THE NATIONAL LABOR RELATIONS BOARD HAS FAILED TO ENFORCE FULLY WORKERS' RIGHTS UNDER *COMMUNICATIONS WORKERS V. BECK* NOT TO SUBSIDIZE UNIONS' POLITICAL AND OTHER NONBARGAINING ACTIVITIES

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I.
THE LEGAL BACKGROUND

A. The Limits on Compulsory Unionism Arrangements Under the National Labor Relations Act

Section 8(a)(3) of the National Labor Relations Act (NLRA) authorizes collective bargaining agreement provisions that "require as a condition of employment membership" in a union.[1] However, in a series of cases, the U.S. Supreme Court has recognized that neither actual union membership nor payment of full union dues can be required. The Court decided that, instead, the most that can be required of employees as a condition of employment under the NLRA is the payment of the part of union dues used for activities related to collective bargaining and contract administration.

First, in *NLRB v. General Motors Corp.*, the Court held that, in a proviso to § 8(a)(3), "the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues."[2] Thus, under the NLRA, employees cannot be required to actually join unions as a condition of employment, but nonmembers can be required to pay union dues and fees.[3]

Later, in *Communications Workers v. Beck*, the Supreme Court considered whether § 8(a)(3) agreements may compel nonmembers to pay full initiation fees and dues as a condition of employment.[4] The *Beck* Court began by recognizing that "§ 8(a)(3) and § 2, Eleventh [of the Railway Labor Act (RLA)] are in all material respects identical."[5] The Court concluded by holding "that § 8(a)(3), like its statutory equivalent § 2, Eleventh of the RLA, au-

1. National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3) (2012).

2. 373 U.S. 734, 742 (1963). The proviso on which *General Motors* relied states that

> no employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

29 U.S.C. § 158(a)(3); *see also General Motors Corp.*, 373 U.S. at 742.

3. The distinction is significant for two reasons: first, nonmembers cannot be required to pay full dues; second, nonmembers paying union dues as a condition of employment cannot be disciplined for disobeying internal union rules, such as a prohibition on crossing a picket line and working during a strike. Pattern Makers' League v. NLRB, 473 U.S. 95, 106 & n.16 (1985).

4. 487 U.S. 735 (1988).

5. *Id.* at 745 (citing 26 U.S.C. § 158(a)(3) (1982) & 45 U.S.C. § 152, Eleventh (1982)).

thorizes the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'"[6]

B. The Difficulty in Enforcing the Limits on Forced Union Fees

Implementation of the Supreme Court's *Beck* holding is a serious problem. Many American workers are forced, due to the unique privilege Congress granted unions in § 8(a)(3) of the NLRA, to contribute their hard-earned dollars to political and ideological causes they oppose.

At issue are union dues and so-called "agency fees" collected from workers under threat of job loss. These monies, under federal election law, are lawfully used for registration and get-out-the-vote drives, candidate support among union members and their families, administration and solicitation of funds for union political action committees, independent expenditures for or against candidates directed to the general public, lobbying, and issue advocacy.[7] Such political expenditures by unions that must file financial reports with the Department of Labor amounted to more than one billion dollars in the 2010 election cycle.[8]

Under the NLRA, employees who never requested union representation must accept the bargaining agent selected by a majority in their bargaining unit,[9] an agent often selected before the employees were hired.[10] And, if forced union fees are not prohibited by a state right-to-work law,[11] and the employer and monopoly bar-

6. *Id.* at 762–63 (quoting Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 448 (1984)).

7. *See, e.g.*, 52 U.S.C.A. § 30118(b)(2) (2014) (allowing labor organizations to make certain political expenditures from dues); Citizens United v. FEC, 558 U.S. 310, 321 (2010) (holding labor organizations' independent expenditures for electioneering communications constitute protected speech).

8. *Big Labor Spent $1.4 Billion for Politics*, NAT'L INST. FOR LAB. REL. RES., http://nilrr.org/files/Big%20Labor%20Political%20Spending%20in%20the%202010%20Election%20Cycle.pdf (last visited Sept. 15, 2014).

9. National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (2012).

10. *Cf.* NLRB OFFICE OF GEN. COUNSEL, BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT, at 8 (1997) (detailing NLRB policy that, once certified, a representative may not be effectively challenged for at least one year).

11. NLRA § 14(b) authorizes states to prohibit "agreements requiring membership in a labor organization as a condition of employment." National Labor Relations Act § 14(b), 29 U.S.C. § 164(b) (2012). This section authorizes states to prohibit agreements requiring payment of union dues or fees as a condition of employment as well as agreements prohibiting union membership. Retail Clerks Int'l Ass'n Local 1625 v. Schermerhorn, 373 U.S. 746, 750–54 (1963). As of the date of publication of this Article, there were twenty-five of these "right-to-work"

gaining agent agree, the law forces these employees to pay fees equal to union dues for that unwanted representation or face being fired.[12]

The evil inherent in compelling workers to subsidize a union's political and ideological activities is apparent. As Thomas Jefferson eloquently put it, "'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.'"[13] Preventing that evil, however, is difficult under current law.

To begin with, despite the limitations *General Motors* and *Beck* placed on what can be required of employees under § 8(a)(3), the Court in *Marquez v. Screen Actors Guild* held that collective bargaining agreements can lawfully state that "membership" is required as a condition of employment "without explaining, in the agreement, [the] Court's interpretation of that language."[14] As Justice Kennedy recognized in his concurring opinion in *Marquez*, "language like this can facilitate deception."[15]

Moreover, even when workers know that they have a right not to be a formal union member and a right not to pay full union dues, enforcing the latter right is difficult. In dissenting from the Supreme Court's first ruling on this problem, in *International Ass'n of Machinists v. Street*, the late Justice Black articulated the difficulty well.[16] Avoiding constitutional questions, *Street* held that the RLA prohibits the use of forced union dues and fees for "political causes."[17]

However, the Court's majority held that the employees' remedy was merely a reduction or refund of the part of dues used for politics.[18] Justice Black exposed that remedy's fatal flaw:

> It may be that courts and lawyers with sufficient skill in accounting, algebra, geometry, trigonometry and calculus will be able to extract the proper microscopic answer from the volumi-

states. NAT'L RIGHT TO WORK DEF. FOUND., http://www.nrtw.org/rtws.htm (last visited Apr. 16, 2015).

12. National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3) (2012).

13. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 n.31 (1977) (quoting Thomas Jefferson, *Virginia Statute for Religious Freedom*, *in* 12 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 85 (2d ed. 1823)).

14. 525 U.S. 33, 36 (1998).

15. *Id.* at 53 (Kennedy, J., concurring) (providing examples in which use of the term "membership" in agreements misled workers).

16. 367 U.S. 740 (1961).

17. *Id.* at 768–70.

18. *Id.* at 774–75.

> nous and complex accounting records of the local, national, and international unions involved. It seems to me, however, that . . . this formula with its attendant trial burdens promises little hope for financial recompense to the individual workers whose First Amendment freedoms have been flagrantly violated.[19]

Just this past term, in *Harris v. Quinn*, the Court recognized that Justice Black "accurately predicted that the [*Street*] Court's approach would lead to serious practical problems."[20]

Following *Street*, the Supreme Court's later *Beck* decision ruled that employees covered by the NLRA also cannot lawfully be compelled to subsidize unions' political, ideological, and other nonbargaining activities.[21] That should have paved the way for all private-sector employees not in right-to-work states to stop the collection of dues for anything other than bargaining-related activities.

However, like *Street*, *Beck* is not self enforcing. Experience shows that Justice Black was correct. Without the help of an organization like the National Right to Work Legal Defense Foundation,[22] no employee, or group of employees, can effectively battle a labor union and ensure that they are not subsidizing its political and ideological agenda.[23] Even with the rulings in *Beck* and related cases, the deck is stacked against individual employees. And, even with the help of the Foundation, which cannot assist every worker who wants

19. *Id.* at 795–96 (Black, J., dissenting). Justice Black would have held that the RLA's authorization of forced union fees "violates the freedom of speech guarantee of the First Amendment." *Id.* at 791.

20. 134 S. Ct. 2618, 2630 (2014).

21. Commc'ns Workers v. Beck, 487 U.S. 735, 745–47 (1988).

22. The National Right to Work Legal Defense Foundation is a charitable, "bona fide, independent legal organization" that provides free legal aid to workers subjected to compulsory unionism arrangements. UAW v. Nat'l Right to Work Legal Def. & Educ. Found., Inc., 584 F. Supp. 1219, 1223 (D.D.C. 1984), *aff'd*, 781 F.2d 928 (D.C. Cir. 1986) (internal quotation marks omitted); *see also* Nat'l Right to Work Legal Def. & Educ. Found., Inc. v. United States, 487 F. Supp. 801 (E.D.N.C. 1979).

23. *Harris* explains why this is so:

> Employees who suspect that a union has improperly put certain expenses in the "germane" category must bear a heavy burden if they wish to challenge the union's actions. "[T]he onus is on the employees to come up with the resources to mount the legal challenge in a timely fashion," and litigating such cases is expensive.

134 S. Ct. at 2633 (citations omitted) (quoting Knox v. SEIU, Local 1000, 132 S. Ct. 2277, 2294 (2012)).

to exercise *Beck* rights, complicated and protracted litigation is often necessary to vindicate those rights.[24]

II.
THE NLRB'S FAILURE TO VIGOROUSLY ENFORCE EMPLOYEES' *BECK* RIGHTS

Employees must overcome many hurdles to exercise their *Beck* rights. Unfortunately, many of those hurdles have been sanctioned or, worse, thrown up by the National Labor Relations Board (NLRB). The Board has jurisdiction to prosecute violations of *Beck* rights as unfair labor practices.[25] However, to be blunt, the NLRB has failed to enforce *Beck* vigorously, both in processing cases and applying judicial precedent. This problem got even worse under the Board appointed by President Obama,[26] which the Supreme Court, in *Noel Canning v. NLRB*, unanimously held did not have a constitutionally valid quorum for much of its tenure.[27]

A. The Board's Failure to Expeditiously Process Beck *Enforcement Cases*

Since the Supreme Court decided *Beck* in 1988, the NLRB's General Counsel, its Regional Offices, and the Board itself have failed to process expeditiously unfair labor practice charges of *Beck* violations.

Significantly, in 1994 the General Counsel's Office of the NLRB instructed all regional directors to dismiss immediately *Beck* charges they found unworthy.[28] Further, the General Counsel's Of-

24. For a good example of one such Foundation-supported case, see *Abrams v. Communications Workers of America*, 59 F.3d 1373 (D.C. Cir. 1995). Filed in 1987, the case did not reach a judgment on remand for the plaintiff workers until 1998, after which there were further proceedings, including another appeal to the D.C. Circuit. *See* Abrams v. Commc'ns Workers, No. 99-7095, 2000 U.S. App. LEXIS 7106 (D.C. Cir. Mar. 20, 2000); Abrams v. Commc'ns Workers, 23 F. Supp. 2d 47, 49, 54–55 (D.D.C. 1998).

25. *See Beck*, 487 U.S. at 742.

26. *See, e.g.*, United Nurses & Allied Prof'ls, 359 N.L.R.B. No. 42, at 1, 2012–2013 NLRB Dec. (CCH) ¶ 15,665 (Dec. 14, 2012) (holding that "lobbying expenses are chargeable to objectors to the extent that they are germane to collective bargaining, contract administration, or grievance adjustment").

27. 134 S. Ct. 2550 (2014) (holding that three Board appointments the President made without confirmation by the U.S. Senate were constitutionally invalid because the Senate was not in recess under its own rules at the time those appointments were announced).

28. DIV. OF OPERATIONS-MGMT., NLRB OFFICE OF GEN. COUNSEL, OM 94-50, PRE-COMPLAINT *Beck* Cases (1994).

fice instructed regional directors not to issue complaints on worthy *Beck* charges, but instead to submit them to the Division of Advice in Washington, D.C.[29] This is circumstantial evidence that the then-General Counsel intended to delay the processing of *Beck* charges or to direct the dismissal of as many as possible.

In 2011, then-Acting General Counsel Lafe Solomon similarly instructed regional directors that several types of *Beck* issues must be submitted to the Division of Advice "because there is no governing precedent or . . . [they] involve a policy issue in which [General Counsel Solomon was] particularly interested."[30] Most recently, General Counsel Richard Griffin included cases raising issues of the chargeability under *Beck* of three types of union expenses—job targeting program, legislative, and organizing expenses—as cases that must be submitted to the Division of Advice, because they "involve difficult legal issues or the absence of clear precedent."[31]

The Board itself delayed for eight years before it issued its first post-*Beck* decision, *California Saw & Knife Works*.[32] Many other *Beck* cases languished before the Board for similar lengthy periods; the then-NLRB Chairman admitted that at the end of July 1997, the sixty-five oldest cases before the Board included twenty-one *Beck* cases.[33] The Board later issued decisions in some of those cases only after the objecting workers petitioned for mandamus from the D.C. Circuit.[34]

Many *Beck* cases do not even reach the Board. The General Counsel has settled many *Beck* charges with no real relief for the

29. *Id.*

30. NLRB OFFICE OF GEN. COUNSEL, GC 11-11, MANDATORY SUBMISSIONS TO ADVICE, at 1–2 (2011).

31. NLRB OFFICE OF GEN. COUNSEL, GC 14-01, MANDATORY SUBMISSIONS TO ADVICE, at 3–4 (2014).

32. 320 N.L.R.B. 224 (1995), *enforced sub nom.* Int'l Ass'n of Machinists & Aerospace Workers v. NLRB, 133 F.3d 1012 (7th Cir. 1998).

33. Letter from William B. Gould IV, Chairman, NLRB, to Rep. Tom Lantos (Oct. 15, 1997), at 3 (on file with author).

34. *See, e.g.*, Order, *In re* Weissbach, No. 98-1301 (D.C. Cir. Nov. 24, 1998). In granting the nonmember charging party in *Weissbach* costs under the Equal Access to Justice Act, 28 U.S.C. § 2412 (2012), the court ruled that the mandamus petition "was a catalytic, necessary or substantial factor in obtaining" the Board's decision. *Id.* A more recent example is *United Food & Commercial Workers Local 700*, 361 N.L.R.B. No. 39, 164 Lab. Cas. (CCH) ¶ 15,867 (Sept. 10, 2014), in which it took the Board six years after the Administrative Law Judge's decision to decide the case, and then only after the D.C. Circuit scheduled oral argument on the charging party nonmember's petition for mandamus. *See* Order, *In re* Sands, No. 14-1107 (D.C. Cir. Aug. 21, 2014).

employees.[35] The Board's regional directors have dismissed many other *Beck* charges at the General Counsel's direction.[36]

In 1998, the then-Acting General Counsel set up yet another—and large—roadblock to the exercise of *Beck* rights. He instructed regional directors that *Beck* charges must be dismissed unless the nonmember "explain[s] why a particular expenditure treated as chargeable in a union's disclosure is not chargeable . . . and present[s] evidence or . . . give[s] promising leads that would lead to evidence that would support that assertion."[37] Regional directors and the Division of Advice follow this instruction to this day.[38]

It is impossible for nonmembers to provide evidence or leads to evidence at the charge stage, because nonmembers do not have access to a union's financial and other records; only the union possesses the facts and records from which the proportion of chargeable expenses "can reasonably be calculated."[39] The General Counsel's rule is also contrary to the Supreme Court's admonition that, consequently, "the union bears the burden of proving what proportion of expenditures went to activities that could be charged to dissenters."[40]

B. The Board's Failure to Follow Judicial Precedent

The Board bureaucracy's failure to process unfair labor practice charges vigorously is not the only problem with the Board's enforcement of workers' *Beck* rights. In addition, the Board itself

35. *See, e.g.*, Settlement Agreement, Chi. & Midwest Reg'l Joint Bd., Workers United, Local 2745, No. 13-CB-086477 (NLRB, Nov. 7, 2012) (union failed to notify employees of their *General Motors* and *Beck* rights, regional director imposed settlement requiring only future notice, thus denying employees right to object and obtain refunds for past periods within statute of limitations).

36. *See, e.g.*, E-mail from Robert MacKay, Field Attorney, NLRB, to Glenn M. Taubman, Staff Attorney, National Right to Work Legal Defense Foundation (June 2, 2014, 11:00 AM) (on file with the National Right to Work Legal Defense Foundation) (stating that, absent withdrawal, Division of Advice authorized dismissal of charge that union violated NLRA by burying notice of *Beck* rights in fine print on last page of multi-page new employee "welcome" package).

37. NLRB OFFICE OF GEN. COUNSEL, GC 98-11, GUIDELINES CONCERNING PROCESSING OF *Beck* Cases, at 5 (1998).

38. *See, e.g.*, United Food & Commercial Workers, Local 700, 25-CB-8807, at 7 (N.L.R.B. June 5, 2014); Letter from Marlin Osthus, Regional Director, NLRB Region 18, to John Scully, Staff Attorney, National Right to Work Legal Defense Foundation (July 27, 2012) (on file with the National Right to Work Legal Defense Foundation).

39. Bhd. of Ry. & S.S. Clerks v. Allen, 373 U.S. 113, 122 (1963).

40. Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435, 457 n.15 (1984) (citing *Allen*, 373 U.S. at 122).

has given workers little protection and relief when it finally decides *Beck* cases, in many instances refusing to follow what should be controlling Supreme Court and Courts of Appeals precedents.

1. Not Requiring Unions to Give Adequate Notice of *Beck* Rights

A union has a legal duty to inform workers that they have a right not to join and, if they do not join, a right not to subsidize the union's political and other non-bargaining activities.[41] One major obstacle to the exercise of *Beck* rights is that the NLRB permits unions to notify employees in an obscure manner of their rights not to join and not to subsidize union political activity.

When unions give such notice, they often hide it in fine print inside union propaganda that dissenting workers find offensive and, therefore, do not read. An egregious, but typical, example of that practice was approved by the Board in *California Saw*, the very first post-*Beck* case it decided.[42] The union in that case published its notice of *Beck* rights "on the sixth page of [an] eight-page newsletter. . . . The first page of [that] newsletter [was] largely occupied by an article about Democratic Presidential hopefuls . . . ." The newsletter also contained "a number of other political articles . . . , all with a strong Democratic bias."[43] Such text is hardly notice designed to come to the attention of employees who oppose the union's political activities, yet the Board still follows this outrageous ruling today.[44]

2. Approving Union Objection Requirements

Workers who do not want their compulsory dues and fees used for political purposes must negotiate technical procedural hurdles that unions have erected. The most significant are the requirements, imposed by most unions, that *Beck* objections be submitted during a short time window—typically a month or less—and that the objections must be renewed every year.[45] In *California Saw*, the

41. *See* Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 43 (1998).

42. Cal. Saw & Knife Works, 320 N.L.R.B. 224, 234–35 (1995), *enforced sub nom.* Int'l Ass'n of Machinists & Aerospace Workers v. NLRB, 133 F.3d 1012 (7th Cir. 1998).

43. *Int'l Ass'n of Machinists & Aerospace Workers*, 133 F.3d at 1018.

44. *See, e.g.*, E-mail from Robert MacKay, Field Attorney, NLRB Region 21, to Glenn M. Taubman, Staff Attorney, National Right to Work Legal Defense Foundation (June 2, 2014) (on file with the National Right to Work Legal Defense Foundation) (stating that Division of Advice authorized dismissal of allegation that initial *Beck* notice was in miniscule print buried in union communication).

45. *Cf.* Dynamic Controls Corp., 34-CA-4771, at 8–9 (N.L.R.B. Mar. 29, 1991) (finding that a window period of one month is lawful).

NLRB approved both of these obstacles to the exercise of *Beck* rights.[46] As a result, many employees are forced to pay for union political activities because their objections are considered untimely under union rules.[47]

Why should constitutional rights be available only once a year?[48] Employees should be free to stop subsidizing union political activity whenever they discover that the union is using their monies for purposes they oppose, not just during a short, arbitrary window period. As the Supreme Court recently asked in *Knox v. SEIU, Local 1000*, "[o]nce it is recognized . . . that a nonmember cannot be forced to fund a union's political or ideological activities, what is the justification for putting the burden on the nonmember to opt out of making such a payment?"[49] Affirmative consent, not objection, should be required, as the *Knox* Court held with regard to special assessments and dues increases imposed on nonmembers by public-sector unions.[50]

Certainly, if objection is required at all, workers should be free to make *Beck* objections that continue in effect until withdrawn, just as union membership continues until a resignation is submitted.[51]

46. *Cal. Saw & Knife Works*, 320 N.L.R.B. at 235–36.

47. *Cf., e.g.*, Nielsen v. Int'l Ass'n of Machinists & Aerospace Workers, 94 F.3d 1107, 1116–17 (7th Cir. 1996) (holding that the window procedure is reasonable and that its invalidation would place an undue administrative burden on the union); Abrams v. Commc'ns Workers, 59 F.3d 1373, 1381 (D.C. Cir. 1995) (upholding the union's annual "window policy"); Tierney v. City of Toledo, 824 F.2d 1497, 1506 (6th Cir. 1987) (holding that requiring nonmembers to object by January 31 of a given year is permissible if the union makes appropriate disclosures before objections must be made); Gorham v. Int'l Ass'n of Machinists & Aerospace Workers, 733 F. Supp. 2d 628, 635 (D. Md. 2010) (upholding the union's annual renewal policy).

48. *See* Commc'ns Workers v. Beck, 487 U.S. 735, 761 (1988) (noting that "permitting unions to expend governmentally compelled fees on political causes that nonmembers find objectionable" would raise a "serious constitutional question").

49. 132 S. Ct. 2277, 2290 (2012).

50. *Id.* at 2296.

51. *See, e.g.*, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CONSTITUTION art. 2, § 2(i) (2011), *available at* http://teamster.org/sites/teamster.org/files/IBT-Constitution-2011.pdf ("No member seeking to resign from membership in any Local Union may do so except by submitting such resignation in writing to the Secretary-Treasurer of the Local Union."); UNITED AUTO WORKERS, CONSTITUTION art. 6, § 17 (2014), *available at* http://uaw.org/page/uaw-constitution-membership ("A member of a Local Union may resign or terminate membership only by written communication . . . ."); UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, INTERNATIONAL CONSTITUTION 2013 art. 6 (2013), *available at* http://www.ufcw.org/wp-content/uploads/2014/04/Constitution-Complete-DRAFT.pdf (describing the withdrawal process); *Membership Application*, MINN. ASS'N OF PROF.

After three federal courts declined to follow the Board on this issue,[52] the Board reconsidered.[53] But, instead of finding that annual objection requirements are per se unlawful, the Board decided to evaluate those requirements on a union-by-union basis "to determine 'whether the union has demonstrated a legitimate justification for an annual renewal requirement or otherwise minimized the burden it imposes on potential objectors.'"[54]

Applying that loose standard, a majority of the Board upheld the United Auto Workers' annual objection requirement in 2011, without even considering the union's purported justifications for it, finding that the burden that the requirement imposed on nonmembers was "de minimis."[55] However, as Member Brian E. Hayes said in dissent, the burden of objection under the UAW's scheme "is plainly and decidedly not de minimis" because objecting employees

> still must undertake the affirmative task of writing and mailing a statement of continued objection each year; they must remember to do so before their 1-year objector term expires; and, if they fail to timely renew their objection, they will automatically incur the obligation of paying a full agency fee, including funds for expenditures . . . for nonrepresentational purposes, for some period of time.[56]

The Board clearly could not justify imposing these burdens on nonmembers were it to apply the *Knox* Court's holding that "the use of an opt-out system for the collection of fees levied to cover nonchargeable expenses . . . is indefensible."[57]

EMPS., http://www.mape.org/application (last visited March 26, 2015) ("I understand that this membership shall continue and that I shall be obligated to pay dues and related assessments approved by the Association until such time as I terminate this membership by submitting my written resignation to MAPE.").

52. *See* Seidemann v. Bowen, 499 F.3d 119, 124–26 (2d Cir. 2007); Shea v. Int'l Ass'n of Machinists & Aerospace Workers, 154 F.3d 508 (5th Cir. 1998); Lutz v. Int'l Ass'n of Machinists & Aerospace Workers, 121 F. Supp. 2d 498 (E.D. Va. 2000).

53. UAW Local #376, 356 N.L.R.B. No. 164, 2010–2011 NLRB Dec. (CCH) ¶ 15,424 (May 27, 2011), *vacated sub nom*. Gally v. NLRB, 487 F. App'x 661 (2d Cir. 2012).

54. *Id.* at 1 (quoting *In re* Int'l Ass'n of Machinists & Aerospace Workers, 355 N.L.R.B. 1062, 1062 (2010)).

55. *Id.* at 3.

56. *Id.* at 4.

57. Knox v. SEIU, Local 1000, 132 S. Ct. 2277, 2291 (2012).

3. Allowing Union Financial Opacity

Another procedural hurdle nonmembers face is finding out how the union spends their fees so that they can intelligently decide whether to object. In *Chicago Teachers Union, Local No. 1 v. Hudson*, the Supreme Court held that "*potential* objectors [must] be given sufficient information to gauge the propriety of the union's fee."[58]

Yet the NLRB ruled in *Int'l Brotherhood of Teamsters, Local 166 (Penrod)* that unions need not disclose *any* financial information to nonmembers until *after* they object.[59] The D.C. Circuit reversed the Board, holding that "new employees and financial core payors . . . must be told the percentage of union dues that would be chargeable were they to become *Beck* objectors."[60] Despite that reversal, the Board continues to follow its own *Penrod* ruling. Recently, in *United Food & Commercial Workers Local 700*, the Obama Board explicitly refused to follow the D.C. Circuit's holding.[61] Instead, a Board majority held that, in notifying employees of *Beck* rights for the first time, before they decide whether to refrain from membership and object, a union need not disclose the percentage fee reduction that objectors pay.[62] As the dissent explained, without that information an employee cannot assess whether objecting "is worth forfeiting the benefits of union membership and the right to participate in union affairs."[63]

In *Hudson*, the Supreme Court also specified that "adequate disclosure surely would include the major categories of expenses, *as well as verification by an independent auditor*."[64] Yet when unions give objecting employees financial disclosure, they often do not give them an auditor's verification.[65] The Obama Board approved this

58. 475 U.S. 292, 306 (1986) (emphasis added).

59. 327 N.L.R.B. 950, 952 (1999), *petition for review granted sub nom.* Penrod v. NLRB, 203 F.3d 41 (D.C. Cir. 2000); *see also* Cal. Saw & Knife Works, 320 N.L.R.B. 224, 233 (1995).

60. 203 F.3d at 47.

61. 361 N.L.R.B. No. 39, at 5, 164 Lab. Cas. (CCH) ¶ 15, 867 (Sept. 10, 2104), *petition for review filed sub nom.* Sands v. NLRB, (D.C. Cir. Sept. 23, 2014) (No. 14-1185).

62. *Id.* at 5–9.

63. *Id.* at 10 (Miscimarra & Johnson, Members, dissenting).

64. Chi. Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 307 n.18 (1986) (emphasis added).

65. *Cf.*, *e.g.*, Letter from Yvonne T. Dixon, Dir., Office of Appeals, NLRB Office of the Gen. Counsel, to John C. Scully, Staff Att'y, Nat'l Right to Work Legal Def. Found. (July 26, 2012) (on file with the National Right to Work Legal Defense Foundation) (denying appeal from NLRB Regional Director's approval of unilateral settlement that did not require union to provide objecting employees with independent auditor's opinion letter).

practice in *United Nurses & Allied Professionals*, in which the union merely told objecting nonmember Jeanette Geary that a certified public accountant had verified its major categories of expenses.[66]

The Board majority in *United Nurses* included Members Richard Griffin and Sharon Block,[67] the purported "recess appointments" that were held unconstitutional in *NLRB v. Noel Canning*.[68] The *United Nurses* majority explicitly declined to follow a directly contrary decision of the Ninth Circuit, *Cummings v. Connell*.[69] Instead, the majority argued that unions' conduct under *Beck* "is properly analyzed under the duty of fair representation," not "a heightened First Amendment standard" as in public-sector cases such as *Hudson* and *Cummings*.[70]

The D.C. Circuit had already rejected that argument. In *Ferriso v. NLRB*, the Board ruled that *Hudson*'s requirement that nonmembers be given an independent audit is inapplicable under the NLRA.[71] The D.C. Circuit reversed, holding that unions must provide an objecting nonmember "with an independent audit of their major categories of expenditures."[72] The court explicitly reaffirmed its earlier holding in *Abrams v. Communications Workers* that *Hudson*'s holding on notice and objection "procedures applies equally to the statutory duty of fair representation."[73] Regrettably, as the Seventh Circuit has noted, it is the Board's practice "to ignore precedent from federal appellate courts in favor of its own interpretations" of the law.[74]

In reversing the Board in *Ferriso*, the D.C. Circuit explained that "nonmembers cannot make a reliable decision as to whether to contest their agency fees without trustworthy information about the basis of the union's fee calculations, and that an independent audit is the minimal guarantee of trustworthiness."[75] The court, therefore, held that "'basic considerations of fairness'" require disclo-

66. United Nurses & Allied Prof'ls, 359 N.L.R.B. No. 42, at 1, 2012–2013 NLRB Dec. (CCH) ¶ 15,665 (Dec. 14, 2012).

67. *See id.*

68. 134 S. Ct. 2550, 2557–58 (2014).

69. United Nurses & Allied Prof'ls, 359 N.L.R.B. No. 42, at 3, 2012–2013 NLRB Dec. (CCH) ¶ 15,665 (Dec. 14, 2012) (citing Cummings v. Connell, 316 F.3d 886, 890–91 (9th Cir. 2003)).

70. *Id.* at 2–3.

71. *See* Ferriso v. NLRB, 125 F.3d 865, 866 (D.C. Cir. 1997).

72. *Id*.

73. *Id.* at 868–70 (citing Abrams v. Commc'ns Workers, 59 F.3d 1373, 1379 & n.7 (D.C. Cir. 1995)).

74. Mary Thompson Hosp., Inc. v. NLRB, 621 F.2d 858, 864 (7th Cir. 1980).

75. *Ferriso*, 125 F.3d at 869–70.

sure to objecting employees of an independent audit of a union's calculation of its chargeable expenses.[76]

4. Overbroad Definition of Lawfully Chargeable Activities

The Board has also refused to follow Supreme Court precedent as to what activities are lawfully chargeable to objecting nonmembers. In *Beck*, the Court concluded that "§ 8(a)(3) [of the NLRA], *like its statutory equivalent, § 2, Eleventh of the [RLA]*, authorizes the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'"[77] Moreover, *Beck* ruled that decisions in this area of the law under the RLA are "controlling" under the NLRA.[78]

In *Ellis v. Railway Clerks*, the Supreme Court held that union organizing is not lawfully chargeable under the RLA, because it has only an "attenuated connection with collective bargaining."[79] At the appellate level of *Beck* itself, the Fourth Circuit followed *Ellis* in ruling that organizing expenditures "were not allowable charges against the objecting employees."[80] Despite the Supreme Court's clear mandate in *Beck* that decisions concerning forced union fees under the RLA are controlling under the NLRA, the Board has held that "organizing within the same competitive market" is chargeable to objecting nonmembers under the NLRA because of differences as to other aspects of the two statutes.[81]

The Board further eviscerated employees' *Beck* rights in the more recent *United Nurses* case. There, the majority held that "[s]o long as lobbying is used to pursue goals that are germane to collective bargaining, contract administration, or grievance adjustment, it is chargeable to objectors," even if the bills lobbied "would not provide a direct benefit to members of the" objectors' bargaining unit, indeed, even if the bills were before the legislature of another state.[82] Worse, the majority of the Board, including two members

76. *Id.* (quoting Chi. Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 306 (1986)).

77. Commc'ns Workers v. Beck, 487 U.S. 735, 762–63 (1988) (quoting Ellis v. Bhd. of Ry., Airline, & S.S. Clerks, 466 U.S. 435, 448 (1984)) (emphasis added).

78. *Id.* at 745.

79. *Ellis*, 466 U.S. at 451–53.

80. Beck v. Commc'ns Workers, 776 F.2d 1187, 1211 (4th Cir. 1985), *aff'd on other grounds en banc*, 800 F.2d 1280 (4th Cir. 1986), *aff'd*, 487 U.S. 735 (1988).

81. United Food & Commercial Workers Locals 951, 7 & 1036, 329 N.L.R.B. 730, 733, 736–38 (1999), *enforced in pertinent part*, 307 F.3d 760 (9th Cir. 2002).

82. United Nurses & Allied Prof'ls, 359 N.L.R.B. No. 42, at 5–8, 2012–2013 NLRB Dec. (CCH) ¶ 15,665 (Dec. 14, 2012).

found in *Noel Canning* to be unconstitutionally appointed,[83] proposed a "rebuttable presumption of germaneness" for legislation, such as minimum wage legislation, that "would directly affect subjects of collective bargaining."[84]

The *United Nurses* majority thus ignored the Supreme Court's *Beck* holding that decisions concerning forced union fees under the RLA are controlling under the NLRA. *Machinists v. Street* was the very first case to decide what limits the RLA imposes on forced union fees.[85] At the very point at which the Supreme Court held that the RLA does not authorize unions to use objecting employees' "exacted funds to support political causes," the Court inserted a footnote that lists "lobbying purposes, for the promotion or defeat of legislation," as a "use of union funds for political purposes."[86]

In *Miller v. Airline Pilots Ass'n*, the union, like the Board majority in *United Nurses*, contended that under the RLA lobbying government agencies concerning "issues that animate much of its collective bargaining . . . should be regarded as germane to that bargaining" and therefore chargeable to nonmembers.[87] The D.C. Circuit emphatically rejected that argument: "[I]f the union's argument were played out, virtually all of its political activities could be connected to collective bargaining; but the federal courts, including the Supreme Court, have been particularly chary of treating as germane union expenditures that touch the political world."[88]

The Supreme Court made the same point itself in 2012 in *Knox v. SEIU, Local 1000*.[89] There, a state employee union contended that its expenditures to defeat a ballot proposition were "germane" and chargeable to nonmembers because the proposition would have affected future implementation of its bargaining agreements.[90] The Court rejected that argument: "If we were to accept this broad definition of germaneness, it would effectively eviscerate the limitation on the use of compulsory fees to support unions' controversial political activities."[91]

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83. *See supra* notes 67–68 and accompanying text.

84. United Nurses & Allied Prof'ls, 359 N.L.R.B. No. 42, at 9, 2012–2013 NLRB Dec. (CCH) ¶ 15,665 (Dec. 14, 2012).

85. 367 U.S. 740 (1961).

86. *Id*. at 769 & n.17.

87. *See* Miller v. Airline Pilots Ass'n, 108 F.3d 1415, 1422 (D.C. Cir. 1997), *aff'd on other grounds*, 523 U.S. 866 (1998).

88. *Id.* at 1422–23.

89. 132 S. Ct. 2277 (2012).

90. *Id.* at 2294–95.

91. *Id.*; *see also id.* at 2296–97 (Sotomayor, J., concurring); *cf.* Harris v. Quinn, 134 S. Ct. 2618, 2642–43 (2014) ("[I]t is impossible to argue that the level of Medi-

The *United Nurses* Board majority also ignored what should have been dispositive precedent under the NLRA. In *Abrams v. Communications Workers*, the D.C. Circuit noted that the union's *Beck* notice to nonmembers "lists 'legislative activity' and 'support of political candidates' as non-chargeable expenses."[92] The court agreed that the "*Beck* and *Ellis* holdings foreclose the exaction of mandatory agency fees for such activities" and, consequently, held that the notice was inadequate because it contained other "language which might lead workers to conclude that such activities are chargeable."[93]

CONCLUSION

In sum, there is a systemic problem with the enforcement of workers' *Beck* rights. Since *Beck* was decided in 1988, the NLRB has dismally failed to protect adequately the statutory rights of workers not to subsidize union political, ideological, and other nonbargaining activities. Indeed, the Board majority under President Obama seems bent on totally eviscerating those rights.

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caid funding (or, for that matter, state spending for employee benefits in general) is not a matter of public concern.").

92. 59 F.3d 1373, 1380 (D.C. Cir. 1995).

93. *Id.* (emphasis added). *United Nurses* is still pending before the Board because it retained jurisdiction to determine "how [it] should define and apply the germaneness standard in the context of lobbying activities." United Nurses & Allied Prof'ls, 359 N.L.R.B. No. 42, at 9–10, 2012–2013 NLRB Dec. (CCH) ¶ 15,665 (Dec. 14, 2012). Because a full Board nominated by President Obama was confirmed by the U.S. Senate since the Board retained jurisdiction in *United Nurses*, the new Board will have to reconsider all issues the invalid "recess" Board decided, including its adoption of the *United Nurses* chargeability standard. *See supra* note 82 and accompanying text. However, a majority of the new Board Members are attorneys who formerly represented unions and, thus, are unlikely to rule differently. *See* Press Release, U.S. Senate Comm. on Health, Educ., Labor & Pensions, Harkin Names HELP Committee Team Leaders, New Investigation Unit (May 5, 2010), *available at* http://www.help.senate.gov/newsroom/press/release/?id=741a5748-a89e-4c71-b196-b9be6190e8a5&groups=chair; *Kent Y.Hirazowa*, NLRB, http://www.nlrb.gov/who-we-are/board/kent-y-hirozawa (last visited Apr. 16, 2015); *Lauren McFerran*, NLRB, http://www.nlrb.gov/who-we-are/board/lauren-mcferran (last visited Apr. 28, 2015); *Mark Gaston Pearce*, NLRB, http://www.nlrb.gov/who-we-are/board/mark-gaston-pearce (last visited Apr. 16, 2015). Moreover, through November 5, 2014, the new Board had reconsidered thirty-five decisions issued by Board panels invalidly constituted under *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), and, in all of those cases, "the board reached the same decision as the original panels." *NLRB Officials Offer Practice Tips, Update at ABA Labor and Employment Law Meeting*, [2014] Daily Labor Rep. (BNA) No. 216, at C-2 (Nov. 7, 2014).

As the D.C. Circuit has recognized, nonmembers' *Beck* rights are "First Amendment-type interests."[94] As such, they deserve effective protection, which the NLRB has proven incapable of providing. The only federal labor statutes that effectively protect those fundamental rights are the Federal Labor Relations Act and the statute that covers postal employees, both of which prohibit agreements that require workers to join or pay union dues to keep their jobs.[95] Congress could easily provide the same effective protection for employees covered by the NLRA who work in states that do not have state right-to-work laws simply by amending NLRA § 8(a)(3) to eliminate that section's authorization of agreements requiring "membership" as a condition of employment.[96]

94. Miller v. Airline Pilots Ass'n, 108 F.3d 1415, 1422 (D.C. Cir. 1997), *aff'd on other grounds*, 523 U.S. 866 (1998).

95. *See* 5 U.S.C. § 7102 (2012) (guaranteeing federal employees the right to refrain from "form[ing], join[ing], or assist[ing] any labor organization"); 39 U.S.C. § 1206(c) (2012) (same for postal employees).

96. Legislation to accomplish this, known as the National Right-to-Work Act, was introduced in the 113th Congress by Senator Rand Paul as Senate Bill 204, and Representative Steve King as House Bill 946. S. 204, 113th Cong. § 2(a) (2013); H.R. 946, 113th Cong. § 2(a) (2013).