No. 08-1319

IN THE
SUPREME COURT OF THE UNITED STATES

RONNIE ADCOCK et al.,
Petitioner,

v.

FREIGHTLINER LLC et al.,
Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF THE PETITIONER

Maurice Baskin
Venable LLP
575 7th St., N.W.
Washington, D.C.
(202) 344-4000

Counsel for Amici

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

The National Federation of Independent Business Small Business Legal Center (NFIB) and the Society for Human Resource Management (SHRM), by undersigned counsel, hereby move pursuant to Court Rule 37 for leave to file a brief as *amici curiae* in support of the Petition for Writ of Certiorari in the above-captioned matter. As grounds for this motion, the *Amici* state as follows:

1. NFIB is the nation's leading small business association, with offices in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. The Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Both NFIB and SHRM have filed *amicus* briefs with this Court on issues of great importance to their members and to the business community as a whole.

2. NFIB AND SHRM seek leave to file this *amici* brief in support of the Petitioner because the Petition raises issues of great importance to the business community. In particular, NFIB and SHRM wish to bring to the Court's attention the adverse impact on public policy and labor law generally if the Fourth Circuit's decision is allowed to stand. The Fourth Circuit's misreading of LMRA Section 302's "thing of value" prohibition not only creates a conflict among the circuits, but will also improperly encourage unions to extort valuable organizational assistance from employers, violating the plain language of section 302.

3. The *Amici* have timely informed counsel for all parties of their intent to file this *amici* brief. The Petitioners and the Union Respondent have consented to this filing but Respondent Freightliner has declined to do so.

Wherefore, for the reasons above stated, NFIB and SHRM request that their motion for leave to file the attached brief as *amici curiae* be granted.

Respectfully submitted,

Maurice Baskin
Venable LLP
575 7th St., N.W.
Washington, D.C. 20004
(202) 344-4823

Counsel for *Amici*

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The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center), a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's leading small business association, with offices in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents about 350,000 member businesses nationwide. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

The Society for Human Resource Management (SHRM) is the world's largest association devoted to

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[1] Pursuant to Supreme Court Rule 37.2, the *Amici* state that all parties have consented to the filing of this brief, except for Respondent Freightliner. Therefore, a motion for leave to file is being submitted together with this brief. Pursuant to Supreme Court Rule 37.6, the *Amici* further state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

NFIB AND SHRM are filing this *amici* brief in support of the Petition because the Petition raises issues of great importance to the business community. In particular, NFIB and SHRM wish to bring to the Court's attention the adverse impact on public policy and labor law generally if the Fourth Circuit's decision is allowed to stand.

SUMMARY OF ARGUMENT

The Fourth Circuit's failure to enforce the plain language of Section 302 leaves employers at the mercy of union corporate campaigns whose primary purpose is to extort organizational assistance. Such assistance is inherently valuable to unions, and that is why they are willing to spend significant resources on corporate campaign pressure tactics in order to obtain it. Many of the *Amici's* members have been the targets of such campaigns. Employers require the protection of Section 302 in order to remove the incentives that currently exist for unions to engage in corporate campaigns. This Court's review of the Petition is urgently required in order to restore meaning to Section 302 by recognizing that organizational assistance is a "thing of value" which unions should not be allowed to extort.

ARGUMENT

I. ABSENT REVIEW BY THIS COURT, THE FOURTH CIRCUIT'S MISREADING OF SECTION 302'S "THING OF VALUE" PROHIBITION WILL IMPROPERLY ENCOURAGE UNIONS TO EXTORT VALUABLE ORGANIZATIONAL ASSISTANCE FROM EMPLOYERS, VIOLATING THE PLAIN LANGUAGE OF SECTION 302.

By declaring that employer assistance to union organizing is not a "thing of value" within the meaning of Section 302, the Fourth Circuit's decision allows unions to put pressure on employers to obtain such assistance, including access to private property, paying for and conducting mass meetings of employees, communications, and confidential information. Union pressure tactics against many employers, including members of the *Amici*, are becoming widespread because of the courts' failure to enforce Section 302 according to its plain meaning and original intent. The *Amici* are therefore submitting this brief in order to make the Court aware of the adverse continuing impact on the business community that will result from the Fourth Circuit's erroneous decision, absent review by this Court.

As explained in the Petition, Section 302 was intended "to deal with 'extortion or a case where the union representative is shaking down the employer.'" *Arroyo v. United States*, 359 U.S. 419, 426 n.8 (1959)

(quoting 93 Cong. Rec. 4746 (Sen. Taft)). Congress sought to "prohibit[ ], among other things, the buying and selling of labor peace." S. Rep. No. 98-225 (1984), reprinted 1984 U.S.C.C.A.N. 3182, 3477. *See also* S. Rep. No. 86-187 (1959), reprinted 1959 U.S.C.C.A.N. 2318, 2329 (congressional intent that the statute be "applicable to all forms of extortion or bribery in labor-management relations.").

Significantly, the statute does not merely prohibit payment of money to union agents who already represent the employer's employees. Instead, Section 302 prohibits both the payment of "money *or* other thing of value" (emphasis added); and the Act expressly prohibits employers from providing such things "to any labor organization ... which ... seeks to represent ... any of the employees of such employer."

Many employers have already become targets of union "corporate campaigns" whose stated purpose is to pressure them to enter into organizing assistance agreements. These union campaigns are unquestionably a form of extortion designed to gain something from employers that has great value to unions, *i.e.*, assistance in organizing the employers' employees. *See* Northrup & Steen, *Union 'Corporate Campaigns' as Blackmail: the RICO Battle at Bayou Steel*, 22 Harv. J.L. & Pub. Pol'y 771, 779-93 (1999).

Though not addressed by the Fourth Circuit, union corporate campaigns have been acknowledged by other courts as involving a "'wide and indefinite range of legal and potentially illegal tactics," including "'litigation, political appeals, requests that

regulatory agencies investigate and pursue employer violations of state and federal law, and negative publicity campaigns aimed at reducing the employer's goodwill with employees, investors, or the general public.'" *Food Lion, Inc. v. UFCW*, 103 F.3d 1007, 1014 n.9 (D.C. Cir. 1997)); *see also Diamond Walnut Growers v. NLRB*, 113 F. 2d 1259 (D.C. Cir. 1997); *Smithfield Foods v. UFCW*, 585 F. Supp. 2d 789, 795-97 (E.D. Va. 2008).

Richard Trumka, Secretary-Treasurer of the AFL-CIO, has similarly stated: "Corporate campaigns swarm the target employer from every angle, great and small, with an eye toward inflicting upon the employer the death of a thousand cuts rather than a single blow." Manheim, *The Death Of A Thousand Cuts: Corporate Campaigns And The Attack On The Corporation* (Lawrence Erlbaum Assoc. 2001). *See also* La Botz, *A Troublemakers Handbook* 127 (Labor Notes 1991) ("Every law or regulation is a potential net in which management can be snared and entangled. A complaint to a regulatory agency can cause the company managerial time, public embarrassment, potential fines, and the cost of compliance.").

The result of such union campaigns is often a perversion of the union organizing process, having little to do with the wishes of employees to organize or refrain from organizing, and having much more to do with the great expense to which targeted employers are subjected and what they will do to end the extortion. *See* Northrup, *Corporate Campaigns: The perversion of the Regulatory Process*, 17 J. LAB. RES. 345 (1996). Union corporate campaigns have

been directly connected with demands from the unions to targeted businesses for "top down" organizing assistance agreements. *See* Ellis, *Unions Use Smear Tactics in Corporate Campaigns,* HumanEvents.com (April 23, 2007); Stewart, *"Neutrality" and "Card Check" Agreements: Union Assaults On Employee Rights And The Integrity Of The National Labor Relations Board*, Vol. 27 J. Lab. Res. 443 (Fall 2006). *See also* Eaton & Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 Indus. & Lab. Rel. Rev. 42 (2001); Hiatt & Jackson, *Union Survival Strategies for the Twenty-First Century*, 12 Lab. Law. 165, 176 (1996).

It is also well documented that union success rates in organizing campaigns increase where the union is able to obtain employer assistance. *See* Cohen, *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, 523 (2006); Eaton & Kriesky, *supra*, 55 Indus. & Lab. Rel. Rev. at 51-53; Cooper, *Privatising Labor Law: Neutrality/Check Agreements And The Role Of The Arbitrator,* 83 Ind. L.J. 1589, 1593-94 (2008).

In any event, common sense dictates that unions would not engage in the level of expense and effort required to sustain such corporate campaigns, often over many years, if they did not assign considerable value to the organizing assistance that they demand from the targeted employers. This fact alone belies the Fourth Circuit's claim that the types of organizing assistance at issue in this case are not

"things of value" to labor unions, which Section 302 does not allow employers to provide.

Not all "neutrality agreements" are equal in the eyes of the law. *See* Cohen, *supra*, 20 Notre Dame J.L. Ethics & Pub. Pol'y 521, 523 (2006).[2] Some pre-recognition agreements may be truly "neutral," whereas those like the agreement at issue here go beyond mere neutrality by unlawfully "assisting" union organizing. The Fourth Circuit acknowledged that the National Labor Relations Board (NLRB) engages in "intensive inquiry" of individual neutrality agreements in order to determine whether particular provisions constitute unlawful "assistance" to unions under Section 8(a)(2) of the National Labor Relations Act. Pet. App. 13a-14a, n.1. Yet in the present case, the court of appeals refused to meaningfully analyze the specific benefits afforded to the union by the employer under their current agreement. Had the court done so, or allowed the Petitioner to offer proof of the tangible value of such benefits, the court should have found that the agreement provided a thing of value to the union that violated Section 302.

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[2] As described by Cohen's article: "The elements of 'typical' neutrality agreements fall across a wide continuum of 'intrusiveness,' from those that are moderately intrusive of an employer's operations and the activities of the affected employees, to those that significantly impact operations and activities." *Id.* The provisions of the agreement at issue are among the most intrusive, thereby providing the greatest possible organizing assistance to the union, and clearly a "thing of value."

The Fourth Circuit ultimately did not address some of the most egregious aspects of the agreement at all, instead lumping all of the agreement's provisions together as mere "ground rules" for organizing. Pet. App. 10a.[3] The court specifically failed to address the company's agreement to make its employees available on paid time (as well as on company property). By thus declining to examine the true value of individual aspects of the agreement, the court of appeals abdicated its responsibility to enforce the plain language of Section 302.

The *Amici* agree with the Petitioner that the Fourth Circuit's decision, along with the holding of the Third Circuit in the *Sage Hospitality* case,[4] creates a conflict in the circuits as to the meaning of the term "thing of value." Without repeating the Petitioner's analysis here, it is undeniably important to law enforcement generally that common terms be consistently defined across the several criminal statutes where such terms are used. The Fourth Circuit departed from this principle without explanation or serious analysis. For this reason as

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[3] The Fourth Circuit thus gave little attention to the fact that the agreement at issue here was found by the NLRB's General Counsel to violate Section 8(a)(2) of the Act, a finding which implicitly conveys that the agreement gave an unusually valuable benefit to the union which should have implicated the "thing of value" prohibition of Section 302. See Pet. App. 20a.

[4] *Hotel Employees Union v. Sage Hospitality*, 390 F. 3d 206 (3d Cir. 2004).

well, the Petition should be granted and consistency in law enforcement should be restored.

The net effect of the court of appeals decision is to create a perverse incentive for unions to extort organizing assistance from employers using the device of corporate campaigns. This was not the intent of Congress, as evidenced by the plain language of Section 302. Organizing assistance, at least in the forms presented by the agreement at issue here, is certainly a thing of value which unions should not be allowed to extort from employers in order to "seek to represent employees." *Id.* The Petition should therefore be granted so that the balance of labor relations can be restored.

CONCLUSION

For the reasons set forth above and in the Petition, the Petition should be granted.

Respectfully submitted,

Maurice Baskin
Venable LLP
575 7th St., N.W.
Washington, D.C.
(202) 344-4000

Counsel for *Amici*