considerably greater significance than the one court of appeals decision would suggest, for the threat of disqualification may deter some lawyers and may be used for strategic purposes to force less favorable settlements.<sup>161</sup>

As will be explained, the conflict does not exist. At most it is potential, and the likelihood that a conflict would ever become actual is remote. Even if the conflict did arise, it is waivable by the employees. And finally, even if it were not waivable, such a conflict would not be grounds for disqualification of counsel.

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159. *Brooks v. Farm Fresh, Inc.*, 759 F. Supp. 1185 (E.D. Va. 1991), *rev'd sub nom.* *Shaffer v. Farm Fresh Inc.*, 966 F.2d 142 (4th Cir. 1992). Other decisions are unreported and have been mentioned to the author anecdotally.

160. *Shaffer*, 966 F.2d 142.

161. This Article does not address the ethical obligations owed by union lawyers to bargaining unit members. There is a literature on that topic. *See, e.g.*, Russell G. Pearce, *The Union Lawyer's Obligations to Bargaining Unit Members: A Case Study of the Interdependence of Legal Ethics and Substantive Law*, 37 S. TEX. L. REV. 1095 (1996); James Gray Pope, *Two Faces, Two Ethics: Labor Union Lawyers and the Emerging Doctrine of Entity Ethics*, 68 OR. L. REV. 1 (1989).

*A. There is No Conflict of Interest Between Union Lawyers and the Non-Member Employees Whom They Represent*

*1. The Interests of Employees, the Lawyer, and the Union Are Not in Conflict*

In most every case, there would be no conflict of interest between unions, union lawyers, and the non-member employees whom they represent; indeed, their interests will be congruent. The employee seeks back wages or improved safety protections. The union seeks to improve working conditions so as to eliminate substandard non-union competition and so as to convince non-member employees of the benefits of union representation. The lawyer seeks to win so as to maximize her chances of recovering fees under the FLSA and to achieve the goals of both the individual client and the union financing the litigation.

At most, there may be a *potential* conflict of interest between the union lawyer and the non-member employees. The union could seek to pressure the lawyer to handle the case in a way favorable to union interests. This potential for union pressure on the lawyer would be greatest where the union is the lawyer's only client.

The theoretical possibility of a conflict exists even if the employees' lawyer is in a private practice and the union seeking to organize the employees' workplace is one among many of the attorney's clients. So long as the lawyer values the union as a client, and so long as the union has some hope of organizing the employees in the near or foreseeable future, the union will have some interest in the working conditions of the nonmembers. The ongoing business relation between the union and the lawyer creates the possibility that the lawyer will conduct the representation in a way that furthers the union's interest, irrespective of whether it serves the clients' interest.

A conflict might arise if the employees favored an early settlement and the union wanted to continue the litigation so as to publicize its cause, or vice versa.<sup>162</sup> A conflict might arise if, as part of an agreement in which the employer recognized the union or agreed to neutrality in an election, the employer asked the union to dismiss the employment suit or to cease supporting it. Although the union could not dismiss the suit itself, it might pressure the lawyers to do so. The union might conceivably decide that the organizing victory would be more valuable to it than the possibility of winning the suit. However, it is hard to imagine that the union would embark on such a course since it would risk losing employee support if it

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162. See *Shaffer*, 966 F.2d at 145 (finding this possibility insufficient to justify disqualification).

suddenly abandoned support for a suit it had prosecuted on behalf of the employees from whom it seeks approval.

All of these conflicts are at most potential, and they all rest on the unlikely possibility that a union that seeks support from employees would decide to abandon or compromise litigation from which the employees would likely benefit. A union that suddenly dropped litigation designed to improve working conditions or pressured employees to reject a favorable settlement would likely have a hard time convincing the employees that voting for the union would be in their interest. Thus, the possibility that a union would sell out the employees in exchange for some benefit from the employer is remote at best.

Given the weakness of the arguments for disqualification of union counsel, as explained below, one may wonder why the argument continues to be pressed (and was accepted in at least one case).<sup>163</sup> The contemporary skirmishes over the ethics of union-sponsored employment litigation for nonmembers are simply the latest manifestation of an old phenomenon. As long as civil rights organizations have employed lawyers to effect social change, those on the opposite side of their efforts have invoked various rules regulating lawyers in their efforts to derail the movement.<sup>164</sup> Those who resisted the NAACP's desegregation litigation invoked the rules regulating lawyers' solicitation of business in an effort to prevent the NAACP from bringing and funding litigation.<sup>165</sup> Employers invoked the same ethics rules in an ultimately unsuccessful effort to prevent labor unions from providing legal services to their members for workers' compensation and other matters.<sup>166</sup> Similar unsuccessful attacks were made against the ACLU and its affiliated lawyers.<sup>167</sup>

In those cases, the Supreme Court ultimately rejected the contention that the ethical concerns outweighed the organizations' First Amendment rights to assist members and nonmembers in bringing legal action. As the Court said in *Railroad Trainmen*,

It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition, and assembly give railroad workers the right to gather

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163. *See id.*

164. The NAACP's decades-long struggle against Jim Crow may be the most famous systematic use of lawyers and litigation by a social change organization, but it was not the first. *See* DANIEL R. ERNST, *LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM* (1995) (the American Anti-Boycott Association, a group organized by business to litigate and lobby against organized labor, successfully challenged strikes and boycotts in federal court and obtained broad injunctive relief, thus transforming the Sherman and Clayton antitrust laws into potent, antiunion weapons).

165. *NAACP v. Button*, 371 U.S. 415 (1963).

166. *Bhd. of R.R. Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971).

167. *In re Primus*, 436 U.S. 412 (1978).

together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employers' Liability Act, statutory rights which would be vain and futile if the workers could not talk together freely as to the best course to follow. . . . And the right of the workers personally or through a special department of their Brotherhood to advise concerning the need for legal assistance—and, most importantly, what lawyer a member could confidently rely on—is an inseparable part of this constitutionally guaranteed right to assist and advise each other.<sup>168</sup>

The ethical rules that had been invoked in the disqualification cases discussed above principally concerned the improper solicitation of legal business rather than the conflict of interest rules at issue here.<sup>169</sup> However, some, like the *Trainmen* case, involved issues more salient to the current discussion. The rule at issue in the *Trainmen* case prohibited the “control or exploitation by a lay agency of the professional services of a lawyer.”<sup>170</sup> The underlying concern of all the ethical rules involved in *Trainmen* was that the union’s involvement in the employees’ work lives and control over the lawyers would dilute the lawyers’ duty of undivided loyalty to the client.<sup>171</sup>

When evaluating the ethical concerns in organizational representation, the Court in *United Mine Workers*, concluded that “the theoretical possibility that the union’s interests would diverge from that of the individual litigant members” was “far too speculative” to justify a complete prohibition on the organization’s efforts to provide legal representation for the individuals.<sup>172</sup> The possibility of conflicting interests between union lawyers and their clients is, as the Fourth Circuit concluded in *Shaffer*, no more immediate. The Court has consistently held that application of traditional rules regulating the bar must respect the First Amendment rights at stake, and the possibility that the interests of the organization may at some point conflict with those of the individual employees is not grounds for a blanket prohibition on such representation.

## 2. *The Ethical Rules Allow Union Lawyers to Represent Non-Member Employees*

Every jurisdiction has one or more rules governing conflicts of interest

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168. *Bhd. of R.R. Trainmen*, 377 U.S. at 5-6.

169. *See, e.g., id.* at 6 n.10; *Button*, 371 U.S. at 423-24; *In re Primus*, 436 U.S. at 418.

170. *Bhd. of R.R. Trainmen*, 377 U.S. at 6 n.10.

171. As Justice Clark wrote in his dissent, the system would “work to the disadvantage of the Brotherhood members by directing their claims into the hands of the 16 approved attorneys who are subject to the control of one man, the president of the union.” *Id.* at 12 (dissenting opinion of Clark, J.).

172. *United Mine Workers*, 389 U.S. at 223.

that may occur with simultaneous representation or with third party funding of litigation. The most widely adopted rules are the ABA's 1983 Model Rules of Professional Conduct, which have been adopted in more than two-thirds of the states.<sup>173</sup> Two conflict-of-interest provisions of the Model Rules are potentially applicable. First, Model Rule 1.7(b) prohibits representation where the representation of one client "may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests."<sup>174</sup> A union lawyer's responsibilities to individual employees would not be materially limited by her responsibilities to the union, even if the union lost the election and wished to cease its support of the employees. However, the lawyer's own interest in keeping the union as a client, and the lawyer's interests in having the union continue to pay her fees for representing the individuals might theoretically cause her to seek a quick and inexpensive end to the litigation. On the other hand, the lawyer could withdraw from the representation of the individuals, thus avoiding any future conflict.

The second potentially applicable Model Rule is 1.8(f), which governs third party payment of fees. A lawyer may, under that rule, receive payment of legal fees from a third party so long as the client consents after consultation, the third party does not interfere with the lawyer's independent professional judgment on behalf of the client, and the third party recognizes that the lawyer is bound by a duty of confidentiality to the client.<sup>175</sup>

173. MODEL RULES OF PROF'L CONDUCT (1983).

174. *Florida Bar v. Dunagen*, 731 So. 2d 1237 (Fla. 1999) (conflict where attorney formerly represented a couple in acquisition of a business and attorney later represented husband in divorce proceeding when property previously acquired was part of marital estate); *In re Cole*, 738 N.E.2d 1035 (Ind. 2000) (part-time prosecutor could not represent private clients); *Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151 (Ind. 1999) (insurance company could assign in-house counsel to represent defendant); *In re Geeding*, 12 P.3d 396 (Kan. 2000) (attorney subject to reprimand for representing client in conflict situation without obtaining consent and while receiving compensation from the other client); *Ky. Bar Ass'n v. Bates*, 26 S.W.3d 788 (Ky. 2000) (attorney reprimanded when, in capacity as trial commissioner, he signed protective order in favor of current client); *Lettley v. State*, 746 A.2d 392 (Md. App. 2000) (dual representation of criminal defendant and another client who in fact confessed to crime was grounds for disqualification); *In re Halverson*, 140 P.2d 833 (Wash. 2000) (not disclosing implication of sexual relationship with client to that client); *Bd. of Attys Prof'l. Resp. v. O'Keefe*, 613 N.W.2d 890 (Wis. 2000) (attorney reprimanded for not informing client of dismissal, deducting costs of that case from spouse's settlement, and dual representation); *Guerrero v. Cavey*, 617 N.W.2d 849 (Wis. 2000) (client's attorney disqualified from representing his incompetent mother where son was trying to buy her house below market value and mother lacked capacity to waive conflict).

175. MODEL RULES OF PROF'L CONDUCT R. 1.8(f) (1983); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 215 (Proposed Final Draft No. 2 (1998)) (allowing third party payment of fees if client consents after consultation and third party direction of lawyer's conduct on behalf of client when "the direction is reasonable in scope and character" and the client consents after consultation); *People v. Rivers*, 933 P.2d 6 (Colo. 2000) (third party payment of fees); *Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151 (Ind. 1999) (insurance company paying fees for defendant on conflicting matter); *In re Geeding*, 12 P.3d 396 (Kan. 2000) (receiving compensation from third party where such party's interests conflict with those of present client); *In re Opinion 682 of the Advisory Comm'n on Professional Ethics*,



The ABA Model Code, which is in force in several states (including New York), is substantially similar to the Model Rules in its potentially applicable provisions. DR 5-105(B) prohibits a lawyer to “continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client.”<sup>176</sup> DR 5-107(B) provides that a lawyer “shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such services.”<sup>177</sup> California has its own rules, the pertinent one of which prohibits joint representation when the parties’ interests potentially or actually conflict.<sup>178</sup>

There is no inherent conflict of interest between union lawyers and employees who are not union members. Zealous representation of the employees will in virtually every case be precisely congruent with the union’s interest—to uncover and to remedy all of the employer’s violations of the workplace rights of the employees. The question is whether the possibility that their interests may diverge for the reasons and in the ways suggested above triggers the applicable conflict of interest rule. Under the Model Rules, the question is whether the possibility rises to the level where the representation “may be materially limited.” The comment to Rule 1.7(b) states that:

A possible conflict does not itself preclude representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.<sup>179</sup>

Under the Model Rules, the question is whether the possibility of a conflict “is likely to” adversely affect the representation of the employees.<sup>180</sup>

The *Restatement (Third) of the Law Governing Lawyers* § 201 provides initial guidance on the likelihood of conflict required to trigger a duty to withdraw. It says a conflict exists if there is “a substantial risk” that the representation “would be materially and adversely affected.”<sup>181</sup> The risk that the union’s efforts to obtain recognition as the employee’s bargaining representative would “materially and adversely affect” the lawyer’s representation of the employees is remote. Admittedly, organizing drives

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687 A.2d 1000 (N.J. 1997) (third party compensation); *Fullmer v. State Farm Ins. Co.*, 514 N.W.2d 861 (S.D. 1994) (third party compensation).

176. MODEL CODE OF PROF’L RESPONSIBILITY DR 5-105(B) (1980).

177. MODEL CODE OF PROF’L RESPONSIBILITY DR 5-107(B) (1980).

178. CAL. BAR RULES, PROF’L CONDUCT R. 3-310(C)(1-2) (2001).

179. MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 4 (1983).

180. MODEL CODE OF PROF’L RESPONSIBILITY DR 5-105(A) (1980).

181. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 201 (Proposed Final Draft No. 1, March 1996).

fail. However, it does not seem likely that a failed election results in a “substantial risk” that the representation would be “materially and adversely affected.” A lost election does not necessarily mean that the union would withdraw its financial or other support for the suit (and thus pressure the attorney to quickly end the suit in a way potentially adverse to the non-member client). Indeed, the union might have the incentive to continue its support for the non-member suit pending unfair labor practice challenges to the election, or even in anticipation of seeking representation after the statutory one-year bar to a next election. A union that gains the reputation of abandoning employees who supported unions in union funded litigation will not be successful in organizing other workplaces.

Even if the union were to withdraw its support, the lawyer does not necessarily face a conflict of interest. Rule 1.8(f) recognizes the obligation of the lawyer to resist any efforts of the union to direct the litigation that it financially supports. The risk that the union would attempt to compel the lawyer to subvert the interests of the individual employees as some sort of punishment for the election defeat is remote. The possibility that the lawyer would succumb to that pressure in order to keep the union happy as a client is even more remote.

*B. Any Conflict of Interest Would Be Waivable*

Even if a conflict between the union, the lawyer, and/or the employees were to arise, the employees could waive the conflict. Model Rule 1.7(b) allows a lawyer to continue in multiple representation if (a) the lawyer reasonably believes the representation will not be adversely affected; and (b) the client consents after consultation. The comment to Rule 1.7(b) states that “consideration should be given to whether the client wishes to accommodate the other interest involved.”<sup>182</sup> The Model Code contains similar provisions, allowing multiple representation “if it is obvious that [the lawyer] can adequately represent the interest of each [client] and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.”<sup>183</sup>

The California Rules are similar, although California requires the disclosure of the conflict and the client’s consent both to be in writing. In particular, California’s rule forbids joint representation where the parties’ interests potentially or actually conflict unless the attorney first discloses the conflict, in writing, and obtains the “informed written consent of each client.”<sup>184</sup> The required disclosure “means informing the client . . . of the

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182. MODEL RULES OF PROF’L CONDUCT R. 1.7 (1983).

183. MODEL CODE OF PROF’L RESPONSIBILITY DR 5-105(C) (1980).

184. CAL. BAR RULES, PROF’L CONDUCT R. 3-310(C) (2001).

relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client.”<sup>185</sup> Thus, even to the extent that a conflict between the union and the individual employees might arise, both could waive the conflict in advance.

If the conflict were to arise, and if the union and the plaintiffs waived it, the question would be whether the waivers would be effective. Some conflicts are so serious as to be unwaivable.<sup>186</sup> Under the Model Rules, “when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent.”<sup>187</sup> Under the Model Code, multiple representation based on consent is permissible only if it is “obvious” that the lawyer can “adequately represent the interest of each” client.<sup>188</sup>

Any possible conflict between the union and the employees would not be so serious as to be unwaivable under the standards adopted in the cases.<sup>189</sup> The crucial question is whether the lawyer can provide effective representation in light of the conflict. As noted above, the conflict itself would very likely never arise. As the Fourth Circuit concluded in *Shaffer*, even if one did, there is no reason to believe that the lawyer could not resist the temptation to compromise the employees’ representation simply because the union might decide it would be in the union’s interest.<sup>190</sup> Since the lawyer could recover attorney’s fees under the FLSA if the employees prevailed, she would likely have an incentive and the financial ability to withstand pressure from the union to abandon or compromise a meritorious case.<sup>191</sup> At least one court has held that unions and individual employees can validly waive possible conflicts in advance and consent to joint representation and union control of the litigation finances.<sup>192</sup>

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185. CAL. BAR RULES, PROF’L CONDUCT R. 3-310(A)(1) (2001).

186. Egregious circumstances giving rise to unwaivable conflict existed in *In re A.C.*, 96 Cal. Rptr. 2d 79 (Cal. Ct. App. 2000) (father who is attorney disqualified from representing diseased daughter in action to destroy juvenile records concerning dependency hearings based on parental abuse); *Raymond v. Raymond*, 662 N.Y.S.2d 1016 (N.Y. Fam. Ct. 1997) (attorney disqualified from representing grandfather in criminal proceeding concerning sexual abuse and grandmother in visitation proceeding instituted by mother).

187. MODEL RULES OF PROF’L CONDUCT R. 1.15 cmt. (1983)

188. DR 5-105(C).

189. *See supra* note 186.

190. *Shaffer v. Farm Fresh, Inc.*, 966 F.2d 142, 146 (4th Cir. 1992).

191. 29 U.S.C. § 216(b).

192. *Barton v. Albertson’s Inc.*, Nos. 97-0159-S-BLW, 97-0183-S-BLW, 1997 U.S. Dist. LEXIS 22570, at \*23 (D. Idaho 1997).

C. *Disqualification Is Not an Appropriate Response to a Possible Conflict of Interest*

Disqualification impairs employees' ability to bring suits to enforce their statutorily created employment rights. Employers have any number of strategic reasons to try to get union counsel disqualified. First, the difficulty of obtaining substitute counsel, particularly if the disqualification comes on the eve of trial, is considerable. At least one suit was dismissed because the employees did not find substitute counsel after the union lawyers were disqualified.<sup>193</sup> The uncertainty about whether or when such a motion would be filed might be sufficient to deter unions from filing such suits and investing significant resources in litigating them. Even if the plaintiffs can find substitute counsel, employers have reason to prefer that the union lawyers not be involved in the suit. In some cases, employers have committed alleged unfair labor practices in their responses to employment law litigation—for example, by asking the employees about whether they support the union and the litigation, or by threatening the jobs of employees who support the litigation.<sup>194</sup> Union counsel obviously would be in the best position to file unfair labor practice charges over such actions by the employer during the employees' lawsuit and the union itself might use such threats in its organizing drive. The disqualification of counsel increases the cost of litigation and may delay recovery.

When courts have disqualified lawyers because of their obligations to other clients, they have done so when there is at a minimum a "serious" and "imminent" probability,<sup>195</sup> and often only when, in fact, the lawyer must do

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193. *Brooks v. Farm Fresh, Inc.*, 759 F. Supp. 1185 (E.D. Va. 1991), *rev'd*, 966 F.2d 142 (4th Cir. 1992). It should be noted, however, that late filing of a motion to disqualify can be grounds for denial of the motion if the basis for disqualification was known for some time before the motion was filed. *See Redd v. Shell Oil Co.*, 518 F.2d 311 (10th Cir. 1975); *Lau v. Valu-Bilt Homes, Ltd.*, 582 P.2d 195 (Haw. 1978). *But see Earl Scheib, Inc. v. Superior Court*, 61 Cal. Rptr. 386 (Cal. Ct. App. 1967) (error to deny motion to disqualify simply on grounds of delay; attorney previously represented adversary and learned confidential information relevant to subject matter of current representation; motion to disqualify should have been considered on the merits and not denied as untimely).

194. *See, e.g., Bill Johnson's Rests., Inc.*, 249 N.L.R.B. 155, *enf'd* 600 F.2d 1335 (9th Cir. 1982), *vacated and remanded on other grounds*, 461 U.S. 731 (1983); *Maritz Commun. Co.*, 274 N.L.R.B. 200 (1985); *Manville Forest Prods. Corp.*, No. 9-CA-26331, 1989 N.L.R.B. GCM LEXIS 54 (July 21, 1989) (advice memorandum); *U.S. Gypsum Co.*, No. 2-CA-24353 (Jan. 28, 1991) (advice memorandum); *Anderson Seafoods, Inc.*, No. 21-CA-32671 (Aug. 17, 1998) (advice memorandum); *Heisler Food Enter., Ltd.*, No. 2-CA-30899, 1999 N.L.R.B. LEXIS 889 (Dec. 30, 1999) (ALJ opinion).

195. *Global Van Lines v. Super. Ct.*, 144 Cal. App. 3d 483 (1983) (attorney disqualified when it appeared by virtue of earlier representation of adverse party that confidential information material to current dispute would normally have been imparted); *Gaton v. Health Coalition, Inc.*, 745 So.2d 510 (Fla. 1999) (counsel properly disqualified from representing client when counsel had previously been part of opposing counsel's firm while working on matters material to current controversy); *Johns v. Carr*, 397 S.E.2d 8 (Ga. 1990) (counsel disqualified from representing plaintiff in wrongful death action where such counsel had previously represented defendant's employee on matters relevant to current controversy under doctrine of respondeat superior); *Tydings v. Berk Enter.*, 565 A.2d 390 (Md. 1989) (potential for conflict is grounds to disqualify counsel when counsel represents corporation and

something on behalf of one client that will necessarily be contrary to the interests of the other client.<sup>196</sup> Conversely, when the conflict of interest is only potential, courts deny disqualification.<sup>197</sup> It seems unlikely that the hypothetical conflict between employees' union-funded attorneys and/or unions would rise to the level of "serious" or "imminent," necessitating disqualification.

Apart from the question whether there is a basis for disqualification of plaintiffs' chosen counsel, there is the additional issue of whether employers have standing to disqualify their opponents' lawyer. Although many courts hold that a litigant who will suffer no harm from opposing counsel's conflict of interest lacks standing to seek disqualification,<sup>198</sup>

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represents, in an individual capacity, its directors and shareholders).

196. See, e.g., *In the Interest of Steveon R.A.*, 537 N.W.2d 142, 145 (Wis. Ct. App. 1995) (disqualifying attorney for state in paternity and child support actions who also represents children on the ground that her obligation to the state requires her to prosecute her child-clients' father for child support and money recovered from father on behalf of state will be unavailable to children); *Gilbert v. Nat'l Corp. for Hous. P'ships*, 71 Cal. App. 4th 1240 (1999) (disqualifying attorney when attorneys' former clients were called as witnesses and attorney could not examine them without breaching duty of confidentiality owed to former clients); *Franzoni v. Hart, Schaffner & Marx*, 726 N.E.2d 719 (Ill. 2000) (employer's motion to disqualify employees' counsel in wrongful discharge action granted based on counsel's previous representation of employer in substantially related employment law matters); *Auseon v. Reading Brass Co.*, 177 N.W.2d 662 (Mich. 1970) (court disqualified employee's attorney who had previously been counsel for employer and in that capacity had drafted employment contract of employee that is subject of current litigation); *Int'l Bhd. of Teamsters v. Hoffa*, 242 F. Supp. 246 (D.D.C. 1965) (disqualifies counsel for individual union officers charged with misuse of union funds from representing union because union's interests and those of its officers are likely to be adverse and union is entitled to advice of independent counsel as to whether officers engaged in wrongdoing).

197. *Guillen v. City of Chicago*, 956 F. Supp. 1416 (N.D. Ill. 1997) (denying motion to disqualify city counsel from representing paramedics who were witnesses to police's alleged killing of plaintiff's decedent finding that potential that paramedics' testimony would pin blame on police insufficient to establish conflict of interest between police and city on the one hand and paramedics on the other); *United States v. Valdez*, 149 F.R.D. 223 (D. Utah 1993) (denying disqualification of defense counsel who had previously represented witness based on possibility that defense counsel would not be able to vigorously cross-examine former client); *Clay v. Doherty*, 608 F. Supp. 295 (N.D. Ill. 1985) (denying disqualification of counsel defending county, supervisors of public defender's office and county's chief guardian ad litem in suit seeking damages for alleged incompetent representation, finding possibility that some testimony of some defendants would conflict with that of others insufficient because there was no evidence yet that they would take inconsistent positions); *In re H.W.E.*, 613 S.W.2d 71 (Tex. App. 1981) (representing both father and mother in proceeding to terminate parental rights of both based on father's sexual abuse of child and mother's knowledge of the abuse, finding the "mere potential conflict of interest is insufficient to prohibit multiple representation as long as there is no real and substantial conflict"); cf. *United States v. Melo*, 702 F. Supp. 939 (D. Mass. 1988) (ordering evidentiary hearing on disqualification of counsel who represents co-defendants and whom the prosecution may call as a witness).

198. *Colyer v. Smith*, 50 F. Supp. 2d 966 (C.D. Cal. 1999) (litigant does not have standing to seek disqualification of opposing counsel with whom litigant has no prior professional relationship on theory that counsel's representation of party places it in conflict with interests of another client); *State v. Reddick*, 534 S.E.2d 473, 478 (Ga. App. 2000) ("The objection that an attorney is disqualified by reason of his representing adverse interest is available only to those as to whom the attorney in question sustains, or has sustained, the relation of attorney and client."); *Miller v. City of Omaha*, 618 N.W.2d 628, 636 (Neb. 2000) ("We concluded that as a general rule, courts do not disqualify an attorney on the

courts occasionally entertain and grant motions when they find that a party's interests are compromised by opposing counsel's conflict of interest in representing the adversary.<sup>199</sup>

The principal circumstances in which an adversary may challenge an opponent's choice of counsel are those where the adversary has some interest that will be affected by its opponent's attorney-client relationship. The most obvious is when the opponent's lawyer previously represented or currently represents the party who seeks disqualification.<sup>200</sup> In that circumstance, disqualification may be necessary to protect confidences or to ensure the lawyer's loyalty to the former client. An additional circumstance

grounds of conflict of interest unless the former client moves for disqualification. In order to have standing, a litigant must assert the litigant's own legal rights and interests, and cannot rest his or her claim on the legal rights or interests of third parties."); *Hawkes v. Lewis*, 586 N.W.2d 430, 435 (Neb. 1998) ("In determining standing, however, the issue is not per se whether a conflict of interest is present. Instead, the question is, 'Who has the right to ask the court for disqualification when it seems apparent from the rules stated above that they are intended to protect the confidences and interests, not of a third party, but of the former client?'); *Morgan v. N. Coast Cable Co.*, 586 N.E.2d 88, 91 (Ohio 1995) (stranger to attorney-client relationship lacks standing to assert a conflict of interest in that relationship); *Ahearn v. Ahearn*, 993 P.2d 942, 950 (Wyo. 1999) ("Mr. Ahearn has no tangible interest in either Mrs. Ahearn's or Lewis' choice of counsel.").

For the federal rule, see *In re Yarn Processing Patent Validity Litig.*, 530 F.2d 83, 88 (5th Cir. 1976) ("As a general rule, courts do not disqualify an attorney on the grounds of conflict of interest unless the former client moves for disqualification."). See also *Dawson v. City of Bartlesville*, 901 F. Supp. 314 (N.D. Okla. 1995); *Muchinson v. Kirby*, 201 F. Supp. 122 (S.D.N.Y. 1961); *Lowe v. Graves*, 404 So.2d 652 (Ala. 1981); *State v. Garaygordobil*, 359 P.2d 753 (Ariz. 1961); *Pioneer Natural Gas Co. v. Caraway*, 562 S.W.2d 284 (Tex. Civ. App. 1978).

199. See *Davis v. S. Bell Tel. & Tel. Co.*, 149 F.R.D. 666 (S.D. Fla. 1993) (finding standing when a public attorney represents a private client simultaneously on a related matter, thus giving that private client advantages normally unavailable to a private client with regard to resources); *State ex rel. Romley v. Super. Ct.*, 891 P.2d 246, 258 (Ariz. App. 1995) ("Where the rights of a particular party may be compromised by representation in which opposing counsel is engaged, then that party has standing to bring a motion to disqualify, regardless of whether the party is a client or former client of the attorney . . ."); *Lavaja v. Carter*, 505 N.E.2d 694, 700 (Ill. App. 1987) (third party will have standing if it can allege actual detriment to its own interest as a result of the opposing party's conflict).

200. *In re Cendant Corp. Sec. Litig.*, 124 F. Supp. 2d 235 (D.N.J. 2000) (representation of a current client and attorney of former client's adversary on a related matter); *LZ Props. v. Tampa Obstetrics, P.A.*, 753 So.2d 721 (Fla. App. 2000) (counsel disqualified from representing partnership in action against partner for breach of fiduciary duty where counsel's attorney-client relationship with defendant partner predated the current representation of the partnership); *Robertson v. Wittenmyer*, 736 N.E.2d 804 (Ind. App. 2000) (counsel for passenger disqualified in suit against driver where counsel had previously represented both passenger and driver in previous action arising from same accident); *Detter v. Schreiber*, 610 N.W.2d 13 (Neb. 2000) (counsel who had drafted shareholder agreement for close corporation could not later represent shareholder defendant against shareholder plaintiff's claim for payment of promissory notes); *Shaikh v. Waiters*, 710 N.Y.S.2d 873 (N.Y. Super. Ct. 2000) (law firm disqualified from representing automobile driver and her child passenger in personal injury litigation against driver of second car where issue of mother's negligence had not been resolved, even though child had not filed action against mother); *State ex rel. Taylor Ass'n v. Nuzum*, 330 S.E.2d 677, 681 (W.Va. 1985) ("A lawyer who is the recipient of a potential client's confidence is thereafter disqualified from acting for any other person interested adversely in the same general matter, however slight such adverse interest may be."); *In re Guardianship of Lillian P.*, 736 N.W.2d 849 (Wis. App. 2000) (attorney disqualified for representing elderly client and son in guardianship proceedings).

in which one party may seek disqualification of the opponent's counsel is when the party may need to call the lawyer as a witness.<sup>201</sup> Absent such circumstances, however, the responsibility to resolve conflict of interest issues is, in the language of the comment to Rule 1.7, "primarily the responsibility of the lawyer undertaking the representation."<sup>202</sup>

The Model Rules themselves suggest that a party must have a direct interest in the opponent attorney's conflict of interest to bring a motion for disqualification and that the Rules themselves do not confer standing to raise a conflict. The court may raise the issue in litigation "when there is reason to infer that the lawyer has neglected the responsibility."<sup>203</sup> Opposing counsel may raise it "[w]here the conflict is such as clearly to call in question the fair or efficient administration of justice," but, the comment cautions, opposing counsel's "objection should be viewed with caution, however, for it can be misused as a technique of harassment."<sup>204</sup> Moreover, the comment on the Scope of the Model Rules cautions that:

[T]he purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.<sup>205</sup>

The employer has no cognizable interest in the employees' choice of counsel in employment law matters (and thus no standing to bring a motion for disqualification) unless the employer was itself in an attorney-client relationship with the union lawyers. The only possible injury the employer might suffer would be if the employees or their lawyer were later to terminate their relationship, the employer might suffer delay or additional expense associated with substitution of counsel. But the possibility that one's opponent might later decide to substitute counsel is too remote and

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201. *Commonwealth v. Patterson*, 739 N.E.2d 682 (Mass. 2000) (actual conflict of interest evident where it became apparent that defense counsel would be called as a witness on behalf of client); *Klupt v. Krongard*, 728 A.2d 727 (Md. App. 1999) (counsel for patent licensor in fraud action disqualified when it became apparent that due to his previous representation of licensee in dispute concerning validity of agreement he would be called as witness in instant litigation because his previous statements contradicted his client's current contentions); *Mutual Group U.S. v. Higgins*, 611 N.W.2d 404 (Neb. 2000) (in subrogation action, insured's counsel disqualified when it became apparent that counsel would be a material witness regarding statements made concerning the insurer's rights); *Korfman v. Kemper Nat'l. Ins. Co.*, 685 N.Y.S.2d 282 (App. Div. 1999) (counsel disqualified from representing plaintiff in bad faith action against insurance company where counsel had been privy to previous negotiations with insurance company and would therefore be material witness); *In re Bahn*, 13 S.W.3d 865 (Tex. App. 2000) (in action against debtor, debtor's attorney disqualified when it became apparent that attorney would testify that creditor violated Texas collection statutes).

202. MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt. 15 (1983).

203. *Id.*

204. *Id.*

205. MODEL RULES OF PROF'L CONDUCT, SCOPE, para. 6 (1983).

speculative to justify allowing the employer to force the parting of the ways before any such conflict has arisen. Employers are sufficiently protected against the possibility of unfair expense associated with last-minute withdrawal or substitution of counsel by the power of the court to deny withdrawal or substitution. Also, potential delay due to withdrawal is a general concern in any lawsuit.

It might be argued that since the court has a sufficient interest in ensuring the appearance and the fact of ethical behavior so as to permit it to raise the possible conflict *sua sponte*, the employer should be permitted to raise it too. However, the employer, unlike the court, has a significant (albeit illegitimate) strategic interest in interfering with the employees' choice of counsel, and the potential for abuse of motions to disqualify is great. Disqualification of counsel, especially shortly before trial, can make it impossible for the plaintiffs to continue the litigation because it is difficult to find other lawyers willing to step in, particularly if, as is often the case, the litigation is complex, the potential financial recovery is not large, and the union is prohibited or unable to contribute financial support. Moreover, since disqualification orders are not immediately appealable and appellate review is extremely deferential, the potential for serious harm to the plaintiffs' interests is considerable.<sup>206</sup>

## V.

### CONCLUSION

In sum, there are several reasons for the courts to reconsider their hostility to union enforcement of employment law in the pre-election period. First, enforcement of employment law for non-members is one of the most important roles unions can play today. With only about ten percent of the private sector workforce currently unionized, and dim prospects for a significant short-term increase, many unions are evaluating what role they can serve in protecting the vast majority of the workforce who are not members. Ensuring compliance with the minimum standards imposed by law is an important part of their mission today. Second, effective enforcement is perhaps the single most significant problem in the field of employment law. The persistence of sweatshops, entirely preventable but devastating factory fires, and appallingly substandard working conditions for the most vulnerable of the American workforce is an embarrassment to the wealthiest country in the world, particularly since

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206. See *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 426, 433-34 (1985) (order disqualifying counsel is not immediately appealable; in exceptional circumstances such orders are reviewable by writ of mandamus or by certification under 28 U.S.C. 1292(b); review is limited to abuse of discretion); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 372 n.1, 375 (1981) (denial of motion to disqualify opposing counsel is not immediately appealable).



these practices have been illegal for decades. The search for more effective enforcement of minimum workplace standards remains pressing. Finally, labor law's long diffidence toward the First Amendment is simply no longer tenable, now that the Supreme Court has ruled that content-based restrictions of any sort, in any field of law, must be judged by strict scrutiny.

Unions and union lawyers are and should be free to provide legal services to any worker without regard to the existence of an organizing drive or the pendency of an election petition. The courts of appeals should accept the NLRB's determination that provision of such services is protected concerted activity under section 7 of the NLRB, is not grounds for setting aside an election under the so-called laboratory conditions doctrine, is protected by the First Amendment, and is entirely consistent with the highest standards of professional ethics.

