Statement of Eugene Scalia

before the

Senate Republican Conference

and

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Dirksen Senate Office Building

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Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before you to testify about the Employee Free Choice Act ("EFCA"), S. 560. The Act would constitute the most far-reaching and consequential change in federal labor law in 60 years or more.

I would like to be clear about the spirit in which I offer this testimony. Labor unions can perform a valuable service for employees and for society. I have written that publicly in the past and continue to believe it.[1] In some workplaces a union is the best means of achieving appropriate terms and conditions of employment and ensuring fair treatment. Workers should—as the title of this bill suggests—be free to choose whether to unionize or not. Unfortunately, the terms of the bill are the antithesis of what its title advertises.

There are three central components to the bill: A so-called card check provision, a mandatory, or "interest" arbitration provision, and provisions increasing penalties for violations of the National Labor Relations Act by employers, by not by unions. Although all of these

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[1] Eugene Scalia, *Ending Our Anti-Union Federal Employment Policy*, 24 Harv. J.L. & Pub. Pol'y 489 (2001).

provisions are of concern, I will concentrate today on the card check and mandatory arbitration provisions.

Card Check

The card check provision would require the National Labor Relations Board ("NLRB") to certify a union without a secret ballot election if the union presents cards signed by a majority of employees stating that they wish to be represented by the union.[2] By contrast, under current law an employer is entitled to ask that a union establish majority support through a secret ballot election before it is certified.

There should be no mistaking that the effect of EFCA's card check provision would be to eliminate the use of secret ballot elections for unionization. The Act states that when a union presents valid authorization cards from more than 50 percent of employees, the union "shall" be certified and an election "shall not" be conducted. S. 560 § 2. Supporters of the bill have suggested that a union organizing a workplace might nonetheless choose to present the NLRB with authorization cards from fewer than 50 percent of employees. In those circumstances, they have said, elections would still be conducted. That scenario is mythical. The goal of the card check provision is to bypass secret ballot elections because card check would be a far easier means of organizing. (Even today, unions do not petition for recognition unless they have

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[2] The provision provides in relevant part: "If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative and that no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit, the Board shall not direct an election but shall certify the individual or labor organization as the representative." S. 560 § 2.

authorization cards from well in excess of 50 percent of workers in the unit.) I am not aware of a scenario under which a union that could be certified through card check would nonetheless choose the more difficult route of secret ballot election. Perhaps EFCA's supporters can theorize circumstances in which that would occur. But their theories would be that—theories, not how EFCA would work in practice.

I would like to make two principal points about the card check provision. First, the provision is antithetical to the purpose for which it is said to be offered. EFCA's supporters say they are proposing card check as an antidote to intimidation by employers in union elections. But the single most valuable protection against intimidation in voting is the secret ballot. If you are concerned about voter intimidation, you institute the secret ballot, you don't eliminate it. That is common sense reflected in our national tradition. The Supreme Court has described the secret ballot as "the hard-won right to vote one's conscience without fear of retaliation." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 343 (1995). With regard to union elections particularly, Justice White, who was appointed by President Kennedy, said: "The expressed preference in the National Labor Relations Act for secret ballot elections assumes that *voters may act differently in private than in public*, and ordinarily guarantees to employees the ability to make a secret choice." *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 287 (1973) (White, J., concurring) (emphasis added). Former President Jimmy Carter, through The Carter Center, has helped develop a "Declaration of Principles for Democratic Election Observation"—the third principle is that "[t]he will of the people . . . must be determined through genuine periodic elections . . . by secret balloting or equivalent free voting procedures." Declaration of Principles

for Democratic Election Observation, Oct. 27, 2005, *available at* http://www.cartercenter.org/documents/2231.pdf.[3]

EFCA would not to eliminate intimidation in union elections, instead, it would give unions a monopoly on intimidation. The bill would enable unions to organize without the employer receiving notice that a campaign is underway, so it has no opportunity to speak to employees to express its view. Union members, on the other hand, would confront individual employees in the parking lot, at their homes, or at the hardware store and give them an authorization card and a pen and ask for their support. Voting that once was done privately, by secret ballot, and supervised by federal officials, would now be overseen by union organizers whose livelihood depends on getting employees to sign authorization cards.

There is no disrespect to labor unions in saying they are self-interested organizations and their interests sometimes are not the same as employees—they can conflict. The AFL-CIO and "Change to Win" made this point in a brief before the Supreme Court this Term. In *14 Penn Plaza v. Pyett*, No. 07-581, which was argued in December, the Court is considering whether employees should be barred from suing their employer for age discrimination if they agreed through their union contract to submit all disputes with the company to binding arbitration. The AFL-CIO and Change to Win filed an amicus brief arguing *no*—employees should be able to sue even if the union agreed to arbitrate instead; the union should not be trusted to bind employees in

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[3] Representative George Miller, sponsor of EFCA in the House, has said that "the secret ballot is absolutely necessary in order to ensure that workers are not intimidated into voting for a union they might not otherwise choose." Letter from George Miller and 15 other members of Congress to members of the Junta Local de Conciliacion y Arbitraje of the state of Puebla (Mexico) (Aug. 29, 2001).

that circumstance. The reason, the unions' amicus brief says, is that a labor union has a "'self-interest of its own to serve.'" Brief of the American Federation of Labor and Congress of Industrial Organizations and Change to Win as Amici Curiae in Support of Respondents at 13, *14 Penn Plaza LLC v. Pyett*, No. 07-581 (July 18, 2008) (quoting *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974)). This self-interest, the AFL-CIO and Change to Win stated, sometimes poses a "direct conflict of interests with respect to an employee's choice." *Id.* at 13–14. Unions sometimes are sued by workers alongside the company in discrimination cases, the brief points out, and therefore cannot always be trusted to always act in employees' interest when processing discrimination grievances.

I disagree with the bottom line position of the AFL-CIO and Change to Win in the *Penn Plaza* case, but they certainly are right that unions have interests of their own that can cause them to oppose an employee's "choice." An organizing campaign is plainly such an instance. When a union organizer seeks an employee's authorization vote, he is seeking something else too—the employee's money, in the form of dues. The organizer's own salary depends on dues. Benefits available to existing union members depend on persuading other employees to join. The employee, on the other hand, has an interest in not joining a union and paying dues if there are other means of assuring satisfactory treatment in the workplace.

And yet, in this case of clear divergence between the union's interest and the employee's, EFCA makes the union the voting supervisor in a campaign in which it is the principal candidate.

The second point I will make about card check is that in speaking about union elections it is important to distinguish between employer coercion on the one hand, and employer speech on the other. Employer coercion in union elections is illegal under existing law. If there is a

widespread problem with employer coercion—and I am skeptical of claims that there is—then the solution lies in more effective enforcement of existing law.[4]

Much of what EFCA's supporters complain about, however, is not employer coercion, it is constitutionally-protected speech by employers that causes some employees to conclude that unionization is not the best course. The Supreme Court has ruled that "an employer's free speech right to communicate his views to his employees is firmly established" and rooted in the First Amendment. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). American jobs are created by entrepreneurs who make substantial personal investments to conceive, establish, and operate their business. A union will have a great effect on how their business is run; it is appropriate that they share their views with the voters who will decide whether, going forward, the business will be run with a union or not.

Just as a secret ballot is integral to the voting process, so is campaigning—allowing voters to hear both sides. If unions have a prospect of getting EFCA passed today, it is because we recently completed a lengthy campaign in which one candidate—the one who would sign this bill—was especially effective in speaking to voters, changing minds, and winning support. We consider campaign speech a good thing, which helps voters weigh issues and reach an informed decision through what Justice Holmes called the "free trade in ideas." *Abrams v. United States*,

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[4] *See generally* Richard A. Epstein, *The Case Against the Employee Free Choice Act* (forthcoming Hoover Press 2009).

I was an editor at the University of Chicago *Law Review* when Professors Meltzer and LaLonde submitted the manuscript that was published the next year as *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. Chi. L. Rev. 953 (1991). With respect to Professor Paul Weiler, I continue to regard that article, and more recent research, to be an effective rebuttal to Weiler's "rogue employer" thesis.

250 U.S. 616, 620 (Holmes, J., dissenting). We do not reach our best decisions by squelching debate. Yet EFCA's supporters acknowledge that the goal of the card check provision is, in part, to reduce the time employers are aware of organizing drives to reduce their opportunity to speak.[5] This problem afflicts other legislative proposals, incidentally, that would allow secret ballot elections but would require them to occur so quickly that only one side in the election—the union—would have time to campaign.

In sum, the members of this body and the House of Representatives owe their own power and position to the secret ballot. They should not deny the secret ballot to workers voting on one of the most important economic decisions of their lives.

Mandatory Arbitration

EFCA also includes a provision that would authorize a federally-appointed arbitrator to dictate the terms of a first collective bargaining "agreement" if the company and newly-certified union are unable to reach agreement within 120 days. S. 560 § 3.[6] This provision has received less attention than the card check provision. But it is potentially more destructive of American

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[5] *See* Cynthia L. Estlund, Testimony before the Senate Committee on Health, Education, Labor, and Pensions, at 6 (Mar. 27, 2007), http://help.senate.gov/Hearings/2007_03_27_a/Estlund.pdf.

[6] The provision states in relevant part that if there is no agreement after the 120-day bargaining period, and the parties do not agree to an extension, then the Federal Mediation and Conciliation Service "shall refer the dispute to an arbitration board" and "[t]he arbitration panel shall render a decision settling the dispute and such decision shall be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties." S. 560 § 3.

business and the economy, and is equally or more at odds with American labor law, policy, and the proper role of government in our economy and daily lives.

Among the most fundamental principles of American labor law since enactment of the National Labor Relations Act is that a company is required to bargain with a union in good faith, but is not required to accede to any particular contract term. Instead, the Act subjects an employer to enforcement by the NLRB for bad-faith bargaining, and permits workers to deploy one of the most powerful remedies available under our labor and employment laws—the strike—to discipline a company whose bargaining is unreasonable, dilatory, or bad faith. Unions regularly use a variety of other means to powerfully pressure employers, including the corporate campaign.

It was one of the Supreme Court's first observations about the NLRA—in the decision upholding it from constitutional challenge—that "[t]he act does not compel agreements between employers and employees. It does not compel any agreement whatever." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937). Later, in a decision written by Franklin Roosevelt appointee Hugo Black, the Court explained the wisdom of this policy. The approach of our labor laws, Justice Black said, has never been "to allow governmental regulations of the terms and conditions of employment." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970). Instead, its goal has been "to ensure that employers and their employees could work together to establish mutually satisfactory conditions." *Id.* Even if negotiations were in some instances prolonged, "it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement." *Id.* at 103–04. As Justice Black summarized it, our labor laws' "fundamental premise" is "private bargaining under

governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *Id.* at 108.

EFCA's mandatory arbitration provision would topple this pillar of American labor law. Companies and workers would now be governed by so-called collective bargaining agreements that are none of the above—they would not have resulted from bargaining; they would not be agreements, they would be government mandates; and they would not reflect the collective effort of the employees, who would have no opportunity for a ratification vote on the contract.

Especially in our current economy, it would be perilous—indeed, reckless—to turn the keys for managing American companies over to government-appointees who do not know the companies' business and may never have managed a company or payroll at all.

It is important to understand that a collective bargaining agreement does not merely address workers' pay and hours. It typically establishes rules that govern the very operation of the business. Can a company contract with suppliers for certain goods or services, or instead must all work be done in-house? What hours will the company be open for operation, and what flexibility will it have to adopt cost-saving technologies or move workers from one position to another to fill unexpected needs and ensure everyone is actively engaged? And consider pensions: Many unions want employers to provide retirement benefits through multiemployer pension plans that are managed in part by union officers. Often, these plans are very financially troubled. A participating company can face staggering liabilities if it tries to withdraw in order to offer its employees retirement benefits on its own. *See* 29 U.S.C. § 1381 *et seq.* Employers that remain in the plan can face enormous annual contribution requirements, due in part to the accelerated funding requirements of the Pension Protection Act of 2006. 29 U.S.C. §§ 1084–85.

Decisions on such matters, which can be determinative of a company's financial viability, would now be made by government-appointed arbitrators rather than the company, its owners, and employees. But an arbitrator's proper role is to *interpret* contracts, like a judge. We do not ask judges to make the law, much less to design our businesses. We should not trust government-appointed arbitrators to design American businesses either.

To appreciate some of the problems that could result from rules for a business being written by someone who does not know the business well, consider the problems in the text of the EFCA mandatory arbitration provision itself. This provision would be the most important change in labor law in 60 years or more, yet its vagueness would sow confusion and litigation. Who will the arbitrators be? How will they be selected, and by whom? How would the arbitrators go about deciding the contract terms, and what knowledge of the company and industry would they bring to the task? If the arbitrator writes a terrible, one-sided contract—as has happened in other jurisdictions with "interest" arbitration—what opportunity would there be to get it reviewed by a court, and what legal standard would the court apply?

Allow me to address the claim by EFCA's supporters that this interest arbitration provision is needed because sometimes employers and unions have not come to terms on a collective bargaining agreement longer after the union was certified. First, whether agreement is reached is necessarily the function of both parties' demands. I am aware of many instances where agreement was not reached because the union held out for terms that were unreasonable and could have been financially devastating to the company. It solves nothing to have such unreasonable terms imposed by an arbitrator who does not appreciate the economic consequences of her action.

Second, to the extent the company's aim is to avoid an agreement and it is engaged in bad faith bargaining, that is illegal. Increased enforcement is well within the power of the National Labor Relations Board and the new Administration.

Third, EFCA's supporters claim that the law's current penalties for bad faith bargaining are inadequate compared to the penalties employers face for violating other federal labor laws. They overlook the uniquely powerful sanction available under the National Labor Relations Act—the strike—which employees can impose unilaterally when necessary to kick loose stalled negotiations. Employees who go on strike to oppose bad faith bargaining are entitled to their jobs back, with back pay. *NLRB v. Int'l Van Lines*, 409 U.S. 48 (1972). Certainly when I advise a company in difficult negotiations, the risk of what the Board determines to an unfair labor practice strike is a serious, powerful consideration. Unions also use their resources and access to government officials and the media to bring pressures on companies in negotiations that can present far more serious concerns to the company than the possibility of an adverse verdict in an employment lawsuit.

The National Labor Relations Act is, like a collective bargaining agreement itself, a compromise between interests of employers and unions that leaves both sides with issues to grumble about. But the Act that unions now blame for their decline is the same that was in place when unions once thrived. I believe the evidence shows that increased global competition and effective alternatives to unionization—especially the extensive federal and state regulation of the employment relationship that unions have supported—are the principal cause of the lower unionization figure we see today. (See notes 1 & 4 above.) The labor movement bears the burden of making a far more compelling case than it has to date to justify the gross interference

in the operation of American businesses that would result from EFCA's mandatory arbitration provision.

Constitutional Concerns

Ultimately EFCA's central provisions—chard check and mandatory arbitration—present concerns under the Constitution. I will conclude by identifying some, though not all, of those constitutional difficulties.

The first concerns the denial of the secret ballot to employees on a vote of central importance to their economic well-being: Whether they will be able to accept an employer's invitation to negotiate directly regarding the terms and conditions of their employment, or whether the government will certify someone else to speak on their behalf. Bear in mind that with card check, some employees will be denied the ability to vote at all on the question of unionization, because organizers will avoid certain employees whom they regard as too close to management, never giving them the chance to sign or refuse authorization cards. *No* employees would vote with the protections of the secret ballot.

The Equal Protection Clause of the Fourteenth Amendment (which has been incorporated against the federal government through the Fifth Amendment) establishes certain baseline requirements for voting rules and standards, including the one-person, one-vote rule prohibiting practices that weigh one person's vote less than another's. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Bolling v. Sharpe*, 347 U.S. 497 (1954). The Equal Protection Clause requires courts to strictly scrutinize laws that deny the right to vote to certain classes of voters. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969). And, under the First Amendment, the Supreme Court has recognized a right to anonymous speech that includes, for instance, the right to

anonymously distribute handbills. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). This right to anonymous speech, the Supreme Court has said, is "perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation."

On the basis of such considerations, the U.S. Court of Appeals for the Sixth Circuit struck down a Kentucky law that required voters to declare their support for an unaffiliated presidential candidate when signing a petition for that candidate to appear on the general election ballot. *Anderson v. Mills*, 664 F.2d 600, 608 (6th Cir. 1981). The court stated that the secret ballot was "one of the fundamental civil liberties of our democracy" because it "safeguards the purity of our election process by eliminating the fear of scorn and ridicule, as well as lessening the evils of violence, intimidation, bribery and other corrupt practices which can be incumbent in non-secret elections." *Id.* By forcing citizens to publicly declare their intentions, the Kentucky law ran afoul of the Constitution.

These voting cases I have mentioned concerned elections for public office or public laws. But the principles should apply to card check also. Through card check, the federal government would be certifying employees' exclusive bargaining representative based on an elective process. State action is present.[7] Some of the election cases I have described involved voting on matters of *less importance* to voters' economic well-being than the question whether to have a union. In one case, the Court found that a bachelor living with his parents had a constitutional right to vote

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[7] *See also Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 199, 202 (1944), stating that "Congress has seen fit to clothe the [union] bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents," and that this requires that unions be held to standards "at least as exacting" as under the Equal Protection Clause.

for the school board. *Kramer*, 395 U.S. 621. This interest pales besides a worker's interest in an uncoerced vote on whether the government will bar him from negotiating directly with an employer who wishes to do so, and will certify someone else to speak for him instead.

Card check infringes constitutional rights of employers also, particularly when combined with the Act's mandatory arbitration provision. Business owners have constitutionally-protected property interests in their companies, which are the fruits of their labor and investment. They also have an interest in the current set of contracts they have with their workforce and others (*e.g.*, subcontracts), just as a government employee has a constitutionally-protected property interest in his employment contract. *Perry v. Sindermann*, 408 U.S. 593 (1972). The Constitution guarantees a minimum amount of due process before individuals or corporations may be deprived of property interests. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Under current law, before a businessperson is compelled to set aside her existing set of individually-negotiated employment agreements and subcontracts and adhere to a union contract instead, she has an opportunity to speak directly to employees about whether to unionize; the employees' decision is manifested through secret-ballot voting that is protected from coercion; and the businessperson has *agreed* to the contract after good faith negotiations. EFCA changes all that: Someone who establishes a business can be forced to run it according to rules imposed by a government-appointed arbitrator, with no opportunity to speak to employees beforehand about their decision to unionize, and potentially with no ability to obtain meaningful review of the arbitrator's decision. This presents serious concerns under the Due Process Clause, and potentially under the Takings Clause as well.

In sum, the Supreme Court has long-recognized that the National Labor Relations Act reflects a delicate balance between national economic policy on the one hand, and constitutional protections for property, speech, and freedom of association on the other. EFCA sharply undermines corporations' control of their business, curtails their free speech rights, and forces the individual worker to accept a union as his representative with no requirement for advance notice, no opportunity to learn the company's objections, and no opportunity for the worker and his co-workers to manifest their views with the protections of the secret ballot. These radical changes should not be accepted by Congress, and would present serious issues for the courts.

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Thank you for the opportunity to present this testimony today, and I welcome your questions.