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Chairman DeMint and Members of the Conference, thank you for the opportunity to comment on the importance of protecting secret ballot rights for American workers considering union representation.

By way of introduction, I was nominated by President George H.W. Bush, confirmed by the Senate and served as a Member of the National Labor Relations Board (“NLRB” or “Board”) from August 27, 1990 until November 26, 1993. I practice labor law and Chair the U.S. Labor and Employee Relations Law Practice in the global law firm, Baker & McKenzie. I served as a Naval Officer, earned a Masters Degree in labor economics, and teach labor law as an adjunct faculty member at Northwestern University School of Law. I am a member of the Labor Relations Committee of the U.S. Chamber of Commerce and of the Labor Relations Expertise Panel of the Society for Human Resource Management. Today I testify in my personal capacity.

In 1953, “organized labor” (“Labor”) represented 34 percent of the private sector U.S. workforce.¹ Labor’s density has steadily eroded to 7.5 percent in 2007.² The reasons are several and acknowledged by econometric and social studies – namely, employee sentiment and job satisfaction, structural change in our global market economy, substitution of legislative mandates, unit size, technology, degree of union investment in organizing, and employer resistance.³

Notable is employee sentiment. Studies show a drop in overall demand for union representation measured by the fraction of the workforce holding a union job and those who would vote for union representation on their nonunion jobs -- a range from 27 percent to 53 percent.⁴ The 47 to 73 percent of American workers not interested in third-party representation are satisfied at work, reject antiquated confrontational representation, and/or available information – erroneous or factual – regarding Labor.⁵

Our adversarial, Depression-era, labor and industrial “relations” model and applicable law is no longer universally relevant and has not been for years. The National Labor Relations Act (“NLRA” or “Act”) creates an exclusive system for a limited topical agenda affecting workers’ wages, hours and working conditions. It is an inherently confrontational system by design – leaving collective bargaining to the parties with economic leverage – strikes, lockouts, and unilateral implementation to resolve impasse. Today’s workforce and workplaces are diverse. Employees want options, not a single choice – union or nothing. Rather, at least half of the workforce wants to converse with their employers on a variety of subjects without relying on an adversarial, institutional “take-it or leave it” model and result. The Act must allow, not outlaw, employee participation, workplace cooperation, and employee voice to acknowledge the needs and realities of today’s workforce. Such was the hope of the TEAM Act. Not every worker wants or needs the 75 year old model of paternalism, rigidity, and uniformity. Please recognize and accommodate today’s heterogeneous, flexible, involved, and competent workforce and technological workplace.⁶

Now, to the much lobbied-for circumvention of the secret ballot -- Labor’s bizarre, despotic, and desperate solution to its 55 year slide. Labor’s Employee Free

Choice Act (“EFCA”) effectively eliminates the ballot box for the in-your-face, sign-now campaign. Combined with civil penalties for employer’s only and cram-down interest arbitration of first contracts, Labor’s EFCA puts raw power ahead of citizen-worker rights and interests. Institutional demands, whether Labor or Management, are and must remain subordinate to workers’ freedom to choose whether to associate and delegate individual self-interest.

Labor claims that elevating card-check to secret ballot status does not do away with the ballot box. Their double-speak is a pathetic attempt to “change the subject.” To trigger the secret ballot election process and the NLRB’s administrative involvement, 30 percent or more of the employees in an “appropriate unit” must sign a petition requesting an election. Should a union garner signatures from more than 50 percent of the unit employees, an employer can voluntarily recognize the union or not to ensure a secret ballot election. Why? To protect the employee-voter from peer pressure and third-party overreaching.

A workplace is not Congress. Accountability lies only with the citizen-employee. Labor wants card-check with 50+ percent yield to bypass but equate to the ballot box process. Why? To effectively silence the employer by conducting a quick, one-sided campaign without counter-information from the employer.⁷ Moreover, without the ballot-box, there is effectively no cure to overreaching and false Labor promises.

Labor and its funded academics ignore Taft - Hartley specifically protecting a worker’s right to refrain from third-party representation. Were the union to come up short of 50+ percent signed cards, would it really proceed to file a petition for an election? No, the secret ballot would not remain a real option under the EFCA proposal.

