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## Employer-Union Organizing Assistance and Neutrality Agreements: Have We Overshot Congress's Landing and Upset a Fragile Balance

Robert Mollohan

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# EMPLOYER-UNION ORGANIZING ASSISTANCE AND NEUTRALITY AGREEMENTS: HAVE WE OVERSHOT CONGRESS'S LANDING AND UPSET A FRAGILE BALANCE?

**Robert J. Mollohan, Jr.\***

## TABLE OF CONTENTS

INTRODUCTION .....	886
I. SETTING THE STAGE FOR NEUTRALITY AGREEMENTS IN AMERICAN LABOR PRACTICE.....	890
A. <i>Unfair Labor Practices Under Taft-Hartley</i> .....	890
B. <i>The Rise of Neutrality Agreements and Current         National and Local Union Membership</i> .....	892
C. <i>Judicial Interpretation of a "Thing of Value"</i> .....	895
1. <i>"Value" Set by Desire to Have the Thing</i> .....	895
2. <i>A Benefit to a Union Does Not Necessarily             Constitute a "Thing of Value"</i> .....	895
II. THE RELATIONSHIP BETWEEN ORGANIZING ASSISTANCE AND A SECTION 302 "THING OF VALUE".....	897
A. <i>Why Neutrality Agreements With Union Organizing         Assistance Can Constitute a "Thing of Value"</i> .....	897
1. <i>The Eleventh Circuit, the Value of Intangibles, and             "Common Sense"</i> .....	897
2. <i>Deconstructing "Organizing Assistance": "Active"             Versus "Passive" as the Key Factor</i> .....	899
B. <i>Why Neutrality Agreements with Union Organizing         Assistance Should Not Constitute a "Thing of         Value"</i> .....	902
1. <i>Statutory Support for Upholding Employer-Union             Contractual Agreements, Most Notably Within             LMRA</i> .....	902
2. <i>Congress's Intent in Enacting Section 302</i> .....	905

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886	GEORGIA STATE UNIVERSITY LAW REVIEW	[Vol. 30:3
	<ul style="list-style-type: none"> <li>a. <i>Construing “Thing of Value” With Reference to Preceding Textual Companion of “Money” in Statute’s Text</i>..... 905</li> <li>b. <i>Lack of Mention in Statute and Legislative History</i>..... 906</li> <li>c. <i>Failure to Necessarily Corrupt a Union and to Necessarily Implicate Congress’s Anti-Bribery and Extortion Purpose in Enacting Section 302</i>..... 908</li> </ul>	
III.	COMING FULL CIRCLE: FAVORING RETAINING EMPLOYER-UNION STABILITY OVER LESS-THAN-THREATENING POLICY CONCERNS.....	909
	<ul style="list-style-type: none"> <li>A. <i>Some Opposing Policy Considerations</i>..... 910 <ul style="list-style-type: none"> <li>1. <i>“Privatizing” Labor Law</i>..... 910</li> <li>2. <i>Coercion of Disenfranchised Employees to Join a Union</i>..... 911</li> </ul> </li> <li>B. <i>The Overriding Favorable Policy Consideration: Retaining Employer and Union Autonomy to Negotiate Union Organization and to Respect More Clearly-Established Outer Limits</i>.....</li> </ul>	913
	CONCLUSION .....	915

## INTRODUCTION

Since its inception, the Labor Management Relations Act (LMRA)<sup>1</sup> has been a divisive piece of legislation.<sup>2</sup> Generally, it made several important changes to the National Labor Relations Act (NLRA)<sup>3</sup> and, in so doing, outlined a series of “unfair labor practices” that would be

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1. Labor Management Relations Act, 29 U.S.C. §§ 171-89 (2006) (also commonly known as the “Taft-Hartley Act”).

2. In fact, the 80th Congress, then under a Republican majority, overrode a veto by Democratic President Harry Truman to make the LMRA law. HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS 389–92 (1950). Its reforms to American labor law at the time were sweeping and quite significant. See Mark Gruenberg, *Taft-Hartley Signed 60 Years Ago*, POL. AFF. (June 13, 2007, 9:11 AM), <http://www.politicalaffairs.net/taft-hartley-signed-60-years-ago> (“On June 23, 1947, U.S. labor law turned upside down.”).

3. National Labor Relations Act, 29 U.S.C. §§ 151–69 (2006) (also commonly known as the “Wagner Act”); Arthur L. Stern, Annotation, *The Labor Management Relations (Taft-Hartley) Act, 1947, and its Effect on the National Labor Relations (Wagner) Act*, 173 A.L.R. 1401, 1402–03 (1948).

forbidden to unions.<sup>4</sup> Section 302 of LMRA makes it unlawful for “any employer . . . to pay, lend, or deliver, any money or other thing of value . . . to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer . . . .”<sup>5</sup> Congress passed Section 302 with a predominant objective in mind—to prevent employers from compromising union officials’ loyalty and union officials from unduly wresting financial concessions from employers.<sup>6</sup>

Over the past sixty-five years, courts have been tasked with interpreting this broad language to identify what constitutes a “thing of value” within the meaning of Section 302 in an extremely wide variety of circumstances.<sup>7</sup> In recent decades, this issue has surfaced in several United States Courts of Appeal challenging the validity of

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4. R. ALTON LEE, EISENHOWER & LANDRUM-GRIFFIN: A STUDY IN LABOR-MANAGEMENT POLITICS 6 (1990) (noting that LMRA was “[b]ased on the premise that the national government should be an impartial referee rather than a union supporter in labor-management conflict”); *see also* *Arroyo v. United States*, 359 U.S. 419, 425 (1959) (averring that LMRA “was aimed at practices which Congress considered inimical to the integrity of the collective bargaining process”). For further background and discussion pertaining to each of the unfair labor practices outlined in LMRA, see MILLIS & BROWN, *supra* note 2, at 420–81 and discussion *infra* Part I.A.

5. 29 U.S.C. § 186(a)(2); *United States v. Douglas*, 634 F.3d 852, 857 (6th Cir. 2011). Additionally, Section 302 makes it unlawful for anyone to “request, demand, receive, or accept . . . any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.” 29 U.S.C. § 186(b)(1); *Douglas*, 634 F.3d at 857.

6. *Adecock v. Freightliner LLC*, 550 F.3d 369, 375 (4th Cir. 2008) (“The Supreme Court has noted that [Section] 302 was enacted to curb abuses that Congress felt were ‘inimical to the integrity of the collective bargaining process.’” (quoting *Arroyo*, 359 U.S. at 425)); *Caterpillar, Inc. v. Int’l Union, UAW*, 107 F.3d 1052, 1057 (3d Cir. 1997) (“Section 302 of that statute was passed to address bribery, extortion and other corrupt practices conducted in secret.”); *Turner v. Local Union No. 302, Int’l Bhd. of Teamsters*, 604 F.2d 1219, 1227 (9th Cir. 1979) (citing *Alvares v. Erickson*, 514 F.2d 156, 164 (9th Cir. 1975)); Bill Lurye, *Section 302: The LMRA’s Criminal Cousin*, A.B.A., [http://www.americanbar.org/content/dam/aba/administrative/labor\\_law/meetings/2011/ac2011/073.pdf](http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/ac2011/073.pdf) (last visited Nov. 15, 2013) (prefacing that Section 302 was “[e]nacted for the purpose of preventing corruption and disloyalty in labor-management relations”). Specifically to this point, Congress “[forbade] the delivery to any such [union] official of that which might ‘turn the edge of his allegiance.’” *United States v. Roth*, 333 F.2d 450, 453 (2d Cir. 1964) (quoting *United States v. Ryan*, 225 F.2d 417, 426 (2d Cir. 1955)).

7. *See United States v. Overton*, 470 F.2d 761, 764–66 (2d Cir. 1972) (holding the purchasing of products from clients of a public relations corporation incorporated by union officials constituted a thing of value); *United States v. Ferrara*, 458 F.2d 868, 873 (2d Cir. 1972) (holding a restaurateur’s employer’s agreement to switch coffee suppliers constituted a thing of value). *But see Zentner v. Am. Fed’n of Musicians*, 237 F. Supp. 457, 463 (S.D.N.Y.), *aff’d*, 343 F.2d 758 (2d Cir. 1965) (per curiam) (holding a list of employees’ names and addresses did not constitute a thing of value). For an exhaustive list of things that courts have held do and do not constitute a “thing of value” within the meaning of Section 302 of LMRA, see James Achermann, *Small Gifts and Big Trouble: Clarifying the Taft-Hartley Act*, 44 U.S.F. L. REV. 63, 88–90 (2009).

certain employer-union organizing agreements, specifically those that provide for organizing assistance from an employer to a union.<sup>8</sup> Courts tasked with determining whether these provisions constitute a “thing of value” to unions in violation of Section 302 of LMRA have followed varying rationales and reached different conclusions.<sup>9</sup>

Recently, in *Mulhall v. Unite Here Local 355*, an Eleventh Circuit panel interpreted “thing of value” in an illuminating but controversial way: it held that a neutrality agreement between an employer and a union that provided for organizing assistance from an employer to a union could constitute a “thing of value” in violation of Section 302 of the LMRA.<sup>10</sup> This decision poses significant ramifications for employers and unions operating within the Eleventh Circuit’s jurisdiction.<sup>11</sup> On the whole, it “potentially undermines the ability of an employer and a union to contract without risking a legal challenge from an individual employee,” who simply may not wish to work at a

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8. See generally *Adcock*, 550 F.3d 369; *Hotel Emps. Union, Local 57 v. Sage Hospitality Res., LLC*, 390 F.3d 206 (3d Cir. 2004); *Roth*, 333 F.2d 450. Generally, these agreements provide for employer neutrality to potential unionization and are “contract[s] between a union and an employer under which the employer agrees to support a union’s attempt to organize its workforce.” *What is a “Neutrality Agreement” and How Does it Affect Workers?*, NAT’L RIGHT TO WORK LEGAL DEF. FOUND., [http://www.nrtw.org/neutrality/na\\_1.htm](http://www.nrtw.org/neutrality/na_1.htm) (last visited Nov. 15, 2013). The majority of these agreements also involve “recognition of a union on the basis of a card check or other alternative recognition process, and avoidance of the National Labor Relations Board election and litigation process.” Kurt G. Larkin, *Section 302: Drawing the Line for Employers, Unions*, LAW360 (July 31, 2012, 2:38 PM), <http://www.law360.com/articles/358507/section-302-drawing-the-line-for-employers-unions>.

9. Compare *Roth*, 333 F.2d at 454, with *Adcock*, 550 F.3d at 375, and *Sage Hospitality*, 390 F.3d at 219. Defined broadly, “organizing assistance” refers to “intangible services, privileges, or concessions” on the part of an employer that a union may accept in exchange for other “bargaining concessions.” *Mulhall v. Unite Here Local 355*, 667 F.3d 1211, 1215 (11th Cir. 2012), *cert. dismissed*, 134 S. Ct. 594, and *cert. denied*, 134 S. Ct. 822 (2013); Mark A. Carter & Shawn P. Burton, *The Criminal Element of Neutrality Agreements*, 25 HOFSTRA LAB. & EMP. L.J. 173, 180 (2007). For a brief discussion of the holdings and rationales of these cases, see discussion *infra* Part II.C.

10. *Mulhall*, 667 F.3d at 1215–16.

11. For instance, *Mulhall* weakens “the confidence with which unions and employers contract in neutrality agreements . . . because employees have standing to challenge the agreements.” Patrick L. Coyle & Alexandra V. Garrison, *Labor and Employment*, 62 MERCER L. REV. 1199, 1211 (2011). In fact, the Eleventh Circuit confirmed *Mulhall*’s (the plaintiff-employee) standing to sue in a previous appeal. *Mulhall v. Unite Here Local 355*, 618 F.3d 1279, 1288 (11th Cir. 2010). Such a framework threatens to undermine an otherwise stable employer-union relationship. See Jonah J. Lallas, *Taking the Fear Out of Organizing: Dana II and Union Neutrality Agreements*, 32 BERKELEY J. EMP. & LAB. L. 541, 547 (2011) (noting that these agreements “help lead to ‘industrial peace’ between the parties by removing the coercive nature of management activity in N.L.R.B. election processes and promoting greater employee free choice”); Larkin, *supra* note 8 (noting that these agreements “facilitate successful union organizing without the use of secret ballot voting”).

place where employees are unionized, regardless of whether the individual employee opts out of representation.<sup>12</sup> Neither an employer nor a union may wish to risk the threat of a lawsuit to enjoin the agreements and penalties, as a Section 302 violation is an enumerated predicate “racketeering” activity in the RICO statute.<sup>13</sup>

Part I of this Note traces the enactment of the Taft-Hartley Act and briefly chronicles the rise in the use of neutrality agreements.<sup>14</sup> Part I also addresses both sides of federal jurisprudence in the interpretation of what constitutes a “thing of value” within the meaning of Section 302 of LMRA, in the context of both employer-union organizing assistance and neutrality agreements.<sup>15</sup> The development of this statutory inclusion, as well as recent judicial interpretation of this phrase, provides enormous insight into the Eleventh Circuit’s recent decision, discussed in more detail in Part II.<sup>16</sup> However, the rationale behind this decision has arguably imputed some sort of “intent requirement” into the statute, unsupported by its language and

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12. Coyle & Garrison, *supra* note 11, at 1206. An employee who does not want to be a part of a unionized workforce for any number of reasons may sue to enjoin the agreement. *Id.* As a consequence, both employers and unions may pay the price by “forego[ing] entering into such arrangements entirely, even when to do so would be *beneficial and entirely legal.*” Dan Bushell, *11th Circuit Elevates Individual Circumstances Over Categorical Rules in Assessing Union-Employer Cooperation Agreements*, FLA. APP. REV. (Jan. 19, 2012), <http://www.floridaappellatereview.com/general-civil-litigation/playing-too-nicely-11th-circuit-says-union-employer-cooperation-agreement-may-violate-lmra> (emphasis added).

13. *Adcock*, 550 F.3d at 373 n.2 (citing 18 U.S.C. § 1961(c) (2006)). Generally, the RICO statute can be summarized as follows:

The Act provides for criminal and/or civil remedies when a person or enterprise engages in a pattern of racketeering activity for the purpose of: using the income from racketeering activity to acquire an interest in an enterprise; obtaining an interest in an enterprise by means of racketeering activity; participating in the operation of an enterprise through a pattern of racketeering activity; or conspiring to commit any of the above.

Raymond P. Green, *The Application of RICO to Labor-Management and Employment Disputes*, 7 ST. THOMAS L. REV. 309, 310 (1995). Additionally, Green notes that “[a] large area of ambiguity exists when applying RICO to labor disputes . . . in terms of . . . what types of activities constitute patterns of racketeering acts.” *Id.* at 312. In his article, James Brudney notes that “[w]hen RICO was drafted and enacted, Congress did not anticipate its widespread injection into routine business controversies or traditional labor-management relations.” James J. Brudney, *Collateral Conflict: Employer Claims of RICO Extortion Against Union Comprehensive Campaigns*, 83 S. CAL. L. REV. 731, 734 (2010).

14. See discussion *infra* Part I.A–B.

15. See discussion *infra* Part I.C.

16. The *Mulhall* court made its decision largely based on its interpretation of congressional inclusion of similar broad language throughout other criminal statutes, as well as on the court’s so-called “common sense.” *Mulhall*, 667 F.3d at 1214–15; see also discussion *infra* Part II.A.1.

legislative history.<sup>17</sup> It also does not serve the comprehensive judicial interest in “line-drawing and predictability” in statutory interpretation.<sup>18</sup> After an analysis of arguments of both sides of this issue, Part III proposes that classifying these agreements as “things of value” does not serve Congress’s purpose in enacting the statute, and that opposing policy considerations can be reconciled without following such a classification. Part III also highlights a potentially unworkable framework for interpreting all organizing agreements, past and future.<sup>19</sup>

## I. SETTING THE STAGE FOR NEUTRALITY AGREEMENTS IN AMERICAN LABOR PRACTICE

### A. *Unfair Labor Practices Under Taft-Hartley*

The Taft-Hartley Act came about as a result of almost immediate dissatisfactions with the previously-passed Wagner Act.<sup>20</sup> Generally, three major points underscore the arguments that changes to federal labor law were still warranted.<sup>21</sup> First, organized labor had achieved a dominant power in industry, necessitating a balancing of organized labor’s collective position with that of employers and individual employees.<sup>22</sup> Second, unions had not necessarily developed a “sense of responsibility to industry and the public, or to individual employees and union members, correlative to their protected rights.”<sup>23</sup> Third, labor organizations were not subject to the same or equivalent limitations and responsibilities as were employers.<sup>24</sup> In response to

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17. See Larkin, *supra* note 8.

18. See Bushell, *supra* note 12; discussion *infra* Part II.B.

19. See Larkin, *supra* note 8 (“Such a result would imply that virtually all organizing rights agreements are ‘illegal’ under Section 302. This cannot be the case, as the number of federal courts upholding voluntary organizing agreements under Section 301 of the LMRA are legion.”); discussion *infra* Part III.

20. In the ten-year period from 1936 to 1946 following the passage of the Wagner Act, 169 bills relating to national labor policy were introduced in Congress, on top of sixty-one bills introduced before the 80th Congress (the Congress that passed the Taft-Hartley Act) and fifty other such legislative proposals. MILLIS & BROWN, *supra* note 2, at 333. Unfair labor practices made up one of seven general areas that appeared to need further legislation and regulation. *Id.* at 336.

21. *Id.* at 272.

22. *Id.*

23. *Id.*

24. *Id.*

these widespread concerns, the Taft-Hartley Act added special prohibitions specifically aimed at preventing unfair labor practices and also applied the prohibitions to both union and employee conduct.<sup>25</sup>

As it stands, however, LMRA expressly provides certain exceptions to Section 302's prohibition on an employer giving any "thing of value" to a union or its representatives.<sup>26</sup> An employer may only contribute financially to a union's operating account by deducting union dues from employee wages with express written consent from union representatives.<sup>27</sup>

LMRA's prohibition on monetary transfers from employers to unions has not been an overly complex and problematic issue for parties, courts, and commenters to reckon with.<sup>28</sup> Similar "intangible" benefits have proven more difficult to evaluate, however, as a "thing of value" within the meaning of Section 302.<sup>29</sup> Several United States

25. *Id.* at 336–37. Generally, these unfair labor practices fall into five categories: (1) free speech and interference with the rights of employees; (2) company dominated unions; (3) discrimination and union-security provisions; (4) restraint or coercion by unions; and (5) collective bargaining, refusal to bargain, and dispute settlement. *Id.* at 420–71. The prohibition on employers providing any "thing of value" to a union falls within category two. *Id.* Its aim is to prevent "assistance or support of a labor organization by an employer that interferes with the organization's ability to function as an independent representative of employee interests." STEPHEN I. SCHLOSSBERG & JUDITH A. SCOTT, *ORGANIZING AND THE LAW* 83 (4th ed. 1991).

26. Labor Management Relations Act, 29 U.S.C. § 186(c)(1)–(5) (2006). Notably, this code section is titled "Restrictions on financial transactions." *Id.* § 186. Specified exceptions include the payment of dues collected under a check off system (the automatic deduction of union dues from employees' paychecks) and the payment of contributions to certain welfare or trust funds for the benefit of employees. *Blassie v. Kroger Co.*, 345 F.2d 58, 68–69 (8th Cir. 1965) (also noting that the court "prefer[red] to approach [its] present task with a construction policy favoring inclusion and benefits where there is no positive statutory language or inference of exclusion, rather than one favoring exclusion and a denial of benefits where there is no positive language of inclusion"); *Local No. 2 of Operative Plasterers Int'l Ass'n v. Paramount Plastering, Inc.*, 310 F.2d 179, 182–83 (9th Cir. 1962). Congress provided these exceptions for certain special funds derived from employer contributions "to limit the type of funds which could be jointly administered" by labor and management. *Id.*

27. 29 U.S.C. § 186(c)(4); *Int'l Longshoremen's Ass'n v. Seatrain Lines, Inc.*, 326 F.2d 916, 920 (2d Cir. 1964) (reading Section 302(c)(4) of LMRA as the "exclusive method by which employers may contribute to the general purpose funds of unions"); CONG. OF INDUS. ORGS., *ANALYSIS OF THE TAFT-HARTLEY ACT* 12 (1947) ("[I]f an employer receives an assignment from a man to check off initiation fees there is no violation of the Taft-Hartley Act involved.").

28. MILLIS & BROWN, *supra* note 2, at 428 (relating that Section 302(a) "largely concerned 'trust funds' or 'welfare funds' . . . [and] there can be little doubt that the words applied also to financial contributions in connection with aid to a company union" given the severe penalties imposed for violation).

29. "Countless hypothetical cases can be put, each on its facts approaching that evanescent borderline between the proper and the improper. No calculating machine has yet been invented to make these determinations with certainty." *United States v. Roth*, 333 F.2d 450, 454 (2d Cir. 1964). "In the meantime



Court of Appeals cases have addressed forms of intangible benefits between employers and unions, including “benefits” in the form of organizing assistance in employer-union neutrality agreements.<sup>30</sup> Given the lack of statutory and regulatory guidance on “things of value” (with reference to intangible benefits),<sup>31</sup> these courts have undertaken varying analyses, reached different conclusions, and set forth competing standards.<sup>32</sup>

### *B. The Rise of Neutrality Agreements and Current National and Local Union Membership*

Typically, non-unionized employees initiate the unionization process by contacting a local union.<sup>33</sup> Once a majority of the employees at an establishment have designated a particular union as their authorized bargaining representative, the union “ordinarily will request that the employer recognize the union and enter into a collective bargaining relationship.”<sup>34</sup> At this point, the employer can simply grant this request, but more often than not, it declines in favor of exercising its right to demand a representation election.<sup>35</sup> During the

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the courts must rely upon the less mechanical judgment and common sense which under the present system is, and of necessity must be, lodged in judges and juries.” *Id.*; W. J. Dunn, Annotation, *Section 302(a)–(d) of Labor Management Relations Act (29 USC § 186(a)–(d)) Concerning Payments Between an Employer and a Representative of His Employees*, 13 A.L.R.3D 569, 575 (1967) (“Somewhat more difficulty [sic] has been encountered when the transaction does not involve the direct transfer of money from an employer to a representative of his employees . . .”).

30. See generally *Adcock v. Freightliner LLC*, 550 F.3d 369 (4th Cir. 2008); *Hotel Emps. Union, Local 57 v. Sage Hospitality Res., LLC*, 390 F.3d 206 (3d Cir. 2004); *Roth*, 333 F.2d 450. Neutrality agreements had become more popular since the 1970s. Matthew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1, 73 (2008) (noting the increase in popularity of neutrality agreements (citing James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 824, 828–30 (2005))). For a discussion of the rise of neutrality agreements, see *infra* Part I.B.

31. See Achermann, *supra* note 7, at 63 (“[The statute’s] provisions are overly expansive and vague. The plain language of the statute is extremely broad, using convoluted and ambiguous terminology.”).

32. See discussion *infra* Part I.C.1–2.

33. James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 824 (2005). Brudney also notes that such employees may “for any number of reasons feel unfairly treated in their work environment.” *Id.*; see also National Labor Relations Act, 29 U.S.C. § 159(c) (2006); BENJAMIN WERNE, *THE LAW OF LABOR RELATIONS* 3 (1951).

34. Brudney, *supra* note 33, at 824.

35. *Id.* at 824–25 (noting that exercising this right gives the employer the opportunity to urge its employees “to vote against unionization; the election is thus a contest challenging the union’s assertion that it enjoys majority support”); see also Charles I. Cohen, Joseph E. Santucci, Jr. & Jonathan C. Fritts,

so-called campaign period, employers give employees the management perspective of employees' union rights and the potential ramifications for agreeing to union representation.<sup>36</sup>

Beginning in the late 1970s, in response to a sharp decline in national union membership,<sup>37</sup> unions began working with employers to modify the traditional organizing approach by agreeing that the employer would remain neutral with regard to organizing efforts.<sup>38</sup> By the late 1990s, unions bargained for neutrality much more frequently, and these agreements became “a central component of the labor movement's organizing strategy.”<sup>39</sup> Today, both employers and unions enter into neutrality agreements for a wide variety of strategic reasons.<sup>40</sup>

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*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, 524 (2006) (“A neutrality/card check agreement amounts to a waiver by the employer of its right to insist on an NLRB election as the basis for union recognition.”).

36. Zev J. Eigen & David Sherwyn, *A Moral/Contractual Approach to Labor Law Reform*, 63 HASTINGS L.J. 695, 715 (2012). Many of the issues employers typically raise in this context include:

Whether unions can “guarantee” increased pay, benefits, or anything else; [h]ow collective bargaining really works; [w]hat happens when strikes are called or picketing is conducted; [w]hat it costs to be a union member in terms of dues and initiation fees; where that money goes; how it is used, and by whom; [w]hether the union's leaders are trustworthy and capable; [t]he employer's record of responsiveness to employee issues; [t]he fact that employees will be paying someone to do what they may have been able to do (represent themselves) for free; [w]hether the organizing drive has actually been beneficial in the sense that it has called attention to problems that need to be addressed whether the union is there or not; and [w]hether the employer should make management changes (because an organizing drive seems to have been triggered by a perceived lack of leadership).

Arch Stokes, Robert L. Murphy, Paul E. Wagner & David S. Sherwyn, *Neutrality Agreements: How Unions Organize New Hotels Without an Employee Ballot*, 42 CORNELL HOTEL & REST. ADMIN. Q., Oct.-Nov. 2001, at 86, 88–89. The most important limitation on an employer's latitude in campaigning against unionization is that “informing employees of the consequences does not rise to the level of a threat.” Eigen & Sherwyn, *supra* 715 n.121 (citing Labor Management Relations Act, 29 U.S.C. § 158(c) (2010)).

37. The “story of neutrality agreements” can be traced back to “unions' frustrations in trying to counteract the decline in union density in the latter half of the twentieth century.” Laura J. Cooper, *Privatizing Labor Law: Neutrality/Card Check Agreements and the Role of the Arbitrator*, 83 IND. L.J. 1589, 1591 (2008). In the mid-1970s, unionized workers represented but a quarter of the national workforce, down from its mid-1950s peak of one-third of the national workforce. *Id.*; see also Jonathan P. Hiatt & Lee W. Jackson, *Union Survival Strategies for the Twenty-First Century*, 12 LAB. LAW. 165, 165 (1996) (“Forty years ago, one in three private sector workers belonged to a labor union; today the figure is closer to one in ten.”).

38. Brudney, *supra* note 33, at 825.

39. *Id.*

40. Adrienne Eaton and Jill Kriesky posit that:

[B]oth employer and union strategies related to organizing fall into two “major classes,”

As of early 2012, unionized employees represent 11.8% of the national workforce.<sup>41</sup> In the Eleventh Circuit, unionized employees represent 10.8% of Alabama's workforce, 5.4% of Florida's workforce, and 5.3% of Georgia's workforce.<sup>42</sup> Within these classes of employees, those that enjoy union representation under the auspices of a neutrality agreement may face uncertainty in the ultimate enforceability of those agreements in the wake of the Eleventh Circuit's recent decision.<sup>43</sup>

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internal and external. "External strategies" are those that seek to alter the context in which an organization operates. The American labor movement has recently begun to develop new, structurally oriented, internal strategies to deal with its organizing failures . . . . However, it has had a much longer, more sustained external strategy focused on shifting the context in which organizing takes place, specifically by neutralizing employer opposition. It has pursued two separate tracks in this regard, one *legislative*, the other *contractual*.

Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42, 43 (2001) (emphasis added). Unions bargain for employer neutrality in lieu of the NLRB secret ballot election process largely because of increased success in organizing campaigns under these agreements. Brudney, *supra* note 33, at 832. On the whole, this increased success can largely be attributed to the removal of employer anti-union tactics from the equation. *Id.* ("Neutrality arrangements allow unions to avoid these effects—in particular to sidestep the intimidating consequences of employers' anti-union speech or conduct and to minimize the eviscerating impact of lengthy delays under the Board's legal regime."). Moreover, employers agree to neutrality in part because of potential costs due to work stoppages and "picketing and handbilling aimed at deterring customers." *Id.* at 836. Additionally, employers may agree to neutrality because of the possible marketing edge that it provides in attracting new business, the formation of union-management partnerships that "can more effectively extract benefits from government," the ability to help attract more highly qualified workers, and the promotion of larger labor-management goals. *Id.* at 836–39.

41. News Release, U.S. Dep't of Labor, Bureau of Labor Statistics, Union Members—2011, USDL-12-0094 (Jan. 27, 2012), [http://www.bls.gov/news.release/archives/union2\\_01272012.pdf](http://www.bls.gov/news.release/archives/union2_01272012.pdf).

42. Barry T. Hirsch, David A. Macpherson & Wayne G. Vroman, *Union Density Estimates by State, 1964–2013*, UNION MEMBERSHIP & COVERAGE DATABASE, <http://unionstats.gsu.edu/MonthlyLaborReviewArticle.htm> (follow "State Union Membership Density, 1964–2013" hyperlink) (last visited Feb. 20, 2014). "Two sources of data are combined to produce the estimates: compilations from the Current Population Survey (CPS), a monthly survey of U.S. households, and the now discontinued BLS publication *Directory of National Unions and Employee Associations (Directory)*, which contains information reported by labor unions to the Federal Government." Barry T. Hirsch, David A. Macpherson & Wayne G. Vroman, *Estimates of Union Density by State*, 124 MONTHLY LAB. REV., July 2001, at 51, available at <http://www.bls.gov/opub/mlr/2001/07/ressum2.pdf>. For a description of the methodology used to compile this data, see *id.* at 54.

43. See Larkin, *supra* note 8 ("Such a result would imply that virtually all organizing rights agreements are 'illegal' under Section 302.").

### C. *Judicial Interpretation of a “Thing of Value”*

#### 1. *“Value” Set by Desire to Have the Thing*

In *United States v. Roth*, the vice president of a vending machine company, with the president’s approval, secured a \$30,000 loan to the secretary-treasurer of the local union representing the employees.<sup>44</sup> The company argued that Congress’s 1959 amendment to the statute, which added the word “lend”, was meant to cure a “deficiency or loophole” in the former section, which was controlling at the time of the case.<sup>45</sup> The Second Circuit rejected this assertion and ruled adversely to the employer, finding that “[v]alue is usually set by the desire to have the ‘thing’ and depends upon the individual and the circumstances.”<sup>46</sup> Disregarding the loan as the item at hand, the court read the broad nature of the statutory language as giving the “broadest possible scope” to the statute.<sup>47</sup> This expansive interpretation seems to favor classifying intangible “things” as Section 302 “things of value.”

#### 2. *A Benefit to a Union Does Not Necessarily Constitute a “Thing of Value”*

In *Hotel Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, the hotel development authority entered into a neutrality agreement with the local hotel and restaurant employees union.<sup>48</sup> In the pertinent part, the agreement provided that whether or not the union would be recognized as the employees’ bargaining agent would be determined by using a “card check” procedure, and included a

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44. *United States v. Roth*, 333 F.2d 450, 452 (2d Cir. 1964). The local union secretary-treasurer repaid the loan in eight months. *Id.*

45. *Id.* at 453–54. While the Second Circuit ultimately decided *Roth* in 1964, the events that formed the basis for the plaintiff’s complaint occurred in 1957. *Id.* at 452.

46. *Id.* at 453. At trial, the jury was permitted to consider all surrounding circumstances as indicated by the evidence, and the court “made specific reference to such factors as the terms of the loan, interest, duration, collateral or absence thereof, [the secretary-treasurer]’s purpose in obtaining the loan, [and] the use to which he put the money.” *Id.*

47. *Id.* (citing *United States v. Ryan*, 350 U.S. 299, 300 (1956)). In a short dissenting opinion, Judge Hays simply stated that the statute “failed to prohibit loans with that clarity which is required of criminal statutes,” as demonstrated by the majority’s need to argue the issue extensively. *Id.* at 454 (Hays, J., dissenting).

48. *Hotel Emps. Union, Local 57 v. Sage Hospitality Res., LLC*, 390 F.3d 206, 209 (3d Cir. 2004).

provision requiring disputes to be settled by arbitration.<sup>49</sup> Affirming the trial court's order compelling arbitration of a dispute arising from card-count results, the Third Circuit held that the neutrality agreement presented no violation of LMRA Section 302 because it did not require the employer to provide anything of value to the union.<sup>50</sup> It reasoned that the fact that the neutrality agreement, "like any other labor arbitration agreement[,] benefits both parties with efficiency and cost saving does not transform it into a payment or delivery of some benefit," and that any inherent benefit the union may enjoy in more efficient dispute resolution did not constitute a "thing of value" within the meaning of the statute.<sup>51</sup>

Furthermore, in *Adcock v. Freightliner LLC*, five trucking company employees, who did not want to be unionized, challenged agreements between the company and United Auto Workers (UAW) as a Section 302 violation.<sup>52</sup> Under these contracts, the company agreed, in pertinent part, to do three things: (1) require some employees to attend union presentations explaining the Card Check Agreement; (2) provide the union with access to areas in company plants to allow union representatives to meet with employees; and (3) "refrain from making negative comments about the [u]nion during the organizing campaigns."<sup>53</sup> The Fourth Circuit read the plain language of Section 302 to conclude that these concessions did not implicate the statutory meaning of "thing of value."<sup>54</sup> It characterized this reading of the statute as consistent with Congress's purpose in enacting Section 302: "to curb abuses that Congress felt were 'inimical to the integrity of the collective bargaining process.'" <sup>55</sup> In the court's view, these concessions did not involve the company bribing or bestowing personal benefits on union officials, but instead served the interests of

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49. *Id.* at 209. The agreement also contained a "no-picketing promise." *Id.* Under a typical "card check" provision of a neutrality agreement, the employer is required "to recognize the union if it obtains signatures on representation cards from a majority of employees." Bodie, *supra* note 30, at 73.

50. *Sage Hospitality*, 390 F.3d at 219.

51. *Id.*

52. *Adcock v. Freightliner LLC*, 550 F.3d 369, 373 (4th Cir. 2008).

53. *Id.* at 374.

54. *Id.* ("Rather, all that is involved is the establishment of mutually acceptable ground rules . . .").

55. *Id.* at 375 (quoting *Arroyo v. United States*, 359 U.S. 419, 425 (1959)).

both parties.<sup>56</sup> Importantly, the Fourth Circuit commented that Congress “clearly intended § 302’s ‘thing of value’ to have at least some ascertainable value.”<sup>57</sup> This rationale suggests those intangible benefits that objectively cannot be monetarily valued do not come within Section 302 of LMRA, a conclusion that forms a core issue with regard to this analysis.

## II. THE RELATIONSHIP BETWEEN ORGANIZING ASSISTANCE AND A SECTION 302 “THING OF VALUE”

### A. *Why Neutrality Agreements With Union Organizing Assistance Can Constitute a “Thing of Value”*

#### 1. *The Eleventh Circuit, the Value of Intangibles, and “Common Sense”*

In *Mulhall v. Unite Here Local 355*, an employer and local union entered into an agreement under which the employer made three promises: “to (1) provide union representatives access to non-public work premises to organize employees during non-work hours; (2) provide the union a list of employees, their job classifications, departments, and addresses; and (3) remain neutral to the unionization of employees.”<sup>58</sup> The employer, Hollywood Greyhound Track, Inc., provided Unite Here with information about its employees for 2006 and 2007 (pursuant to the agreement), but refused to provide any more employee information in 2008.<sup>59</sup> After Hollywood ignored Unite Here’s request to arbitrate the dispute over employee information,

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56. *Id.*

57. *Id.*

58. *Mulhall v. Unite Here Local 355*, 667 F.3d 1211, 1213 (11th Cir. 2012), *cert. dismissed*, 134 S. Ct. 594, and *cert. denied*, 134 S. Ct. 822 (2013). In return, the union “promised to lend financial support to a ballot initiative regarding casino gaming . . . [and] promised to refrain from picketing, boycotting, striking, or undertaking other economic activity against [the employer].” *Id.* The employer, Hollywood Greyhound Track, Inc., doing business as Mardi Gras Gaming, operated a dog track. *Mulhall v. Unite Here Local 355*, No. 08-61766-CIV, 2009 WL 8711022, at \*1 (S.D. Fla. Apr. 22, 2009), *rev’d*, 618 F.3d 1279 (11th Cir. 2010). The union, Unite Here, represents “workers throughout the U.S. and Canada who work in the hotel, gaming, food service, manufacturing, textile, distribution, laundry, and airport industries.” UNITE HERE!, <http://www.unitehere.org/about/> (last visited Nov. 17, 2013).

59. *Mulhall*, 2009 WL 8711022, at \*1.

Unite Here brought suit to compel arbitration.<sup>60</sup> Martin Mulhall, an employee who had worked as a parimutuel clerk and a groundskeeper for forty years and who opposed being unionized, sued to enjoin enforcement of the agreement, contending that its enforcement would violate Section 302 of LMRA.<sup>61</sup>

The Eleventh Circuit held that because “organizing assistance” could constitute a “thing of value,” such neutrality agreements were a Section 302 violation on the employer’s part.<sup>62</sup> Noting that it disagreed with the Third and Fourth Circuits on this issue,<sup>63</sup> the court first highlighted that, because Congress has included the phrase “thing of value” in other criminal statutes, it has evolved “‘into a term of art which the courts generally construe to envelop[] both tangibles and intangibles.’”<sup>64</sup>

Second, it agreed with the Second Circuit that “common sense should inform determinations of whether an improper benefit has been conferred.”<sup>65</sup> It found important that, “[i]f employers offer organizing assistance with the intention of improperly influencing a union, then the policy concerns in [Section] 302—curbing bribery and extortion—are implicated.”<sup>66</sup> However, improper intention aside, this decision

60. *Id.*

61. *Mulhall*, 667 F.3d at 1213; *Mulhall*, 2009 WL 8711022, at \*1.

62. *Mulhall*, 667 F.3d at 1213.

63. See discussion *supra* Part I.C.2.

64. *Mulhall*, 667 F.3d at 1214 (citing *United States v. Nilsen*, 967 F.2d 539, 542 (11th Cir. 1992) (per curiam)). This determination that intangibles can nonetheless still have value (at least, within the meaning of Section 302) is a focal point of Mulhall’s position before the United States Supreme Court with respect to Unite Here’s certiorari petition. In *Adcock*, the Fourth Circuit took a different position, finding support for the converse proposition in two other places in Section 302. First, the “penalty provision” of the statute calls for a sliding scale of the severity of penalties for violation. *Adcock v. Freightliner LLC*, 550 F.3d 369, 375 (4th Cir. 2008). “Thus, Congress clearly intended [Section] 302’s ‘thing of value’ to have at least some ascertainable value.” *Id.* Second, the language of Section 302 prohibits agreements to “‘pay, lend, or deliver . . . any money or other thing of value.’” *Id.* at 376. Since the concessions made to and the collateral benefits enjoyed by the union under such an agreement cannot be “‘delivered,’” neutrality agreements cannot come within the meaning of this provision. *Id.* As a matter of statutory interpretation, the Fourth Circuit declined to “attempt to stretch [Section] 302 beyond its limits” and to apply Section 302 “in a manner inconsistent with both the statute’s plain language and Congress’ intent in passing the statute.” *Id.* at 377.

65. *Mulhall*, 667 F.3d at 1215 (citing *United States v. Roth*, 333 F.2d 450, 454 (2d Cir. 1964)).

66. *Id.* This analysis is notable, because it makes the subjective intent of the employer factor into the objective determination of whether or not its concessions have “value.” This appears nowhere in the statutory framework of Section 302. See Larkin, *supra* note 8 (“In reaching this ruling, the court read into the statute a specific intent requirement that is not there.”); see also 2 Guide to Emp. Law & Reg. § 17A:29

seems to make the inferential step between entering into a neutrality agreement and illegal labor practices, such as bribery and extortion much more easily than other courts have.<sup>67</sup>

2. *Deconstructing “Organizing Assistance”: “Active” Versus “Passive” as the Key Factor*

Another way to evaluate whether organizing assistance provided for in a neutrality agreement constitutes a “thing of value” within the meaning of Section 302 is to deconstruct the type of assistance for which the agreement provides. Generally, an employer can react in three ways in response to a union organizing drive.<sup>68</sup> First, it can resist unionization altogether—this could not constitute a “thing of value” to a union because, on its face, it works against the broad union interest in the success of an organizing campaign.<sup>69</sup>

The more important distinction is between the second and third forms of employer responses to union organizing efforts. On one hand, an employer can provide a form of “passive” assistance, whereby it simply acquiesces to the union’s prerogatives and agrees to go along with the ultimate result of the organizing campaign.<sup>70</sup> This type of assistance is less likely to implicate Section 302’s “thing of value” provision.<sup>71</sup> Even if a union considers such assistance to be “valuable” within the meaning of Section 302, it arguably cannot be “lent” or “delivered,” which is an essential element of Section 302’s prohibition.<sup>72</sup> On the other hand, an employer can provide more

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(2012) (“Innocuous ground rules between unions and employers can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer.”).

67. See *Hotel Emps. Union, Local 57 v. Sage Hospitality Res., LLC*, 390 F.3d 206, 219 (3d Cir. 2004) (“Not surprisingly, Sage is unable to provide any legal support for the remarkable assertion that entering into a valid labor agreement governing recognition of a labor union amounts to illegal labor bribery.”).

68. Carter & Burton, *supra* note 9, at 190.

69. *Id.* This response is by far the most common among employers, and given that it is likely to lessen the success of an organizing drive, it is the “form unions try to avoid with the use of neutrality agreements.” *Id.*

70. *Id.* Elaborating on this form of employer conduct, these authors continue: “For example, employers agree to remain silent during a campaign or not insist on a Board-supervised election. Employers are simply inactive during and non-resistant to union organizing efforts.” *Id.*

71. *Id.*

72. Labor Management Relations Act, 29 U.S.C. § 186(a) (2006); Carter & Burton, *supra* note 9, at 190 (noting that, because passive employer conduct may not, arguably, be “lent” or “delivered,” it



“active” assistance, in which it may agree to certain concessions above and beyond the “bare bones” agreement of a neutral position on the outcome of the organizing efforts.<sup>73</sup> This type of conduct is more likely to constitute a “thing of value” in the context of Section 302 “because the employer is actively doing something for a union.”<sup>74</sup>

Semantically, this way of evaluating organizing assistance is vulnerable to the counterargument that stood at the heart of the Fourth Circuit’s rationale in *Adcock v. Freightliner LLC*. Simply put, the fact that a union may realize some benefit from the structure and content of a neutrality agreement does not automatically mean those provisions have “value” as a categorical matter.<sup>75</sup> Understandably, the relationship between an employer and a prospective union can be rather complex, as both seek to protect their own interests throughout the organizing process.<sup>76</sup> It may be unwise to place a categorical bar on certain provisions, like those at issue in *Mulhall*, where the line between a “benefit” and a “thing of value” is unclear. Rather, such categorical limits on organizing assistance should be limited to provisions where the “value” to a union is much more tangible and more clearly goes beyond a mere “benefit.”<sup>77</sup>

In her dissent in *Mulhall*, Judge Restani voiced her agreement with the rationales of the Third and Fourth Circuits and her belief that

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follows that “[p]ure employer neutrality and card check arrangements are, therefore, more likely than not lawful under [S]ection 302”). Of course, this analysis presumes that “passive” assistance *does* come within the meaning of a “thing of value,” which is a proposition that should not so easily be inferred, as this Note discusses further in this section II.A.2.

73. Carter & Burton, *supra* note 9, at 190–91. Elaborating on “active” forms of employer assistance, these authors continue: “[A]ctive employer organizing assistance, such as granting organizers access to the workforce during working hours and compelling employees to attend union proselytizing meetings during working hours, besides being a ‘thing of value,’ can be, and is, lent or delivered to the union . . . .” *Id.* (emphasis omitted).

74. *Id.* at 191 (“The distinction is akin to the difference between misfeasance and nonfeasance, with misfeasance being to torts what active employer assistance is to [S]ection 302. There is indeed (or at least should be) a relevant difference in the [S]ection 302 analysis between assistance and acquiescence, or action and inaction.”).

75. *Adcock v. Freightliner LLC*, 550 F.3d 369, 375 (4th Cir. 2008).

76. See Brudney, *supra* note 33, at 824–40.

77. Evaluating these provisions objectively should focus on the significance of the asset to the union. This should favor a factual determination of that issue over a categorical bar on the use of such provisions. See Lalas, *supra* note 11, at 543 (discussing *Dana Corp.*, 356 N.L.R.B. No. 49 (2010), which upheld an organizing agreement with more substantive provisions than those at issue in *Mulhall* and permitting “a ‘certain amount of employer cooperation with the efforts of a union to organize’”).

improper intent is not relevant to the determination of whether the organizing assistance provisions could constitute a “thing of value” under Section 302.<sup>78</sup> Given that “LMRA is designed to promote both labor peace and collective bargaining,” she observed that “LMRA cannot promote collective bargaining and, at the same time, penalize unions that are attempting to achieve greater collective bargaining rights.”<sup>79</sup> By departing from the Third and Fourth Circuits’ decisions as to whether such agreements constitute a “thing of value” within the meaning of Section 302 of LMRA, the Eleventh Circuit has created a circuit split on the issue.<sup>80</sup> Consequently, its decision poses ramifications for future Eleventh Circuit jurisprudence pertaining to neutrality agreements.<sup>81</sup> It also presents the possibility that an employer or a union that is a party to a neutrality agreement can use Section 302 of LMRA as grounds to not enforce the agreement if harmony between the two parties ceases at some point in time after it is made.<sup>82</sup>

Petitions for certiorari and supporting memoranda were filed on the parts of both *Unite Here Local 355* and *Martin Mulhall*.<sup>83</sup> After

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78. *Mulhall v. Unite Here Local 355*, 667 F.3d 1211, 1216 (11th Cir. 2012) (Restani, J., dissenting) (stating rather that the focus should remain on “whether a union that demands these types of concessions with an improper intent commits extortion and thereby runs afoul of [Section] 302” (which *Mulhall* did not allege in his complaint) and also pointing out that “[a]dding the element of intent is a non-starter because to do so conflicts with the purpose of the LMRA regardless of whether the focus is the concessions or the intent behind them”), *cert. dismissed*, 134 S. Ct. 594, and *cert. denied*, 134 S. Ct. 822 (2013).

79. *Id.* at 1216–17 (Restani, J., dissenting). Pointing out that *Mulhall*’s complaint alleged that the enforcement of the agreement violated Section 302 of LMRA, Judge Restani voiced her agreement with the Fourth Circuit in *Adcock* that “[b]y no stretch of the imagination are the concessions a means of bribing representatives of the Union[.]” *Id.* at 1216 n.1 (Restani, J., dissenting) (citing *Adcock*, 550 F.3d at 375).

80. See discussion *supra* Part I.C.2.

81. In the view of the Third Circuit, interpreting neutrality agreements as “things of value” “would wreak havoc on the carefully balanced structure of the laws governing recognition of and bargaining with unions.” *Hotel Emps. Union, Local 57 v. Sage Hospitality Res., LLC*, 390 F.3d 206, 219 (3d Cir. 2004).

82. For example, during the time that *Martin Mulhall*’s case against *Unite Here* was pending in the Southern District of Florida and the Eleventh Circuit Court of Appeals, *Mardi Gras* (*Mulhall*’s employer) began taking the position that the neutrality agreement with *Unite Here* was unenforceable on the basis that its enforcement would violate Section 302 of LMRA. Brief for the United States as Amicus Curiae at 4, *Unite Here Local 355 v. Mulhall, Mulhall v. Unite Here Local 355*, 134 S. Ct. 594 (2013) (Nos. 12-99, 12-312), 2013 WL 2316734. After arbitration proceedings on that issue, an arbitrator disagreed and found that the agreement was enforceable, and that ruling was upheld by a Southern District of Florida federal court. *Id.*

83. Petition for Writ of Certiorari, *Unite Here Local 355 v. Mulhall*, 134 S. Ct. 594 (2012) (No. 12-99), 2012 WL 3027183; Conditional Cross-Petition for Writ of Certiorari, *Unite Here Local 355 v.*

inviting an *amicus curiae* brief from the United States on the issue, the United States Supreme Court granted certiorari on June 24, 2013.<sup>84</sup> However, after the case had been fully briefed and argued, the Court dismissed the writ as improvidently granted on December 10, 2013.<sup>85</sup> Thus, the debate over the legality of neutrality agreements that provide organizing assistance continues without definitive guidance from our highest court.<sup>86</sup>

### *B. Why Neutrality Agreements with Union Organizing Assistance Should Not Constitute a “Thing of Value”*

#### *1. Statutory Support for Upholding Employer-Union Contractual Agreements, Most Notably Within LMRA*

A powerful argument in support of the proposition that neutrality and card check agreements do not constitute a “thing of value” under

Mulhall, 134 S. Ct. 594 (2012) (No. 12-312), 2012 WL 4042969; Respondent Martin Mulhall’s Memorandum in Support of the Petition, *Unite Here Local 355 v. Mulhall*, 134 S. Ct. 594 (2012) (No. 12-99), 2012 WL 3613484.

84. *Unite Here Local 355 v. Mulhall*, 81 U.S.L.W. 3066 (U.S. June 24, 2013) (No. 12-99). In its *amicus curiae* brief submitted to the Supreme Court, the United States contended that “the court of appeals went astray in concluding that the legitimacy of such agreements turns on an inquiry into the parties’ intent.” Brief of the United States as Amicus Curiae at 9, *Mulhall*, 134 S. Ct. 594 (Nos. 12-99, 12-312), 2013 WL 2316734. However, it implored the Court not to intervene at this time for two reasons. First, “[o]nly three courts of appeals have addressed the underlying issues, and further consideration in the lower courts would benefit this Court should review eventually be justified.” *Id.* Second, since the case has reached the Supreme Court in an interlocutory posture (from a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)), “further proceedings on remand may clarify the decision’s effects.” *Id.* Lastly, it posited that a question of mootness existed, given that the challenged agreement was no longer in force. *Id.*

85. *Unite Here Local 355 v. Mulhall*, 134 S. Ct. 594 (2013) (per curiam). In a dissent joined by Justices Sotomayor and Kagan, Justice Breyer identified mootness as a possible issue, also raised by the United States in its *amicus* brief with respect to the certiorari petitions, as well as two other issues. *Id.* at 594–95 (Breyer, J., dissenting); see also *supra* note 84. First, he pointed out that “it is arguable that . . . Mulhall, the sole plaintiff in this case, lacks Article III standing.” *Mulhall*, 134 S. Ct. at 595 (Breyer, J. dissenting). Second, he raised the question of whether Section 302 still authorizes a private right of action, given the Court’s “more restrictive views on private rights of action in recent decades.” *Id.* While any of these three issues could have prevented the Court from reaching the merits of the Section 302 question, the dissenting justices would have instead favored further briefing on those issues. *Id.* at 594–95.

86. See, e.g., William Gould, *Opinion Analysis: Union Organizing Lives to Fight Another Day—But so do its Opponents*, SCOTUSBLOG (Dec. 11, 2013, 4:56 PM), <http://www.scotusblog.com/2013/12/opinion-analysis-union-organizing-lives-to-fight-another-day-but-so-do-its-opponents/> (“[C]ourts will remain divided on union neutrality agreements, so that their lawfulness (as will any ‘collective-bargaining process’ which addresses them) will remain uncertain.”).

Section 302 of LMRA is LMRA's internal statutory support for upholding and enforcing otherwise valid contractual agreements between employers and unions.<sup>87</sup> Most notably, Congress enacted Section 301(a) of LMRA concurrently with Section 302.<sup>88</sup> This section gives federal courts jurisdiction over breach of contract actions between an employer and a labor organization representing employees.<sup>89</sup> The importance of this provision cannot be understated. Under LMRA, "the [National Labor Relations Board] has exclusive jurisdiction over activities which are clearly or arguably subject to Sections 7 and 8 of the Act—sufficient to preempt state and federal courts from asserting concurrent jurisdiction."<sup>90</sup> However, suits under Section 301 of LMRA comprise one of two areas in which federal courts reserve jurisdiction in labor-management relation matters.<sup>91</sup>

The fact that federal courts retain jurisdiction over Section 301 suits, which "are frequently filed to enforce arbitration provisions of collective bargaining contracts," strongly suggests that the purpose of Section 301(a) was "to make labor contracts equally binding on both employers and unions, to the end of promoting industrial peace through the enforcement of these contracts, including the no-strike clauses Congress expected would be included in them."<sup>92</sup> Moreover, contracts enforceable under Section 301(a) include agreements

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87. Petition for Writ of Certiorari, *supra* note 83, at 11–16.

88. Labor Management Relations Act, 29 U.S.C. § 185 (2006).

89. *Id.* § 185(a).

90. GORDON E. JACKSON, LABOR AND EMPLOYMENT LAW DESK BOOK 25 (1986). Section 7 is codified at 29 U.S.C. § 157 and Section 8 is codified at 29 U.S.C. § 158. Jackson also points out that any question of whether or not NLRB enjoys such exclusive jurisdiction over such activities was answered affirmatively in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). *Id.* at 25 & n.2. With reference to Congress's intent in regulating labor-management relations under LMRA, the Supreme Court commented, "[b]y the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces." *Garmon*, 359 U.S. at 240 (quoting *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 480–81 (1955)).

91. JACKSON, *supra* note 90, at 27. The other major area of suits over which federal courts retained exclusive jurisdiction under LMRA comprised suits brought under Section 303 of LMRA, which "grants jurisdiction to federal district courts to entertain suits brought by business or property owners who are injured as a result of a labor union engaging in, inducing, or encouraging strikes or secondary boycotts prohibited by Section 8(b)(4) of the LMRA." *Id.* Both types of actions may be brought in federal district courts without regard to the amount-in-controversy or citizenship requirements of 28 U.S.C. § 1332. *Id.*

92. Petition for Writ of Certiorari, *supra* note 83, at 12–13 (citing *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 453–54 (1957)); JACKSON, *supra* note 90, at 27.

between employers and labor organizations that are significant to mutual labor peace.<sup>93</sup> Importantly, neutrality agreements can contribute significantly to maintaining labor peace between labor unions and employers.<sup>94</sup>

More recently, courts that have reviewed the enforceability of neutrality and card check agreements have sought to ensure the presence of employee freedom of choice as to whether or not to support unionization, and they have widely held that the “presence of a card check arrangement qualifies as such an opportunity [to allow employees to choose whether to accept or reject the union].”<sup>95</sup> Even the NLRB has taken the position that card checks enjoy a presumption of validity.<sup>96</sup> In fact, the NLRB recently pointed out that voluntary recognition of a union “predates the National Labor Relations Act and is undisputedly lawful under it.”<sup>97</sup>

To some, this argument only goes so far. Federal courts have held that, “while union representation issues are within the primary jurisdiction of the [NLRB], neutrality and card check agreements are enforceable in federal court *as long as they are consistent with federal labor law.*”<sup>98</sup> In other words, the agreement’s ultimate enforceability hinges on the lack of any other labor law violation contained within the agreement. However, firmly making this determination is difficult, given the broad and vague nature of Section 302’s language, and

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93. *Retail Clerks Int’l Ass’n v. Lion Dry Goods, Inc.*, 369 U.S. 17, 28 (1962); Cohen, Santucci & Fritts, *supra* note 35, at 525 (“Section 301 jurisdiction applies to a wide range of labor contracts, and not just a traditional collective bargaining agreement which may be negotiated only if the union has achieved representative status.”). Notably, the decision from which Cohen, Santucci, and Fritts derive this proposition arose from the Second Circuit (*Hotel & Restaurant Employees Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561 (2d Cir. 1993)), that also decided *United States v. Roth*, 333 F.2d 450 (2d Cir. 1964), discussed in Part I.C *supra*. Indeed, “[c]ourts have repeatedly upheld labor-management agreements providing for arbitration over recognition disputes.” *Hotel Emps. Union, Local 57 v. Sage Hospitality Res., LLC*, 390 F.3d 206, 219 (3d Cir. 2004) (referring to *J.P. Morgan*, 996 F.2d 561 (2d Cir. 1993) and *Hotel Emps. Union, Local 2 v. Marriott Corp.*, 961 F.2d 1464 (9th Cir. 1992) as support for this proposition).

94. *See, e.g., L alas, supra* note 11, at 541 (“Agreements that create a ‘framework’ for organizing . . . are also consistent with the Act’s goal of promoting ‘industrial peace’ and allow for more employer free choice, not less.”).

95. *Brudney, supra* note 33, at 861.

96. *Id.*

97. *Lamons Gasket Co.*, 357 N.L.R.B. No. 72, 2011 WL 3916075, at \*4 (Aug. 26, 2011) (internal citation omitted).

98. Cohen, Santucci & Fritts, *supra* note 35, at 521 (emphasis added).

consequently, requires an inquiry into Congress's intent in enacting Section 302.<sup>99</sup>

## 2. Congress's Intent in Enacting Section 302

### a. Construing "Thing of Value" With Reference to Preceding Textual Companion of "Money" in Statute's Text

Courts follow several canons of construction when interpreting statutes.<sup>100</sup> The first and foremost of these canons is the "plain meaning rule," that a court should presume that "Congress says in a statute what it means and means in a statute what it says."<sup>101</sup> However, when a statute's words are ambiguous, as is the case with Section 302 of LMRA, courts properly consider the context in which the words are used in order to read them as a whole and avoid construing statutory phrases by themselves in isolation.<sup>102</sup> In a situation where general word(s) (in this case, "thing of value") follow specific word(s) (in this case, "money") in a statute, the general words should be construed "to embrace only objects similar in nature to those objects enumerated by the preceding specific words."<sup>103</sup>

Construing such employer "organizing assistance," like that provided for in the neutrality agreement in *Mulhall*, arguably would expand the interpretation of "thing of value" to encompass intangible items that have no ascertainable value, rather than restrict the phrase

99. See discussion *infra* Part II.B.2.

100. See, e.g., *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) ("[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation . . .").

101. *Ayes v. U.S. Dep't of Veterans Affairs*, 473 F.3d 104, 108 (4th Cir. 2006) (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted)).

102. *Id.* (citing *United States v. Morton*, 467 U.S. 822, 828 (1984)). In contrast, when a statute's words are unambiguous, then "this first canon is also the last: 'judicial inquiry is complete.'" *Id.* (citing *Germain*, 503 U.S. at 254).

103. *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001)). The tenets of *esjudem generis* ("of the same kind") and *noscitur a sociis* ("a word is known by the company it keeps") are used to prevent "the giving of unintended breadth to the Acts of Congress." *Id.* at 384–85 (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)); see also *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 36 (1998) (characterizing the construing of statutory provision(s) in isolation as the "use of blinders").

to its companion reference to “money.”<sup>104</sup> Any subjective valuation by the union of the employer’s conduct does not automatically demand an abstract interpretation of Section 302, which uses the phrase “thing of value” restrictively in companion with “money,” and potentially undermines the scope of Congress’s intent in enacting this section.<sup>105</sup> Thus, unless an employee challenging the enforceability of a neutrality agreement providing for organizing assistance can establish that the assistance is an asset significant enough to have some sort of “value,” these tenets suggest that the statute should be read restrictively to preserve Congress’s legislative intent.

*b. Lack of Mention in Statute and Legislative History*

Despite the rise and increasing popularity of neutrality agreements in labor union organizing efforts,<sup>106</sup> there is a surprising dearth of mention of these agreements in legislative and administrative materials pertaining to federal labor law outlining unfair labor practices.<sup>107</sup> Granted, when enacting Taft-Hartley, Congress intended to enumerate

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104. Section 302 of LMRA makes it unlawful for “any employer . . . to pay, lend, or deliver . . . any money or other thing of value . . . to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer . . . .” Labor Management Relations Act, 29 U.S.C. § 186(a)(2) (2006) (emphasis added). Such an interpretation would define “thing of value” in the abstract, rather than objectively, and seems to violate this tenet, which demands a restrictive interpretation of this phrase, a general residual category, only with reference to the preceding specific thing of “money.” See *Keffeler*, 537 U.S. at 385 (“[T]he usual rules of statutory construction should [not] get short shrift for the sake of reading ‘other legal process[.]’ [(the general residual phrase at issue in *Keffeler*),] in abstract breadth.”).

105. *Cf. Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 490 (2006) (“Congress expressed the intent to immunize only a subset of postal wrongdoing, not all torts committed in the course of mail delivery.”).

106. See discussion *supra* Part I.B.

107. Simply put, both employers and unions do not enjoy the benefit of comprehensive administrative guidance on the “thing of value” issue in this context. The Department of Labor has mandated disclosure of financial transactions and interest transfers between employers and unions under the Labor-Management Reporting and Disclosure Act, or “LMRDA,” requiring employees to identify these items on a form filed with the Department of Labor. Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401–531 (2006). However, the policy-serving function of this statute only goes so far. As previously discussed, the Fourth Circuit pointed out in *Adcock* that a neutrality agreement or the concessions made therein have no “ascertainable value.” *Adcock v. Freightliner LLC*, 550 F.3d 369, 375 (4th Cir. 2008) (“Congress clearly intended [Section] 302’s ‘thing of value’ to have at least some ascertainable value. In this case, unquestionably, the concessions made by Freightliner, which simply involved allowing the Union access to Freightliner’s employees, have no such whatsoever.”). As a result, no law requiring disclosure of certain financial transactions between an employer and a union can reach neutrality agreements.

practices that would be prohibited, rather than to enumerate those that were lawful.<sup>108</sup> However, Congress has subsequently amended LMRA, and specifically Section 302, without adding any provisions governing neutrality agreements.<sup>109</sup>

In fairness, the argument that because Congress has not legislatively addressed the use of neutrality agreements and organizing assistance provisions within them they do not violate Section 302 of LMRA cuts both ways. Congress did provide several exemptions, nine in total, to Section 302's prohibitions.<sup>110</sup> An exemption for organizing is not included among them, and as a result, some could argue that Congress intended no such exemption by virtue of the principle *expressio unius est exclusio alterius* ("the express mention of one thing excludes all others").<sup>111</sup> Still, Congress's failure to include an exemption for organizing can ostensibly be explained by the virtual, if not total, nonexistence of neutrality agreements at the time LMRA was enacted.<sup>112</sup> In sum: (1) neutrality agreements have been used widely for the past four decades; (2) Congress has revisited the statutory

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108. See, e.g., MILLIS & BROWN, *supra* note 2, at 457 ("[T]he intent of the Congress was to proscribe many types of union behavior designed to obtain labor's objectives . . . [a] list of things remaining lawful is not too significant.").

109. BASF Wyandotte Corp. v. Local 227, Int'l Chem. Workers Union, 791 F.2d 1046, 1053 (2d Cir. 1986) (noting Congress's purpose of preventing bribery and extortion in enacting Section 302 of LMRA and "[i]n enacting amendments . . . Congress reaffirmed the purpose of [Section] 302 as the limited one of 'prevent[ing] bribery, extortion, shakedowns, and other corrupt practices'") (internal citation omitted). Congress amended Section 302 of LMRA in 1959, 1969, and 1973, and more recently, several pieces of legislation to amend LMRA have been introduced in the House of Representatives. Brudney, *supra* note 33, at 841–44; Petition for Writ of Certiorari, *supra* note 83, at 8–9.

110. The exemptions listed in Section 302(c)(1)–(9) of LMRA include (1) payments to an employee or former employee "as compensation for" or "by reason of" his service to the employer; (2) payments to satisfy a judgment or settlement; (3) payments for a commodity at market rate; (4) payments of union membership dues deducted from employee wages; (5) payments to a union trust fund for the benefit of employees, their families, and their dependents; (6) payments to a trust fund for pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeships or training programs; (7) payments to a trust fund for scholarships for employees, their families, and their dependents, for child care centers, or for employee housing assistance; (8) payments to a trust fund for "defraying the costs of legal services for employees, their families, and their dependents for counsel"; and (9) payments to a "plant, area, or industrywide labor management committee" established for a purpose under Section 5(b) of the Labor Management Cooperation Act of 1978. Labor Management Relations Act, 29 U.S.C. § 186(c)(1)–(9) (2006).

111. Respondent Martin Mulhall's Memorandum in Support of the Petition at 10, *Unite Here Local 355 v. Mulhall*, 134 S. Ct. 594 (2012) (No. 12-99), 2012 WL 3613484.

112. The use of neutrality agreements in the employer-union organizing context did not begin until the 1970s and did not reach full proliferation until the 1990s. See discussion *supra* Part I.B.



structure of LMRA several times in this period; (3) Congress has examined the relationship of neutrality agreements to existing federal labor law principles, and; (4) Congress has not legislatively prohibited their use.<sup>113</sup> Consequently, courts that have expressly given more in-depth consideration to Congress's intent when interpreting the phrase "thing of value" (such as the Second Circuit in *Adcock*) have found that common provisions for organizing assistance within neutrality agreements do not implicate this provision.<sup>114</sup>

*c. Failure to Necessarily Corrupt a Union and to Necessarily Implicate Congress's Anti-Bribery and Extortion Purpose in Enacting Section 302*

As previously mentioned, Congress was concerned with bribery, extortion, and the like when it enacted and subsequently amended Section 302 of LMRA.<sup>115</sup> However, provisions for organizing assistance within neutrality agreements may operate merely to do two things: (1) to make the union organization process less contentious and (2) to allow the union to perform its duties if recognized by a majority.<sup>116</sup> To be consistent with Congress's intent in enacting this statute, the provisions should serve core interests of employees and core functions of unions. The agreement should not inhibit individual employees' rights—to join the union or pay dues, to accept union representation if not established by a majority, and to speak out against accepting union representation during the organization process.<sup>117</sup>

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113. As previously noted, several pieces of legislation pertaining to the recognition of unions via neutrality and card check agreements have been introduced in Congress. Brudney, *supra* note 33, at 841–44. For a brief discussion of these attempts, see discussion *infra* Part III.A.1.

114. *Adcock v. Freightliner LLC*, 550 F.3d 369, 375 (4th Cir. 2008) ("Our reading of the statute is consistent with the purposes of [Section] 302.")

115. *See Toth v. USX Corp.*, 883 F.2d 1297, 1300 (7th Cir. 1989) ("It is fairly universally acknowledged that a central purpose of [S]ection 302 as a whole was to prevent employers from bribing union officials."); *see also Turner v. Local Union No. 302, Int'l Bhd. of Teamsters*, 604 F.2d 1219, 1227 (9th Cir. 1979); *Bricklayers Int'l Union, Local 15 v. Stuart Plastering Co.*, 512 F.2d 1017, 1024 (5th Cir. 1975).

116. Charles I. Cohen, *Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?*, 16 LAB. LAW. 201, 201–02 (2000); George N. Davies, *Neutrality Agreements: Basic Principles of Enforcement and Available Remedies*, 16 LAB. LAW. 215, 215 (2000).

117. Petition for Writ of Certiorari, *supra* note 83, at 10.

Moreover, the agreement should not compromise the union's duty of fair representation to the employees.<sup>118</sup>

Certain specific provisions, like those at issue in *Mulhall*, that are less likely on their face to implicate Congress's purpose in enacting Section 302 of LMRA would seem to require the pleading and proving of more facts sufficient to implicate bribery, extortion, and the like. Certain provisions for organizing assistance, like those at issue in *Mulhall* (such as union access to company property and employees' names and addresses), have not been questioned by courts interpreting Section 302's "thing of value" language despite their longstanding use and implementation.<sup>119</sup> Moreover, the upholding of these types of provisions in the face of Section 302 makes more sense when viewed alongside provisions that have been held to violate Section 302, such as those providing for retroactive payments to union employees or monetary kickbacks in exchange for assent to a collective bargaining agreement.<sup>120</sup>

### III. COMING FULL CIRCLE: FAVORING RETAINING EMPLOYER-UNION STABILITY OVER LESS-THAN-THREATENING POLICY CONCERNS

In light of the arguments on both sides of the issue of whether organizing assistance within neutrality agreements should be considered a "thing of value" for the purposes of Section 302 of LMRA, taking a stance on one side is a delicate task that brings several policy considerations into focus. However, many of the concerns held

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118. *Id.* at 9.

119. For support for the proposition that provisions for union access to employer property have been upheld, see, e.g., *Facet Enters., Inc. v. NLRB*, 907 F.2d 963, 983 (10th Cir. 1990) (characterizing plant access as one of the "important areas of labor-management relations"). For support for the proposition that provisions for the giving of employees' names and addresses should survive section 302, see, e.g., *Wyman-Gordon Co. v. NLRB*, 397 F.2d 394, 396 (1st Cir. 1968) ("[W]e are not greatly impressed by the contention that compelling a list of names and addresses forces appellant to . . . give a 'thing of value' to a labor organization, in violation of 29 U.S.C. § 186." (dictum)), *rev'd*, 394 U.S. 759 (1969).

120. See, e.g., *United States v. Philips*, 19 F.3d 1565, 1566-69 (11th Cir. 1994), *amended by* 59 F.3d 1095 (11th Cir. 1995) (examining union officials' acceptance of an unfavorable agreement in exchange for the employer's agreement to make retroactive pension payments for themselves and other union employees); *United States v. Bloch*, 696 F.2d 1213, 1214 (9th Cir. 1982) (dealing with payoffs to union officials so that they would except the employer from a union's standing local hiring requirement), *abrogated on other grounds by* *United States v. Jimenez Recio*, 537 U.S. 270 (2003).

by those who might favor classifying certain forms of organizing assistance contained within neutrality agreements as Section 302 “things of value,” like those at issue in *Mulhall*, are not as grave in practice as they are in theory. For the following reasons, if the Supreme Court reviews this issue, it should not classify such forms of organizing assistance within neutrality agreements as a “thing of value” in a way that would violate Section 302 of LMRA.

#### A. *Some Opposing Policy Considerations*

##### 1. *“Privatizing” Labor Law*

As previously discussed, there are several reasons that both employers and unions enter into neutrality agreements.<sup>121</sup> Unions generally enter into neutrality agreements to increase their membership.<sup>122</sup> However, commentators criticize neutrality agreements by characterizing their use as the “privatization” of labor law.<sup>123</sup> These criticisms focus on the idea that this “privatization has the secondary consequence of placing in the hands of private individuals serving as arbitrators some powers that had previously been the exclusive province of the NLRB, and other powers that even the NLRB never possessed.”<sup>124</sup>

Truthfully, “today the Board-supervised election is all but dying.”<sup>125</sup> However, despite this concern, federal labor law has not prohibited this practice on the part of employers and unions, and has instead retained the parties’ freedom to contract.<sup>126</sup> Granted, the NLRB has commented

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121. See discussion *supra* Part I.B.

122. Cooper, *supra* note 37, at 1589 (“In entering into neutrality/card check agreements, unions have focused on their goal of increasing union representation.”).

123. *Id.* One study examining the use of neutrality agreements in the union-organizing context estimates that a vast majority of these agreements “call[] for some form of dispute resolution” and that “[t]he process most frequently stipulated was arbitration.” Eaton & Kriesky, *supra* note 40, at 48 (noting that more than ninety percent of the agreements analyzed in their study stipulated a method for resolving disputes).

124. Cooper, *supra* note 37, at 1589. “[S]cant attention has been directed to what neutrality agreements require of arbitrators and whether these expectations are consistent with the institutional capacity and role of arbitrators.” *Id.* at 1589–90.

125. Carter & Burton, *supra* note 9, at 173-74 (referring to the sharp decline in union representation petitions filed with the Board between 1997, in which 6,719 were filed, and 2006, in which 3,643 were filed).

126. Davies, *supra* note 116, at 217 (“[I]t is clear that unions and employers can resolve representational

that “the time has come to take a ‘critical look’ at the law regarding neutrality agreements,” as this trend toward recognizing unions via neutrality agreements has grown largely outside of the NLRB’s administrative framework.<sup>127</sup> However, recent legislative efforts to curb or prohibit outright the use of neutrality agreements have not made their way into federal law.<sup>128</sup> For example, in 2002, eight Republican House members, including the majority leader, introduced H.R. 4636, a bill to prohibit card check recognition.<sup>129</sup> In 2004, thirty-three Republican House members co-sponsored H.R. 4343, a similar bill.<sup>130</sup>

In fact, a piece of legislation, entitled the “Employee Free Choice Act,” which would recognize union formation through majority sign-up, has been introduced in very recent Congressional sessions.<sup>131</sup> Support for this bill is more prevalent than for bills that would prohibit the use of card check agreements, as it passed the House once already in 2007, and should it pass both houses in the same Congress, President Obama has indicated his willingness to sign it into law.<sup>132</sup> This suggests that any legislative action on neutrality and card check agreements is more likely to favor privatization of labor union organization rather than rejection of it altogether.

## 2. *Coercion of Disenfranchised Employees to Join a Union*

As previously discussed, employees who sue to enjoin the enforcement of neutrality agreements that provide for organizing assistance on the theory that they constitute a violation of Section 302 of LMRA are largely motivated by their desire not to work as a part of a unionized workforce, as has previously been the case.<sup>133</sup> To serve

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issues in neutrality agreements privately and commit these matters to contracts that will be subject to enforcement under [S]ection 301 and not run afoul of the NLRB’s primary jurisdiction.”)

127. Cohen, Santucci & Fritts, *supra* note 35, at 521–22, 539.

128. Brudney, *supra* note 33, at 841.

129. H.R. 4636, 107th Cong. (2002).

130. H.R. 4343, 108th Cong. (2004).

131. *The Employee Free Choice Act*, INT’L BHD. OF ELEC. WORKERS, <http://www.ibew.org/efca/index.htm> (last visited Nov. 18, 2013).

132. Mark Koba, *Unions Seeking Comeback: Obama ‘Owes Them Big Time’*, CNBC (Nov. 13, 2012, 10:48 AM), <http://www.cnbc.com/id/49762716>.

133. *See, e.g., Mulhall v. Unite Here Local 355*, 667 F.3d 1211, 1213 (11th Cir. 2012), *cert. dismissed*,

this interest, states have provided for a person's "right to work" (either by constitutional or statutory provision) and generally prohibit an employer from requiring an employee to join or to remain a member of a union as a condition of employment.<sup>134</sup>

However, the theory that the use of neutrality agreements leads to undue coercion of employees to join a union does not play out so grimly in practice. Simply put, "there is no basis for inferring that neutrality agreements systemically inhibit the expressive options of employees who wish to oppose unionization."<sup>135</sup> Indeed, a neutrality agreement between an employer and a union does not bind an individual employee, who is not a party to the contract.<sup>136</sup> As a result, employees remain free to speak out against unionization, and empirical studies have shown that "employees resisting unions retain an effective voice."<sup>137</sup> But as a policy matter, the NLRB favors union recognition based on a majority selection and has stated that no opposing policy considerations to bar enforcing neutrality agreements exist, and employees should routinely enjoy the right to opt out of union representation.<sup>138</sup>

Still, despite the fact that neutrality agreements may not violate an employee's individual rights under "right to work" statutes, some argue that their use leads to misconduct in the card signature process that is designed to raise the chances of the campaign's overall success.<sup>139</sup> Three prominent examples of such misconduct on the part

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134 S. Ct. 594, *and cert. denied*, 134 S. Ct. 822 (2013); *Adcock v. Freightliner LLC*, 550 F.3d 369, 373 (4th Cir. 2008).

134. JACKSON, *supra* note 90, at 28, 540. *See generally* FLA. CONST. art. I, § 6 ("The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization."); ALA. CODE § 25-7-32 (2012) ("No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment."); O.C.G.A. § 34-6-23 (2012) ("Any provision in a contract between an employer and a labor organization which requires as a condition of employment or continuance of employment that any individual be or remain a member or an affiliate of a labor organization or that any individual pay any fee, assessment, or other sum of money whatsoever to a labor organization is declared to be contrary to the public policy of this state; and any such provision in any such contract heretofore or hereafter made shall be absolutely void.").

135. Brudney, *supra* note 33, at 848–49.

136. *Id.* at 848.

137. *Id.* at 848–49.

138. *Id.* at 859–60.

139. *Id.* at 856.

of those soliciting employee signatures include (1) misrepresentation, (2) coercion, and (3) improper promises of benefits.<sup>140</sup> However, “[i]n the end, there is no evidence of widespread or systemic misconduct associated with card signatures, and no reason to believe that existing instances of misconduct are not being adequately addressed through case-specific review of alleged abuses.”<sup>141</sup> As a result, adequate remedies exist through unfair labor practice proceedings for such alleged violations, and courts have been careful to ensure employees’ free choice has been preserved.

*B. The Overriding Favorable Policy Consideration: Retaining Employer and Union Autonomy to Negotiate Union Organization and to Respect More Clearly-Established Outer Limits*

The landscape of labor law has changed dramatically over the past fifty years. Specifically, campaigns under neutrality agreements have largely replaced NLRB elections as the preferred method of union organizing and employer recognition of unions.<sup>142</sup> This trend is “part of a larger commitment on the part of unions to modify the NLRB election-based approach to organizing.”<sup>143</sup> Studies have found that, on the whole, unions enjoy a much higher rate of success in campaigns in which neutrality and card check are utilized.<sup>144</sup> Undoubtedly, union management has become more sophisticated in negotiating contractual provisions in organizing agreements to increase the effectiveness of

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140. *Id.* at 860 (“Those soliciting employees’ signatures may provide inaccurate information as to the content or import of the cards, they may exert considerable pressure on employees to sign, or they may promise benefits as an inducement for signatures.”).

141. Brudney, *supra* note 33, at 862 (“When combined with the history of reliance on cards in a range of settings—including when conditions for a fair election exist—and the strong policy favoring voluntary labor-management agreements in general, it seems clear that employers’ willingness to recognize unions based on a card majority does not raise any serious problem of legality under the NLRA.”).

142. *See id.* at 827 (“[A]s union organizing activity has increased, the annual number of Board representation elections has reached its lowest level since the 1940s.”). More recently, in the six-year period from 1998 to 2003, less than one-fifth of newly organized employees did so under the “formerly pre-eminent Board elections process.” *Id.* at 828–29 (emphasis omitted).

143. *Id.* at 828.

144. Eaton & Kriesky, *supra* note 40, at 51–52 (noting that in a study of organizing campaigns from 1983 to 1998, those conducted under neutrality and card check enjoyed a success rate of 78.2%, far exceeding the 45.6% success rate of NLRB elections).

organizing campaigns.<sup>145</sup> Employer neutrality goes a long way to increase the success of an organizing campaign by removing the potential detrimental effects of outward opposition.<sup>146</sup> For such a concession, it stands to bear that employers should enjoy a similar, albeit limited, position to bargain at arm's length.

In *Mulhall*, the union agreed to lend financial support to a ballot initiative pertaining to casino gaming.<sup>147</sup> This specific fact is important because, on the whole, the concession the union made had nothing to do with individual employees' substantive rights. Rather, the parties chose to put into practice commonly-used and historically-upheld provisions to make the process run more smoothly.<sup>148</sup> In other words, "setting the ground rules" hardly suggests improper motives on the employer and union's parts, which would more severely implicate Section 302.

Rather, more substantive provisions (capable of financial valuation) in neutrality agreements should be subject to factual consideration and scrutiny under Section 302 of LMRA. A more proper class of provisions for the purposes of a Section 302 analysis would be those that govern important employment terms and that are normally reserved for later-finalized collective bargaining agreements, where employees maintain more time and a higher interest in what those provisions say. Subjecting these types of provisions to a Section 302 analysis would ensure that the union's duties to employees would not be undercut and that individual employees' rights would not be compromised.

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145. Brudney, *supra* note 33, at 854.

146. L alas, *supra* note 11, at 544–45 (discussing how neutrality agreements "allow[] workers to consider unionizing in relative comfort and security" and "help[] protect employees' ability to choose a union by removing the fear out of the organizing drive"). To these points, L alas also points out that neutrality agreements can quicken the time before an election is held. *Id.* at 545. In a Board election, workers have to wait two months to vote, during which time management mounts a "visceral campaign to turn workers against the union using a variety of fear-inducing tactics." *Id.* However, under a neutrality agreement, workers are sometimes able to participate in an election in a much shorter time, such as a few weeks. *Id.*

147. *Mulhall v. Unite Here Local 355*, 667 F.3d 1211, 1213 (11th Cir. 2012), *cert. dismissed*, 134 S. Ct. 594, and *cert. denied*, 134 S. Ct. 822 (2013).

148. *Id.*

## CONCLUSION

When employers and unions decide collectively to enter into a neutrality agreement to govern the organizing process, both parties have fundamental interests they seek to protect. These interests are so important that they make foregoing an NLRB election a calculated, worthwhile decision. Unions ultimately want their campaign to succeed, as it provides them the opportunity to do what they do best—bargain with management and represent employees. Employers have fundamental interests that they seek to protect as well—namely, their freedoms of speech (to speak or not to), to contract (or not to), and to exercise their property rights in a way in which they see fit.

This Note proposes that resolving the circuit split in favor of not categorically classifying certain organizing assistance provisions in neutrality agreements better serves existing practices that employers and unions undertake at the organizing phase of unionization. As discussed, doing so does not run contrary to the LMRA's language or Congress's intent in enacting and amending it. Moreover, this resolution does not necessarily implicate negative policy implications in practice as much as it does in theory. Under such a construction, employers, unions, and employees alike retain fundamental rights. They do so in a context that promotes a union organization process that is less contentious and allows for employers and unions to realize an accord that will hopefully, in the long run, make their relationship more stable.



