UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MOUNTAIRE FARMS, INC, Employer, and OSCAR CRUZ SOSA, Petitioner and UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 27, a/w UNITED FOOD AND COMMERICIAL WORKERS INTERNATIONAL UNION, AFL-CIO Union,	)	Case 05-RD-256888

BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROPERITY FOUNDATION

Lee A. Steven
Americans for Prosperity Foundation
1310 N. Courthouse Road, Suite 700
Arlington, VA 22201
571-329-1716
lsteven@afphq.org

Counsel for Americans for Prosperity Foundation

September 23, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other

BRIEF OF *AMICUS CURIAE* ON THE QUESTION OF THE CONTRACT BAR DOCTRINE

Pursuant to the Notice and Invitation to File Briefs of the National Labor Relations Board ("NLRB") dated July 7, 2020 in the above-captioned case, together with the NLRB's extension of time to file briefs dated July 23, 2020, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief on the question of whether to eliminate, modify, or retain the Contract Bar Doctrine.

INTEREST OF *AMICUS CURIAE*

AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. As part of this mission, AFPF often appears as *amicus curiae* before courts and agencies.

AFPF has a particular interest in supporting and furthering the rights of workers to choose without impediment whether and to what extent they wish to be represented by a union in their work relationships. The Contract Bar Doctrine undercuts workers' freedom of association and speech, especially as to the choice of who will speak for them before their employers. AFPF believes the doctrine must be eliminated to advance and support workers' rights consonant with the underlying purposes of the National Labor Relations Act ("NLRA") and recent precedent of the United States Supreme Court.

INTRODUCTION

As applied in this case, and absent any exception the Board in its discretion may apply, the Contract Bar Doctrine operates as an election bar, preventing Petitioner and his fellow employees from voting on a valid decertification petition supported by the proper number of signatures. Under this Board-created doctrine, no employee may exercise the right to eliminate or change his union representation for up to three years if there is a valid collective bargaining agreement in place, and then limits the time to petition for a vote to a small 30-day window near the end of that

term. As explained below, the doctrine conflicts with express provisions of the NLRA, which only limits employees' rights to hold an election regarding their union representation if they have conducted a valid election within the previous 12 months. The doctrine also deprives workers of fundamental rights guaranteed under the U.S. Constitution and can no longer be justified as a proportionate means to maintain stability in the workplace. The effect of the Contract Bar Doctrine is to disenfranchise employees, prevent them from associating with whom they wish, and choosing those who would speak on their behalf. For these reasons, the doctrine must be eliminated.

ARGUMENT

The Board should rescind the Contract Bar doctrine. It finds no support in the text of the NLRA, unfairly favors union interests over the constitutional and statutory rights of workers, and serves no necessary or prudential role in safeguarding labor stability.

I. THE TEXT OF THE NLRA DOES NOT SUPPORT THE CONTRACT BAR DOCTRINE.

As the Board is well-aware, the Contract Bar Doctrine finds no support in the express language of the NLRA, the governing statutory regime. The best that can be said of it is that the doctrine is "a discretionary procedure adopted by the Board for reconciling the Wagner Act's goals of promoting industrial stability and employee freedom of choice in the context of representation petitions." *Sarauer v. Int'l Ass'n of Machinists & Aerospace Workers, District No. 10,* 966 F.3d 661, 676 (7th Cir. 2020) (cleaned up); *see also NLRB v. Dominick's Finer Foods, Inc.*, 28 F.3d 678, 683 (7th Cir. 1994) ("The contract bar rule is not statutorily or judicially mandated, but is a creation of the Board.").

If applied in this case, that "discretionary procedure" will operate as an election bar, denying the Petitioner and all other employees who signed the decertification petition any vote for the next three years. But that result cannot be reconciled with the express provisions of the NLRA *guaranteeing* the Petitioner and his co-signatories a right to vote on the decertification petition in

this case. As codified at 29 U.S.C § 159(e)(1), where "30 per centum or more of the employees in a bargaining unit covered by" an applicable collective bargaining agreement file with the Board "a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer." The use of the word "shall" means this provision is mandatory. The only caveat to this express grant to the workers is that no election may be held where a valid election was made "in the preceding twelve-month period." 29 U.S.C. § 159(e)(2); *see also* 29 U.S.C. § 159(c)(3) ("No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held.").

Thus, under the NLRA, the Board is justified in barring a vote on a decertification petition only if (1) a valid election was made (2) within the previous 12 months. The Contract Bar Doctrine violates those limitations, not only by extending the period of the election bar from one year to three years but also by ignoring the requirement that a valid election take place within that period. That is, the Contract Bar Doctrine applies as long as a valid collective bargaining agreement is in place, regardless of whether the employees have voted during that period to appoint or retain the union designated to represent them.

But, as the very first Board decision to consider the idea of a Contract Bar Doctrine stated, agreements affecting the employer-employee relationship are a separate matter from the question of union representation:

> [T]he agreements in nowise prohibit the employees from changing their representatives for bargaining in accordance with the method prescribed. If the employees at the time of signing the agreements preferred that the Association represent them under the agreements but now desire to be represented by the Union, the employer cannot object to such a change of representatives. . . . . The whole process of collective bargaining and unrestricted choice of representatives assumes the freedom of the employees to change their representatives, while at the same time continuing the existing agreements under which the representatives must function.

New England Transp. Co., 1 NLRB 130, 138–39 (1936).

Here the Board recognized that a fundamental purpose of the NLRA is that employees have an "unrestricted choice of representatives." The Act itself expressly states that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives *of their own choosing*, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]" 29 U.S.C. § 157 (emphasis added). The only statutorily mandated limitation to this right of free choice is where the employees have conducted a valid election within the previous 12 months.

It is axiomatic that a Board-created doctrine must fall in the face of a conflicting statutory provision. The Contract Bar Doctrine contradicts the express statutory scheme granting employees the right to choose their own representatives. As such, the doctrine finds no support in the NLRA and should be eliminated.

II. AS APPLIED BY THE BOARD, THE CONTRACT BAR DOCTRINE VIOLATES CONSTITUTIONAL RIGHTS OF WORKERS.

In addition to violating the statutory rights of workers to hold elections concerning their union representation, the Contract Bar Doctrine, in its effect, violates the fundamental constitutional rights of freedom of association and freedom of speech. This result has been clarified explicitly for public employees by the 2018 United States Supreme Court decision in *Janus v. AFSCME*.

Although *Janus* concerned the rights of public sector employees, the rationale of the Supreme Court in finding that, as a matter of constitutional law, such employees cannot be required to pay agency fees as a condition of their employment is relevant to the question at hand. The state law at issue in the case had instituted an agency shop arrangement: public employees who chose not to become members of the applicable union nevertheless were required to pay an agency fee, a percentage of the full union dues designed to cover union expenditures attributable to the union's

collective bargaining and related activities. The Supreme Court found the forced payment of such fees, even if they covered only the union's collective bargaining activities (and thus presumptively benefited the non-union members), constituted compelled speech and that no compelling government interest justified that infringement of an individual's First Amendment rights. *Janus v. AFSCME*, 138 S. Ct. 2448 (2018).

As the Court explained, the First Amendment "forbids abridgment of the freedom of speech. [The Court has] held time and again that freedom of speech includes both the right to speak freely and the right to refrain from speaking at all. *The right to eschew association for expressive purposes is likewise protected*." *Id.* at 2463 (cleaned up) (emphasis added). The Court quoted *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) for the proposition that "Freedom of association . . . plainly presupposes a freedom not to associate."

Moreover, "[w]hen speech is compelled . . . individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning[.]" *Janus*, 138 S. Ct. at 2464. "Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns. As Jefferson famously put it, 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.' . . . Because the compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed." *Id.* (cleaned up).

The relevance of *Janus* and the above quotations to the instant case is two-fold. *First*, *Janus* makes clear that the choice of union representation is not simply a matter of statutory labor law but impacts constitutional rights to free speech and free association. *Second*, forced payment of fees to a union that the employee no longer wishes to associate with is a form of compelled speech that is anathema to the First Amendment. In light of these concerns, it is incumbent on the

Board, a government agency, to interpret and apply the NLRA to safeguard the First Amendment rights of workers in their interactions with the unions who represent them and with this Board's actions impacting the exercise of their statutory rights. Where the employees voice dissatisfaction with the incumbent union and seek to decertify it, as is their right under the NLRA, the Board should honor their rights to associate with whom they wish and to choose those who will speak on their behalf. The Board should not erect extra-statutory barriers, as it has done with the Contract Bar Doctrine, whose effect is to encumber those rights and force workers to subsidize and associate with representatives in whom they have lost confidence.

As one commentary has noted, although "the NLRB has adopted rather flexible rules for when unions can demand bargaining and for the timeliness of filing unfair labor practice charges, it applies a strict and unforgiving approach when employee or employer petitions are involved." Douglas Darch & Jenna Neumann, *NLRB Contract-Bar Rule Continues To Confuse*, Law360 (Nov. 30, 2018), https://bit.ly/362behi. That approach, especially as the Contract Bar Doctrine is a Board-created rule unsupported by the text of the NLRA, substantially burdens worker's First Amendment rights and treats them inequitably as compared to unions. The Contract Bar Doctrine accordingly should be rescinded.

III. THE CONTRACT BAR DOCTRINE IS UNNECESSARY TO SERVE LABOR STABILITY.

> *But the Board must never forget that unions exist at the pleasure of the employees they represent. Unions represent employees; employees do not exist to ensure the survival or success of unions.*
>
> — *MGM Grand Hotel, Inc.*, 329 NLRB 464, 475 (1999) (Member Brame, dissenting).

The Board has recognized that its own precedent does not "warrant prioritizing labor relations stability at the expense of employee free choice. Each finds its basis in the Act itself, and the Board is required to balance the statutory goal of promoting labor relations stability against its statutory responsibility to give effect to employees' wishes concerning representation." *Silvan*

Industries, 367 NLRB No. 28, slip op. at *4 (Oct. 26, 2018). AFPF submits that where there is sufficient employee support for an election petition (as illustrated by this case), any balance between these two, often competing, goals of the NLRA must shift in favor of giving effect to employees' wishes.

This is so because, *first*, employee choice regarding their union representation implicates fundamental First Amendment rights, as discussed above. No similar constitutional protection extends to the concept of labor relations stability.

Second, the overriding purpose of the NLRA is to serve the interests of employees and safeguard their right to associate with a union of their choice. "The *raison d'être* of the [NLRA's] protections for union representation is to vindicate the *employees'* right to engage in collective activity and to empower *employees* to freely choose their own labor representatives . . . [U]nder Section 9(a), the rule is that the employees pick the union; the union does not pick the employees." *Colorado Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031, 1038 (D.C. Cir. 2018). Where there is a conflict between the concrete exercise of free choice by employees and an abstract, essentially nominal, sense of labor stability, which is almost always the case when the Contract Bar Doctrine is invoked, the latter must give way to the former. As the Board has previously recognized, "[m]aintenance of stable collective-bargaining relationships is important, but only when employees have freely chosen whether, and by whom, to be represented." *Truserve Corp.*, 349 NLRB 227, 232 (2007).

Third, where there is sufficient employee support for an election petition, there is objective evidence of employee dissatisfaction with the union. That dissatisfaction, moreover, is of such severity that it has mobilized a sufficient number of employees to take concerted action to change or remove the incumbent union. In such a situation, labor stability is not served by a Board decision to maintain the union in its place of privilege by banning the employees from exercising their right to choose. If

anything, the Board decision undermines stability by forcing a significant number of employees, often a majority, to endure an association to which they no longer assent. The frustration and resentment of being forced to endure the Board's will rather than following their own choice can be unbearable, especially as the net effect of that decision often serves, or is perceived to serve, union and employer interests *at the expense of* employee interests. *See, e.g.*, *Rollins Transp. Sys.*, 296 NLRB 793, 795 (1989) (rejecting the employer's determination of union representation because doing so would "impose a collective bargaining representative on the employees on the basis of the employer's action rather than the employees' free choice"); *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531, 537 (D.C. Cir. 2003) (finding the Contract Bar Doctrine can be used by employers and incumbent unions to "collud[e] at the expense of employees and rival unions. By focusing exclusively on employer and union intent, the Board has neglected its fundamental obligation to protect employee section 7 rights, opening the door to even more egregious violations[.]").

Finally, as Petitioner's merits brief explains, real world "experience shows the contract bar is unnecessary for industrial stability. . . . Although five-year agreements provide two fully 'open' years at the agreements' end, there has not been a rash of decertification elections that follow the first three years just because a bar does not happen to exist for those years." Pet'r's Br. on the Merits, *Mountaire Farms, Inc.,* Case 05-RD-256888, at 10 (Aug. 21, 2020). In addition, just as the first NLRB case to consider a contract bar rule found (*see New England Transp. Co.*, 1 NLRB at 138–39), a collective bargaining agreement can and does stay in place even where employees successfully petition to change their union representation. Thus, there is nothing inherently disruptive to labor relations by the mere fact of changing union representation, and just because employers may have to interface with different union representatives does not mean labor stability is undermined.

As the Contract Bar Doctrine does little to serve labor stability and, in any event, improperly undercuts the right of employees to choose their union representation, the doctrine should be eliminated.

CONCLUSION

For the above reasons, as well as those articulated by Petitioner, the Board should eliminate the Contract Bar Doctrine. The doctrine disenfranchises employees and prevents them from associating with whom they wish and choosing those who would speak on their behalf. As the doctrine is unsupported in the text of the NLRA, improperly interferes with the First Amendment rights of employees, and is not essential to preserve labor stability, the Board should no longer apply it in any further matter.

Dated: September 23, 2020

Respectfully submitted,

/s/ Lee A. Steven
Lee A. Steven
Americans for Prosperity Foundation
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
(571) 329-1716
lsteven@afphq.org

Counsel for Americans for Prosperity Foundation

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of *Amicus Curiae* Americans for Prosperity Foundation was e-filed with the NLRB's Executive Secretary and served via email on the following parties or counsel this 23rd day of September, 2020:

Sean R. Marshall, Regional Director
National Labor Relations Board, Region 5
Bank of America Center, Tower II
100 S. Charles Street, Ste. 600
Baltimore, MD 21201
Sean.Marshall@nlrb.gov
Andrea.Vaughn@nlrb.gov

Barry Willoughby, Esq.
Adria Martinelli, Esq.
Young Conaway Stargatt & Taylor, LLP
Rodney Square, 1000 North King Street
Wilmington, DE 19801
bwilloughby@ycst.com
amartinelli@ycst.com

Joel A. Smith, Esq.
Christopher R. Ryon, Esq.
Kahn, Smith & Collins, P.A.
201 N. Charles Street, 10th Floor
Baltimore, MD 21201
smith@kahnsmith.com
ryon@kahnsmith.com

Glenn M. Taubman
Angel J. Valencia
Aaron B. Solem
Alyssa K. Hazelwood
William L. Messenger
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
gmt@nrtw.org

/s/ Lee A. Steven
Lee A. Steven
Counsel for Americans for Prosperity Foundation