No. 12-99

In The
Supreme Court of the United States

---

**UNITE HERE LOCAL 355,**

*Petitioner*,

**v.**

**MARTIN MULHALL, *et al.*,**

*Respondents.*

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

---

# BRIEF OF *AMICI CURIAE* OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND CATO INSTITUTE IN SUPPORT OF RESPONDENT MARTIN MULHALL

---


**Karen R. Harned**
***Counsel of Record***
**Luke A. Wake**
**NFIB SMALL BUSINESS LEGAL CENTER**
**1201 F Street, NW, Suite 200**
**Washington, DC 20004**
**(202) 314-2048**
**karen.hared@nfib.org**
**luke.wake@nfib.org**

***Counsel Amicus Curiae***
***NFIB Small Business and Legal Center***

**Ilya Shapiro**
**CATO INSTITUTE**
**100 Massachusetts Avenue, NW**
**Washington, DC 20001**
**(202) 842-0200**
**ishapiro@cato.org**

***Counsel for Amicus Curiae***
***Cato Institute***


***Dated: September 27, 2013***


THE LEX GROUP[DC] ♦ 1825 K Street, N.W. ♦ Suite 103 ♦ Washington, D.C. 20006
(202) 955-0001 ♦ (800) 856-4419 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

## QUESTION PRESENTED

Section 302(a)(2) of the Labor Management Relations Act, 29 U.S.C. § 186, makes it a crime for an employer to "pay, lend, or deliver, any money or other thing of value… to any labor organization…" 29 U.S.C. § 186(a)(2). Likewise, Section 302(b) makes it a crime for labor unions "to request, demand, receive, or accept … any money or other thing of value…" *Id*. § 186(b)(1). There are nine enumerated exceptions, none of which are relevant in the present case. *Id*. § 186(c).

The question here is whether these provisions prohibit unions from demanding—and employers from delivering—free access to private property, lists of information on employees at no cost, and an uncompensated guarantee of forbearance on First Amendment rights?

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

**CONSTITUTIONAL PROVISIONS**



**STATUTES**



**RULE**



**OTHER AUTHORITIES**

## INTEREST OF AMICI CURIAE[1]

Pursuant to Supreme Court Rule 37, the National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) and the Cato Institute submit this brief *amici curiae* in support of Respondent Martin Mulhall.

The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses.

NFIB represents about 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a

---

[1] Counsels of record have consented to the filing of this brief. The parties have filed a blanket consent to all amicus filings with the Clerk of Court. In accordance with Rule 37.6, *Amici* NFIB Legal Center and Cato Institute state that no counsel for a party authorized any portion of this brief and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission.

year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. The NFIB Legal Center has filed in numerous employment law and labor cases, including *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177 (2007), and *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60 (2008). NFIB Legal Center also filed an amicus brief to the 11th Circuit in the present case. As with its filing in the 11th Circuit, NFIB Legal Center files here to urge the Court to give Section 302 of the Labor Management Relations Act broad application, so as to prevent labor unions from coercing small business owners into waiving protected rights. NFIB Legal Center submits that Section 302 was intended to prevent labor unions from making extortionate demands. Given the reality that small business owners are particularly vulnerable to extortionate demands from union officials, NFIB Legal Center believes that its brief will offer a valuable perspective on the issue presented here.

Established in 1977, the Cato Institute is a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court*

*Review*. This case is of central concern to Cato because it implicates the right against forced association and the right not to be coerced into giving up First Amendment rights.

## SUMMARY OF ARGUMENT

The Petitioner, Unite Here Local 355 ("Unite Here"), contends that labor unions should be allowed to demand—and that employers should be allowed to deliver—free access to private property, lists of information on employees at no cost, and an uncompensated guarantee of forbearance on First Amendment rights. Under this view, a decision interpreting Section 302(a)(2) of the Labor Management Relations Act (LMRA), by its plain language—as prohibiting such demands—would frustrate Congress' goal of encouraging "industrial peace." Labor Management Relations Act, 29 U.S.C. § 186. But, LMRA's overarching goal of promoting "industrial peace" cannot be served by enabling unions to wage economic war on businesses that refuse to surrender protected rights.

The sky will not fall if this Court should interpret Section 302 as prohibiting extortionate union demands. Of course Unite Here bemoans the end of its self-interested conception of "industrial peace" because an interpretation giving full effect to the prohibition on employers delivering "things of value" would prevent unions from demanding that employers remain neutral on questions of unionization, or that employers give union's access to company property, or confidential information. Unite Here wishes to maintain the prerogative to

make these demands because such concessions are objectively valuable. To be sure, they directly advance Unite Here's institutional interests.

But, Unite Here's approach is highly problematic because it would enable unions to coerce business owners into waiving protected constitutional rights—including the First Amendment right to voice opposition to unionization efforts and the fundamental right to exclude the public from private property. This is a particularly serious concern for small business owners because they are especially vulnerable to coercive union demands. Small businesses generally lack the resources to survive a targeted corporate campaign when a union threatens economic war.

Finally, *amici* file to illustrate the fact that the contested "neutrality agreement" is a "thing[] of value." Indeed, a license to enter and use private property is objectively valuable, as is an agreement to forebear on the right to speak, or an agreement to deliver information on employees. There is a functioning market for each—otherwise there would be no case before this court. By enacting Section 302, Congress wisely closed this market to unions in order to "prohibit[], among other things, the buying and selling of labor peace." *See* S. Rep. No. 98-225 (1984), reprinted 1984 U.S.C.C.A.N. 3182, 3477.

## ARGUMENT

### I. Industrial Peace is Better Served by Interpreting Section 302 Broadly to Prohibit Coercive Union Demands

#### A. Section 302 Was Intended to Protect Employees From Union Corruption and Employers From Extortionate Union Demands

Unite Here would apparently prefer to view Section 302 as serving a *singular purpose* of prohibiting employers from bribing, or otherwise corrupting, union officials with payment or delivery of money or other things with commercial value. But, Unite Here conveniently overlooks the fact that Congress intended Section 302 to serve the *dual purpose* of (a) protecting employees from union corruption and (b) protecting employers from extortionate union demands. Indeed, Section 302 was intended to apply broadly in order to avoid perversion of the unionization process. *See Arroyo v. United States*, 359 U.S. 419, 426 (1959).

It is true that Section 302 serves as a prophylactic against unscrupulous union officials abusing their posts to advance their individual interests. *See* S. Rep. No. 86-187 (1959), reprinted in 1959 U.S.C.C.A.N. 2318, 2330 (noting that the union's fiduciary relationship carries potential for abuse); *see e.g.*, *Adcock v. Freightliner*, 550 F.3d 369 (4th Cir. 2008) (concerning a case in which a union agreed not to negotiate on severance pay, and certain wage and hour issues, in exchange for

organizing assistance). Conversely, it serves as a deterrent against employers appealing to a union official's pecuniary interests, in a manner that might persuade the official to shirk his or her fiduciary responsibilities to safeguard the interests of those employees whom the union seeks to represent. *See Turner v. Local Union No. 302, Int'l Bhd. Of Teamsters*, 604 F.2d 1219, 1227 (9th Cir. 1979) (recognizing Congress intended to "prevent employers from tampering with the loyalty of union officials."); *Air Line Pilots v. O'Neill*, 499 U.S. 65, 74-75 (1991) (recognizing a fiduciary relationship between unions and employees). But Section 302—by its plain language—prohibits *all* union "request[s]" or "demand[s]" for "money or other things of value..." 29 U.S.C. § 186(b)(1). And, by its plain language, it prohibits employers from entertaining such requests by flatly prohibiting employers from "pay[ing]" or "deliver[ing] *any* money or other things of value..."[2] *Id*. § 186(a)(2) (emphasis added).

There is no qualifying language limiting Section 302's application to prevent only the "demand" and "deliver[y]" of things that benefit union officials *personally*.[3] *Am. Tobacco Co. v. Patterson*,

---

[2] *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (reasoning that use of the word "any" suggests "an expansive meaning…").

[3] Given that Congress explicitly enumerated nine exceptions to Section 302's prohibitions, it would be inappropriate to infer further exceptions. *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.") (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980)).

456 U.S. 63, 68 (1982) (explaining that "'our starting point must be the language employed by Congress' … and [that] we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'") (internal citations omitted). On the contrary, Section 302 expressly prohibits employers from paying or delivering things that benefit the union as an institution. 29 U.S.C. § 186(a)(2) (employer is prohibited from "pay[ing], lend[ing], or deliver[ing], any money or other thing of value… *to any labor organization*…") (emphasis added). Accordingly, the plain language confirms that Section 302 was also intended "to deal with 'extortion or a case where the union representative is shaking down the employer.'" *Arroyo*, 359 U.S. at 426, n.8 (quoting 93 Cong. Rec. 4746 (Sen. Taft)).

Indeed, the legislative record demonstrates that Section 302 was adopted in response to a seemingly extortionate demand, made by union officials, that a mining company should pay money into a union welfare fund under "the sole control of the union … [and] [which] could be used as the individual officers saw fit." *United States v. Ryan*, 350 U.S. 299, 304-305 (1956); *see also* S. Rep. No. 105, 80th Cong., 1st Sess. 52 (1947) (Senate Report). Thus, in crafting Section 302, Congress was careful to paint with a broad brush so as to advance the goal of preventing both union corruption and extortion. *See* S. Rep. No. 86-187 (1959), reprinted 1959 U.S.C.C.A.N. 2318, 2329 (expressing congressional intent that the statute be "applicable to all forms of extortion or bribery in labor-management relations."). Congress sought to "prohibit[], among other things, the buying and selling of labor peace."

S. Rep. No. 98-225 (1984), reprinted 1984 U.S.C.C.A.N. 3182, 3477.

### B. Unions Commonly Wage Economic War to Coerce Businesses Into Waiving Constitutionally Protected Rights

#### i. Corporate Campaigns Aim to Pressure Employers into Delivering Organizational Assistance

Though Unite Here bemoans the fact that no court had previously held Section 302 to prohibit "neutrality agreements," it would be fallacious to say that this speaks to whether—in fact—Congress intended Section 302 to prohibit extortionate union demands.[4] For one, it makes sense that this issue is only now working its way through the courts because, as unions have lost influence in recent years, labor organizations have increasingly turned to new strategies to pressure employers into entering organizing assistance agreements. *See* Mark A. Carter & Shawn P. Burton, *The Criminal Element of Neutrality Agreements*, 25 Hofstra Lab. & Emp. L.J. 173, 176 (2007). Labor unions have only relatively recently moved toward insisting upon "neutrality agreements" as a term of peace in targeted "corporate campaigns." Charles I. Cohen et.

---

[4] *See* Andrew Jay McClurg, *Logical Fallacies and the Supreme Court: A Critical Examination of Justice Rehnquist's Decisions in Criminal Procedure Cases*, 59 U. Colo. L. Rev. 741, 770 (1988) (explaining that a negative premise cannot compel a positive conclusion).

al., *Resisting Its Own Obsolescence-How the National Labor Relations Board Is Questioning the Existing Law of Neutrality Agreements*, 20 Notre Dame J.L. Ethics & Pub. Pol'y 521, 522 (2006) (observing that, "[a]lthough neutrality agreements are now [] common…[,] that was not the case as recently as a decade ago.").

As explained by a prominent officer of the AFL-CIO, Richard Trumka, "[c]orporate campaigns swarm the target employer from every angle, great and small, with an eye toward inflicting upon the employer the death of a thousand cuts rather than a single blow." Jarol B. Manheim, THE DEATH OF A THOUSAND CUTS: CORPORATE CAMPAIGNS AND THE ATACK ON THE CORPORATION (Lawrence Erlbum Assoc. 2001). Union campaigns have been acknowledged by courts as involving a "wide and indefinite range of legal and potentially illegal tactics," including "litigation, political appeals, requests that regulatory agencies investigate and pursue employer violations of state and federal law, and negative publicity campaigns aimed at reducing the employer's goodwill with employees, investors, or the general public." *Food Lion, Inc. v. UFCW*, 103 F.3d 1007, 1014 n. 9 (D.C. Cir. 1997); *see also Diamond Walnut Growers v. NLRB*, 113 F.2d 1259 (D.C. Cir. 1997); *Smithfield Foods v. UFCW*, 585 F. Supp. 2d 789, 795-97 (E.D. Va. 2008). Simply put, a corporate campaign is "an attack by a union on the ability of a company or industry to conduct its routine business…[,] [with an] objective [of] generat[ing] so much pressure on the 'target' that it will give in to union demands." Jarol B. Manheim, *Trends in Union Corporate*

*Campaigns: A Briefing Book* (U.S. Chamber of Commerce, 2005).

In carrying out corporate campaigns, unions seek to "exploit vulnerabilities" of key company relationships by, for example, putting pressure on management and the company's financial stakeholders. Jarol B. Manheim, *Trends in Union Corporate Campaigns: A Briefing Book* (U.S. Chamber of Commerce 2005).[5] Unions can also effectively intimidate business owners into submitting to demands for organizational assistance, by threatening to initiate frivolous claims, or threatening to ask regulatory agencies to scrutinize the company. *See also* Dan La Botz, *A Troublemakers Handbook: How to Fight Back Where You Work—and Win!*, 127 (1991) ("Every law or regulation is a potential net in which management can be snared and entangled."). Knowing that a complaint—even an unsubstantiated one—may cost a business time, energy and money, these tactics can be extremely effective in corralling employers into surrendering things of value that benefit the institutional interests of the union.

**ii. In Pressuring Employers to Sign "Neutrality Agreements," Unions Coerce Waiver of Protected Rights**

The unions are not merely seeking to obtain institutional benefits when targeting an employer in a corporate campaign. What is at stake is even

[5] *Available* at http://www.uschamber.com/reports/trends-union-corporate-campaigns (last visited Sept. 24, 2013).

greater. At issue is the question of whether an employer has a right to be free from coercive demands to waive protected constitutional rights. Indeed, the very concept of a "neutrality agreement" is premised in the idea that an employer waives First Amendment rights to oppose unionization efforts; of course, that should only be acceptable where the employer wishes to do so *voluntarily*. Zev J. Eigen & David Sherwyn, *A Moral/contractual Approach to Labor Law Reform*, 63 Hastings L.J. 695, 721 (2012) (observing that "the common denominator for all [neutrality agreements] is that employers agree to remain neutral to the union's attempt to organize the workforce."). As such, there is a serious problem when a labor organization applies coercive pressure in order to force a waiver of the right to free speech. *See NLRB v. O'Keefe & Merrit Mfg. Co.*, 178 F.2d 445, 447-448 (9th Cir. 1950) (employers have a right to oppose unionization); *see also See Chamber of Commerce v. Brown*, 554 U.S. 60, 68 (2008).

Likewise, when unions wage—or threaten to initiate—economic war, they will often offer a ceasefire on the condition that the targeted business must waive protected property rights. *See* Pet. Br. at 39 (admitting that an agreement to "limit" a company's exercise of property rights may be an "object of coercion"). As in the present case, employers are commonly forced to choose between waiving the right to exclude the public from the company's private property, and a war of attrition with a union demanding access to company facilities. Eigen & Sherwyn, *supra*, 63 Hastings L.J. at 721. To the extent that a union demands use of other forms

of property—including confidential proprietary information, as in this case—the union is likewise forcing employers to choose between "peace" and the continued exclusive enjoyment of company property. *Hendler v. United States*, 952 F.2d 1364, 1374-75 (Fed. Cir. 1991) ("The notion of exclusive ownership as a property right is fundamental to our theory of social organization.").

To be sure the right to exclusive use of private property is a fundamental right of ownership and is constitutionally protected—so much so that the government cannot pressure a landowner into waiving the right to exclude. *See Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 426, 102 S. Ct. 3164, 3171, 73 L. Ed. 2d 868 (1982); *Nollan v. California Coastal Comm'n,* 483 U.S. 825 at 831, 107 S. Ct. 3141 at 3145, 97 L. Ed. 2d 677 (1987). Indeed, our Fifth Amendment jurisprudence recognizes that government should not be enabled to coerce individuals into waiving protected property rights without compensation.[6] *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013). Similarly our First Amendment jurisprudence holds that government cannot pressure individuals into waiving the right to free speech. *See e.g.*, *Perry v. Sindermann,* 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); *Rumsfeld v.*

---

[6] Citing *Lechmere v. NLRB*, 502 U.S. 527, 532-34 (1992), Respondent, Martin Mulhall, correctly notes that "unions have no statutory right to use an employer's private property for organizing." *Amici* stress further that the doctrine of unconstitutional conditions would prevent Congress from ever imposing such a requirement on businesses because it would improperly force businesses to waive the right to exclude the public as a condition of operating a commercial enterprise.

*Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 59–60 (2006). The overarching principle in these cases—referred to as the unconstitutional conditions doctrine—recognizes that there are compelling reasons for protecting constitutional rights against coerced waivers. *See Frost v. R.R. Comm'n of State of Cal.*, 271 U.S. 583, 594 (1926) ("It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."). And given that government exists for the purpose of protecting our constitutional rights, those same policy concerns should inform this Court's interpretation of Section 302. Indeed, it is reasonable to assume that Congress intended to prevent unions from applying coercive pressure to compel employers into waiving their First and Fifth Amendment rights.[7] *See Chamber of Commerce v. Brown*, 554 U.S. at 68 (noting that in enacting the NLRA Congress made a "policy judgment … 'favoring uninhibited, robust, and wide-open debate in labor disputes…'" (quoting

[7] In a true demonstration of chutzpah, Unite Here suggests that its interpretation—allowing unions to demand "neutrality agreements"—is somehow protective of the employer's right to remain silent on issues of unionization. Pet. Br. 48-50. Indeed, it is well established that the First Amendment protects the right of employers to choose whether or not to oppose unionization, but the right to remain neutral *is not* at issue here. *See Kimbrell v. NLRB*, 290 F.2d 799, 801-802 (4th Cir. 1961). Regardless of whether Section 302 prohibits unions from demanding—and employers from delivering—"neutrality agreements," employers are free to *voluntarily* choose to remain neutral on union issues. Accordingly, the real issue here is whether unions may continue to make coercive demands upon employers, to waive their protected right to oppose unionization efforts.

*Letter Carriers v. Austin*, 418 U.S. 264, 272-273 (1974)).

### C. The Union's Interpretation Encourages Industrial Strife—Not Peace

Unite Here belabors the point that the LRMA was enacted with the overarching goal of promoting "industrial peace." *See* Pet. Br. at 13 (asserting Muhall's theory would "criminalize … industrial peace..."). But, the Union goes on to advocate an exceedingly narrow interpretation of Section 302, so as to preserve the prerogative of unions to wage economic war against targeted companies that refuse to give into demands for: (a) neutrality [i.e. waiver of the right to oppose unionization], (b) access to private property [i.e. waiver of the right to exclude the public], and (c) access to confidential proprietary information [same]. Thus, the Union's essential policy argument—that a broad interpretation will inhibit industrial peace—is a deftly disguised affirmation of the fact that there can be no industrial peace so long as unions are allowed to torment, or harass, businesses that refuse to comply with extortionate demands. *See* Pet. Br. at 27 (stating that unions value "neutrality agreements" enough to give up their most "potent tool[s]").

The notion that "industrial peace" is inhibited by prohibiting unions from demanding "neutrality agreements" is nothing more than doublespeak. Of course, in a sense it is always true that one can buy a form of peace by giving into extortionate demands. An owner can always "buy" a form of peace from a

cartel that threatens to destroy his or her home, by submitting to demands for money or other things of value. Bennett G. Young, Chris W. Lacy, Michael J. Kass, Kathryn A. Nyce, *Privilege Survives Coerced Disclosures to Federal Investigators*, 18 Competition: J. Anti. & Unfair Comp. L. Sec. St. B. Cal. 23, 31 (2009) ("By definition, extortion contemplates a volitional and consensual act by the victim…"). But, there is no true peace where an owner is subject to such demands in the first place. Likewise, a regime allowing unions to threaten continued hostilities until employers give into demands for organizing assistance is not truly conducive to "industrial peace." Instead unions are emboldened to make coercive demands, and to pressure employers until they give up protected rights in a negotiated ceasefire. *See Koontz*, 133 S. Ct. at 2595 (rejecting a rule that "would enable the government to [systematically] evade limitations" meant to prohibit extortionate practices). It seems unlikely that this is what Congress had in mind with enactment of Section 302. *See Arroyo*, 359 U.S. at 426.

### D. Small Businesses Are Especially Vulnerable to Extortionate Shakedown Practices

Corporate campaigns can ring the death knell for small businesses that resist demands for neutrality, access to private property, and access to confidential proprietary information. Whereas large businesses, such as Wal-Mart, Verizon, and Nike, are accustomed to dealing with labor disputes, small businesses generally lack the resources needed to

combat and survive corporate campaigns.[8] Small businesses do not usually employ specialized human resource managers, labor consultants or in house counsel.[9] Instead small business owners must either seek outside counsel—at great cost—or become personally enmeshed in time demanding union campaigns.

Small business owners often report that they must spend excessive energy dealing with targeted corporate campaigns. For example, one small business owner described his experience stating that he "logged 20 hour days talking one-on-one with employees and leading meetings where [he] pointed out that unions had not saved local jobs in… 10 factories that recently closed." *Unions: We're Better Off Without Them How the Obama Administration's Push for Employee Free Choice Act Could Cripple the Backbone of the Economy: Small Businesses*, Kevin Kelly, Newsweek, July 2009. Without doubt, small business owners are diverted from spending their time running their ordinary business operations when dealing with corporate campaigns—and are therein inhibited from turning a profit. *See* Small

---

[8] Small businesses depend heavily on the local community, and are therein especially vulnerable to targeted efforts to tarnish the company's public image. Unlike large corporations, with a national consumer-base, it is easier for an aggressive corporate campaign to create enough noise to materially disparage a small business' image within the community in which its entire consumer-base is concentrated.

[9] *See* Damien M. Schiff, Luke A. Wake, *Leveling the Playing Field in David v. Goliath: Remedies to Agency Overreach*, 17 Tex. Rev. L. & Pol. 97, 123 (2012) (generally discussing the special challenges facing small business owners in regulated industries).

Business Legal Center Testifies on Legal Reform: NFIB Testifies Before House Judiciary Committee, National Federation of Independent Business (Mar. 12, 2013).[10] This can cripple a small business and is ultimately harmful for employees.[11] But of course the very goal of a union's corporate campaign is to make it impossible for a company to carry on business without capitulating to its demands. Accordingly, since small businesses usually lack the resources to effectively and efficiently manage corporate campaigns, they make easy targets.

## II. The Contested "Neutrality Agreement" Delivered a License, a Guarantee of Forbearance and Proprietary Interests—All With Objective Commercial Value

Unite Here repeatedly affirms that "things of value" must be understood to mean "'things with commercial value,'" and that it would be inappropriate to consider things with mere

---

[10] *Available* at http://www.nfib.com/legal-center/compliance-resource-center/compliance-resource-item/cmsid/62326 (last visited Sept. 24, 2013).

[11] Moreover, when unions resort to lodging questionable claims with regulatory agencies, or otherwise prompting administrative investigations, small business owners may be paralyzed dealing with unnecessary inspections or audits. Furthermore, when a small business is faced with a frivolous claim, it can prove tremendously costly if fines are assessed, or if the owner is forced to retain an attorney in order to vindicate its name. *See* NFIB Legal Center Testifies on Legal Reform, *supra* (explaining small business owners generally "do not have the resources needed to hire an attorney nor the time to spend away from their business fighting [frivolous legal battles].").

"'subjective value'" to be covered by Section 302.[12] Pet. Br. at 13 (acknowledging that "'things of value' … must be read to mean something of commercial value…"); *but see Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 585 (1993) (explaining that Section 302's "prohibitions… are drawn broadly."). Even if Section 302 is so construed, it should be recognized that the contested "neutrality agreement," delivered a license to use private property, a forbearance on the right to speak, and a collection of confidential proprietary information—each of which has objective value in a free market.[13]

---

[12] The Solicitor General appropriately acknowledges that "[c]ourts have found a wide variety of goods, services, and benefits to be 'things of value' within the meaning of criminal laws." S.G. Br. 16-17. Nonetheless the Solicitor General contends that the full text of Section 302 suggests "a financial-transfer focus for [the] term ["thing of value"]—for example, delivery of free tickets to a sporting event." *Id*. at 18. But it makes no sense to say that Section 302 would prohibit an employer from delivering free tickets to a sporting event if it is not also understood to prohibit an employer from delivering other things with market value. As explained herein, there is no material difference between delivering free tickets and delivering a license to use company facilities, a forbearance on free speech, or confidential proprietary information. There is a 'market' for each.

[13] *Amici* agree with Respondents that the phrase "things of value" encompasses both objective and subjective values. *See United States v. Nilsen*, 967 F.2d 539, 542 (11th Cir. 1992) (explaining that the "thing of value" is a "term of art[,] which the courts generally construe to envelop[] both tangibles and intangibles."); *Morissette v. United States*, 342 U.S. 246, 263, 72 S. Ct. 240 (1952) ("[W]here Congress borrows terms of art… it presumably knows and adopts the … the meaning its use will convey to the judicial mind unless otherwise instructed.").

### A. A License to Use Private Property is Objectively Valuable

It is well established, in the law of eminent domain, that the right to exclude the public from private property is objectively valuable. *Loretto*, 458 U.S. at 436-37 (holding government must pay just compensation for any physical occupation of private property). Even a temporary invasion of private property is compensated in an inverse condemnation action for the "fair market" rental value of the space at issue. *See Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 519 (2012); *see also United States v. Gen. Motors Corp.*, 323 U.S. 373, 382-83 (1945) (discussing short-term market rental values for a warehouse that the federal government temporarily occupied). When courts seek to assess the "fair market value" of rented space on a segment of private property, they look to indicia of what private parties would likely agree to in negotiating use and access to the property. *See United States v. 564.54 Acres of Land, More or Less, Situated in Monroe & Pike Counties, Pa.*, 441 U.S. 506, 511 (1979).

Moreover, these valuations are based on the actual state of the real estate and rental markets. *Id.* As first year law students know, the market for licenses, or easements, to use private property is not theoretical. It is usually necessary to pay for the right to use a business' property for your own private purposes.

Businesses commonly rent out their facilities for many potential uses and potential patrons. For

example, hotels commonly rent conference rooms for businesses and organizations to hold events and meetings. A property management company might frequently rent out space for weddings, or fundraising events. Likewise, a company owning office space might choose to rent out conference rooms on an hourly basis for independent contractors looking for a place to meet clients.[14]

Of course the mere fact that a business has not—thus far—engaged in the market for short-term rental space does not foreclose the business from doing so in the future. Nor does it negate the reality that there is a vibrant market for short-term rental facilities. *See e.g.*, Event Spaces and Meeting Spaces in Washington DC, EVenues (listing hourly and daily rates for 156 short-term rental spaces in the District of Columbia).[15] The fact is that private parties and organizations often need to rent meeting spaces for a variety of reasons, and potentially any space could be rented. The rental value of such space depends upon many factors—including "the kind of building to be occupied, [] its location, [] its susceptibility to various uses, [] its conveniences, or the reverse, and [] many other factors which go to set the value of the occupancy." *Gen. Motors Corp.*, 323 U.S. at 380 (1945). Thus, the fair market value of a license to use a meeting space necessarily depends

---

[14] For example, Liquidspace advertises hourly office space rentals online. *See* Liquidspace, *available* at https://liquidspace.com/ (last visited Sept. 24, 2013).

[15] *Available* at http://www.evenues.com/Meeting-Spaces/Washington/DC (Sept. 24, 2013).

on the going-rate of similarly suited meeting spaces.[16]

### B. A Guarantee to Forebear on First Amendment Rights is Objectively Valuable

In the same way as one must negotiate a rental agreement to attain a license to use private property, one must offer valuable consideration to attain a binding agreement that a business will forebear on the right to engage in free speech.[17] While it is always true that a business has the prerogative to choose to remain silent, the business also retains the right to speak—unless the business has entered into a binding agreement to forebear on such rights. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 343 (2010) (recognizing businesses have First Amendment rights); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (explaining that the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all."). And usually the right to engage in free speech is not lightly relinquished.

---

[16] It is true that a property owner might sometimes choose to provide access to civics groups, or other organizations, at no cost. But, in such a case, free access amounts to a charitable gift. This is because it is ultimately the exclusive right of the landowner to decide when, and to whom, to grant access and use of private property. This is the most fundamental right of private property ownership, and necessarily has value. *Hendler*, 952 F.2d 1374-75.

[17] Likewise, a party wishing to ensure that a property owner will forebear on common law property rights must negotiate a negative easement, which will necessarily require valuable consideration.

For an individual or business to enter into an agreement to waive First Amendment rights—an agreement that gives another party an enforceable right to enjoin free speech—it is usually necessary to offer something of value in exchange. *See e.g.*, *People v. Hochberg*, 62 A.D.2d 239, 246-47, 404 N.Y.S.2d 161, 167 (3d Dep't 1978) (holding an agreement not to run in a primary election to be a thing of value). For example, a company renting space on a billboard necessarily chooses to waive its right to leave the billboard empty when it contracts to advertise for another business; in such a case the billboard company is agreeing to waive its right to remain silent and simultaneously agreeing to speak on behalf of the contracting business.[18] *See Nat'l Ass'n of Mfrs. v. N.L.R.B.*, 717 F.3d 947, 956 (D.C. Cir. 2013) ("[A]ll speech inherently involves choices of what to say and what to leave unsaid.") (quoting *Pac. Gas & Electric Co. v. Pub. Utils. Comm'n,* 475 U.S. 1, 11 (1986) (plurality opinion)). A company might also be willing to enter an agreement to hold-off on advertising within a specified geographic market. *See e.g.*, *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 626-27 (1977) (company entered a non-competition agreement in exchange for valuable consideration). Such an agreement may well raise antitrust problems, but that is because it would be objectively valuable to a competing company seeking to establish a monopoly in that market. Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of*

[18] Likewise, an author with plans to publish a book might be dissuaded from doing so if offered enough money from an interested party. For that matter, in any dispute, an individual might agree to forebear on the right to speak on an issue in order to secure a financial settlement.

*Law?*, 42 U.C. Davis L. Rev. 1375, 1385 (2009) (noting that anticompetitive agreements allow a company to raise prices).

Agreements to forebear on free speech are especially common in the entertainment industry.[19] For example, a company may be willing to pay a premium to ensure that a celebrity is exclusively endorsing its products or representing its company.[20] *See e.g.*, Michael Buteau, *Roy McIlroy Joins Tiger Woods in Nike Golf Sponsorships*, Bloomberg (Jan. 14, 2013). For that matter, television and movie producers commonly enter agreements to feature products—therein waiving their right to opt against featuring such products, or against the right to feature competing products. *See* Clarissa Sebag-Montefiore and Steven Zeitchik, *Chinese Pay for Product Placement in Hollywood Movies*, LA Times

---

[19] For example, for various reasons, a professional sports team might insist on a gag-clause to prevent an athlete from speaking on controversial issues. For example, Jackie Robinson was offered a contract to play baseball for the Brooklyn Dodgers, but was contractually required to refrain from engaging in certain forms of speech. Jim Peters and Hillary Smith, *Jackie Robinson's Fight in Baseball Continues*, NWI Times (Apr. 11, 2013), *Available* at http://www.nwitimes.com/sports/baseball/professional/jackie-robinson-s-fight-in-baseball-continues/article_514e6a51-b36a-59fc-9ffa-d5b36c293085.html.

[20] *Available* at http://www.bloomberg.com/news/2013-01-14/rory-mcilroy-joins-tiger-woods-as-sponsor-of-nike-golf-equipment.html (last visited Sept. 24, 2013).

(Sept. 11, 2012) (discussing prevalence of product placement in cinema and television).[21]

Moreover, agreements to forebear on free speech are made every day and in every industry—and always for valuable consideration. *See e.g.*, *E.E.O.C. v. Severn Trent Servs., Inc.*, 358 F.3d 438, 441 (7th Cir. 2004) (referring to nondisparagement clauses as "common" and "unexceptionable."). To be sure, many companies require employees to abide by social media policies, which may potentially restrict what topics employees may publically speak on. *See* NFIB Guide to the Employee Handbook, NFIB Small Business Legal Center, 7 ("Model Employee Handbook").[22] Even before the advent of Facebook and Twitter, many businesses adopted policies requiring employees to forebear on their right to publically disparage the company. John L. Hines, Jr., Michael H. Cramer, Peter T. Berk, *Anonymity, Immunity & Online Defamation: Managing Corporate Exposures to Reputation Injury*, 4 Sedona Conf. J. 97, 106 (2003) ("[Q]ualifications [on an employee's speech rights] as they relate to confidential information, trade secrets and harassment are not new.").

---

[21] *Available* at http://articles.latimes.com/2012/sep/11/entertainment/la-et-ct-chinese-pay-for-product-placement-in-hollywood-movies-20120910 (last visited Sept. 24, 2013).

[22] *Available* at http://www.nfib.com/portals/0/PDF/Members/Legal/Guides/employee_handbook.pdf (last visited Sept. 24, 2013) (suggesting employers should include language warning employees that inappropriate commentary on social media may result in termination).

Further, most companies require employees to abide by a dress code, which necessarily restricts how employees might express themselves. *See* Model Employee Handbook, *supra* at 6 (noting employers may wish to include "specific requirements… [i]ncluding information regarding uniforms, safety protections… and other dress requirements."); *but see*, *Cohen v. California*, 403 U.S. 15 (1971) (holding that freedom of expression entails decisions on how to present oneself in public). Nonetheless, employees willingly accept positions with these companies knowing that they are required to forebear on their free speech rights as a condition of continued employment. They freely choose to abide by these conditions because they value their salaries and other pecuniary benefits of employment.

There are many reasons why an individual or business may legitimately choose to enter an agreement to forebear on free speech. Such agreements are common and do in fact have a market value. Of course, the fact that one must generally offer something of value in order to attain a guarantee of forbearance on First Amendment rights demonstrates that a guarantee of forbearance is necessarily a "thing of value."

### C. A Collection of Information on Employees Has Objective Commercial Value

Any collection of information on a company's customers or employees is going to have some degree of commercial value in the free market. Jessica Litman, *Information Privacy/Information Property*,

52 Stan. L. Rev. 1283 (2000) (explaining that businesses commonly "collect[] information about us to use in marketing products" and that collected information can be "sold."); Walter W. Miller, Jr. & Maureen A. O'Rourke, *Bankruptcy Law v. Privacy Rights: Which Holds the Trump Card?*, 38 Hous. L. Rev. 777, 788 (2001) (noting that customer lists and associated information can be used as collateral). This sort of information is especially valuable to marketing companies. Indeed, marketing campaigns are most successful when marketers can gather information on potential consumers. Such information can give marketers insights into the tastes and priorities of a targeted demographic or may prove helpful in identifying specific consumers for solicitations. Julia Alpert Gladstone, *Data Mines and Battlefields: Looking at Financial Aggregators to Understand the Legal Boundaries and Ownership Rights in the Use of Personal Data*, 19 J. Marshall J. Computer & Info. L. 313, 329 (2001) ("The use of customer databases has become a critical strategy to successful business, and, thus, consumer profiles are a valuable intangible asset."). Accordingly, many companies are willing to pay money in order to obtain information on perspective consumers. Xuan-Thao N. Nguyen, *Collateralizing Privacy*, 78 Tul. L. Rev. 553, 581 (2004) ("Companies spend significant resources to collect customer information, maintain the information in computer databases, and prevent others from unauthorized mining.").

The fact that labor unions are not in the business of selling products to consumers does not change the reality that there is an active market for information on consumers, including information on

any given business's employees. A union seeking to gain support from a majority of a company's employees resembles a marketing company in so far as it places a value on obtaining this sort of information. *See U.S. v. Sheker*, 618 F.2d 607, 609 (9th Cir. 1980) ("Information obtained for political advantage might have value apart from its worth in dollars."); *see also* Hayley Tsukayama, *Microtargeting has Growing Influence in Political Campaigns, Says Interactive Advertising Bureau*, Washington Post (Feb. 26, 2013) (explaining the economic value of gathering information on perspective voters in a political campaign).[23] Indeed, when unions demand that a company must handover information on its employees, the union seeks this information to facilitate its own marketing campaign. The only difference is that a marketing company seeks to solicit prospective consumers, whereas a union seeks to solicit prospective members. *See* Zev J. Eigen & David Sherwyn, *A Moral/Contractual Approach to Labor Law Reform*, 63 Hastings L.J. 695, 722 (2012) (noting that unions have a much greater success rate in unionization efforts when they can compel businesses into handing over information on employees).

Furthermore, if Congress had not expressly prohibited employers from delivering "things of value" to unions, and if the delivery of such information would not violate employee privacy

---

[23] *Available* at http://www.washingtonpost.com/blogs/post-tech/post/microtargeting-has-growing-influence-in-political-campaigns-says-interactive-advertising-bureau/2013/02/26/32e0723e-8023-11e2-b99e-6baf4ebe42df_blog.html (last visited Sept. 24, 2013).

protections, unscrupulous employers could conceivably sell employee information to the highest union-bidder.[24] *See United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979) (recognizing that "private records" constitute property and a "thing of value"). Since such information would give the acquiring union a competitive advantage over other unions seeking to represent the company's employees, unions would be willing to bid against each other for such information. Indeed, if Congress had not explicitly closed this market, the fair market value of such information would be established in the same manner as fair market value is established with any other proprietary interest—its worth would be determined by the union's subjective decision as to how greatly it values that which it seeks.[25] *564.54 Acres of Land*, 441 U.S. at 511 (explaining that fair market value is what a willing buyer would pay a

---

[24] United Here seems unconcerned over potential privacy concerns from those employees who might prefer that their employer refrain from sharing their personal information. One might expect that Unite Here would object to an employer selling such information to another business. But apparently Unite Here sees no problem with insisting that employers share confidential information on employees when it benefits the union's institutional interests.

[25] As Respondent Martin Mulhall notes, Unite Here has admitted the fact that it placed value on the contested "neutrality agreement." Pet. App. 71 (stating that, in failing to honor the neutrality agreement, Mardi Gras "increased [the union's] organizing expenses and [caused] lost revenues for the Union."). Moreover, the fact that Unite Here was willing to spend $100,000 in satisfaction of the agreement—in campaigning for legalization of slot machines in Miami-Dade and Broward counties—demonstrates that Unite Here valued the benefits conferred by at least that much. *See* Pet. App. 44, 48.

willing seller); *see also Carpenter v. United States*, 484 U.S. 19, 26 (1987) (affirming that "[confidential business information has long been recognized as a property.").

## CONCLUSION

For the foregoing reasons, this Court should hold that Section 302 prohibits unions from demanding—and employers from delivering—a license to access and use private property, a forbearance on free speech, or information on employees because such concessions are valuable. Accordingly, this Court should affirm the decision of the Federal Court of Appeal for the Eleventh Circuit.

Respectfully submitted,

KAREN R. HARNED*
**Counsel of Record*
LUKE A. WAKE
*Of Counsel*
NFIB Small Business Legal Center
1201 F Street, NW Suite 200
Washington, DC 20004
(202) 314-2048
Karen.Harned@nfib.org
Luke.Wake@nfib.org

Ilya Shapiro
Cato Institute
1000 Massachusetts Avenue, NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org