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The Worker Center Movement and Traditional Labor Laws:
A Contextual Analysis

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PRELUDE

The workers at Daniel, an upscale restaurant in Manhattan, believed their employer was violating the law. They complained of numerous wage and hour violations and also believed the employer had engaged in unlawful discrimination, sexual harassment, and retaliation. They approached a nonprofit organization that assists restaurant workers, who in turn contacted several lawyers who believed the workers might have a colorable legal claim. Together with the nonprofit, the workers decided to file suit.

However, the nonprofit first sought to address the problem outside of the courts. Before initiating the lawsuit or engaging in any protest activity, the organization drafted a demand letter with a request to meet with the management of the restaurant. With the possibility of settling the issue and avoiding litigation, the restaurant agreed.

At the meeting, the nonprofit presented a list of demands that had been generated by the Daniel workers in meetings with the nonprofit. True to its mission, the nonprofit sought to reach a solution with the employer that would improve the conditions of all of its workers, not merely those who initially raised the complaints. Therefore, in addition to back pay for the complaining workers, the nonprofit put forth a comprehensive proposal, which included: wage increases for bussers, a promotion policy, installation of a punch card system for “back of the house” employees, sick days, the posting of labor laws, training of the Employer as to labor laws, a uniform allowance, a sexual harassment policy, the development of a procedure for dealing with managers under the influence of a substance, a progressive discipline policy, a grievance procedure, a seniority provision for bussers, and an “on-call” system.

The proposed agreement went further, with two features meant to assure compliance with the agreement. First, the agreement specified that in the event of a planned discharge, the employer must give the worker center three days notice so that they may assess whether the motive is prohibited retaliation. Second, either party has the right to take disputes over compliance with the agreement to arbitration by a third party during the effective period of the settlement.

The nonprofit and restaurant met numerous times in order to hash out an agreement.

But Daniel rejected their offer, and things got ugly.¹ The nonprofit organized demonstrations near the entrances to the restaurant, in which workers chanted, made noise, passed out handbills, carried picket signs, and displayed a giant inflatable cockroach. The protests lasted for many weeks.

The employer, for its part, sought legal action. But it didn’t go to a court of law—it went to the National Labor Relations Board (NLRB). Their contention? That the organization in question, the Restaurant Opportunities Center of New York (ROC-NY) was a “labor organization” under the National Labor Relations Act (NLRA), and that its activities constituted a union unfair labor practice—picketing the employer with the goal of obtaining voluntary recognition without filing an election petition within a reasonable period of time, under NLRA Section 8(b)(7)(C).²

But ROC-NY was not a union. Although the Hotel and Restaurant Employees Union (HERE) Local 100 had played a role in the formation of the organization, and ROC-NY had initially received several contributions from the union’s charitable arm, it did not itself engage in collective bargaining or seek to certify itself as the exclusive representative of workers under the Act.

¹ A final settlement was eventually reached based on an agreement substantially similar to the one described above. *See infra* Section II.B.3.b; Adam B. Ellick, *New York Chef Settles Bias Lawsuit*, N.Y. TIMES, July 31, 2007, at B3.

² 29 U.S.C. 158(b)(7)(C).

Faced with this anomaly, the regional NLRB office who had received the restaurants' complaint submitted the cases for advice. The Associate General Counsel of the NLRB Division of Advice concluded that ROC-NY was not a labor organization under Section 2(5) of the Act,³ and the Regional Director subsequently refused to issue a complaint. The NLRB General Counsel upheld this refusal on appeal.⁴

And thus the status of worker centers under the NLRA seemed resolved, and the issue would appear to have reached a standstill. A similar result had been reached some thirty years prior, when the NLRB ruled that a worker advocacy organization known as the Center for United Labor Action, which had picketed a Rochester department store asking consumers to stop patronizing it until it agreed to cease stocking the precuts, was not a "labor organization" under the Act, and thus could not have violated the Act's restrictions on secondary boycotts by labor organizations.⁵

However, this outcome was contrary to the opinions of several labor law scholars and lawyers.⁶ As non-union worker organizations like ROC-NY continue to grow, the question of their status under the NLRA has likely not yet been finally determined.

I. Introduction

A new crop of worker advocacy organizations has grown up in the last decade, and has coalesced into an organizational form known as the "worker center." Just as worker centers have tended to shy away from utilizing NLRB processes to protect worker rights, the status of worker centers under the NLRA has remained cloudy and subject to debate. Specifically, the NLRB and the courts have not addressed whether organizations like worker centers, which seek to improve the lot of employees in marginal industries but in most cases do not aspire to negotiate with their employers, are statutory labor organizations. As the ROC-NY example indicates, worker centers that use aggressive tactics that constrain employer prerogatives will inevitably face employer-initiated litigation seeking to restrict their activities, invoking the various restrictions of the NLRA that hinge upon the "labor organization" definition. In this paper, I explain how the Act's protections can be utilized by worker centers, and suggest a framework that adjudicators can use to address the question of worker centers' status under the Act.

The NLRA is a mostly unexplored area for worker centers. As discussed throughout this paper, engaging the nation's labor laws has risks as well as potential opportunities. Although worker centers can assist workers in using the rights the NLRA guarantees to all "employees" under Section 7 of the Act, they must be wary of the negative consequences that may result if they are categorized as NLRA "labor organizations," which would subject them to various restrictions built into the law. Classification as a "labor organization" could also subject a worker center to the requirements of the Labor Management Reporting and Disclosure Act (LMRDA) of 1959,⁷ which includes financial reports to the U.S. Department of Labor and

³ Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB to Celeste Mattina, Reg'l Dir., Region 2, NLRB, regarding Rest. Opportunities Ctr. of N.Y., Cases 2-CP-1067, 2-CP-20643, 2-CP-1071, 2-CB-20705, 2-CP-1073, and, 2-CB-20787 (Nov. 30, 2006), available at http://www.nlr.gov/shared_files/Advice%20Memos/2006/2-CP-1067.pdf [hereinafter Kearney, *ROC-NY Advice Memo*].

⁴ Letter from Ronald Meisburg, General Counsel, NLRB to Peter M. Panken, Esq., Epstein, & Pecker & Green, PC (Mar. 19, 2007) (on file with author).

Advice memoranda are sought by the Regional Directors and the General Counsel to determine whether to investigate and pursue unfair labor practice charges in novel cases. Unless the General Counsel issues a complaint, the case will not be presented before the NLRB for adjudication. See 29 U.S.C. § 153(d).

⁵ Center for United Labor Action, 219 N.L.R.B. 873 (1975). See discussion *infra* Section VI.C.1.

⁶ See discussion *infra* Section VI.A.

⁷ Landrum-Griffin Act, 29 U.S.C. §§141-144, 167, 172-187 (2006).

regulation of internal governance practices. In order to make clear what is at “stake” for worker centers with national labor laws, this paper discusses the positive rights, negative possibilities, and collateral consequences posed by the NLRA, LMRDA, and other laws related to labor.

First, in the following section, I discuss the emerging worker center movement, identifying the key features of worker centers that bear on their treatment under federal labor laws, and profiling four organizations that exhibit different tendencies within the worker center movement. Part III is a systematic overview of how worker centers can use the employee protections offered by the NLRA, in particular the right to engage in concerted activity for the purpose of mutual aid or protection. As this section demonstrates, many worker center organizing activities will receive protection under the Act, and the jurisdictional limitations on coverage for the most part will not affect worker centers. However, recent cases suggest that certain types of concerted activity involving charged political speech, such as missing work to participate in mass rallies for immigration reform, may not receive the Act’s protection. Section IV canvasses the negative implications of federal labor law for worker centers, which mostly apply only if the organization in question is deemed a “labor organization.” For example, the NLRA restricts picketing by labor organizations in certain situations where a union election has recently been held, as well as most forms of secondary boycotts. The NLRA also restricts aspects of organizational form and operations, such as by requiring that hiring halls be non-discriminatory, and disallowing labor organizations to receive funds from employers. Potentially more worrisome is the LMRDA, which mandates that financial and other reports be filed with the federal government, and grants members of labor organizations a Union Bill of Rights and more possibilities to bring suit. Lastly, Section IV discusses other consequences of the Act, such as exemption from antitrust liability for the actions of labor groups and assesses whether the exemption applies to worker centers.

The remaining sections pick up on a larger debate about how worker centers should be treated under the Act. I begin in Section V by discussing in broad terms three different schools of statutory interpretation, and how the NLRB approaches questions of statutory interpretation. In Section VI I present three ways in which the question of whether some group is a “labor organization” may be approached. The first, which I dub the “traditional approach,” applies the “labor organization” definition to novel situations without reference to the legal or social context in which the question is raised. However, based on recent case law that has increased the Act’s flexibility to allow some internal employee participation plans for limited purposes, much worker center activity, and even dealings with the employer, will not rise to the level required to make out a statutory labor organization.⁸

The remaining two approaches examine the “labor organization” question contextually, both with regard to the legal setting in which the question is raised and the broader factual scenarios envisaged by the Act’s founders as subjects of regulation. Through analysis of past cases, I attempt to demonstrate that the Board has always been sensitive to such contextual factors and purposive concerns. In fact, different rules seem to apply in different contexts; not only does the definition of “labor organization” seem to apply differently to various manifestations of worker activity, but more surprisingly, the term seems to take on different meaning depending on the statutory context in which it is raised.

Turning towards the nature of worker centers as hybrid social movement organizations that focus on the workplace, I examine how similar organizations have been treated by the Act in the past, and the underlying constitutional concerns that weigh against regulation of such organizations under traditional labor laws. In the background of this analysis are historical realities that should inform how the law develops to meet a new form of worker advocacy

⁸ See *infra* Section VI.A.2.c.

organization. The rise of worker centers takes place against an economic and political backdrop very different from that faced by the NLRA's drafters. While the labor movement in this country has secured a relatively well-off existence for those lucky enough to be union members, the norm of unionization as well as the viability of the NLRA faces considerable doubt as it marches on past its seventieth year in existence. It is not surprising, then, that most worker centers have forgone traditional representation processes in favor of private litigation based on federal and state employment laws concerning wages, hours, and occupational safety. Rather than building a labor aristocracy, worker centers target the poorest workers who have the least stable employment. The immediate goal of such centers is not to build middle-class citizens, but to ensure minimum compliance with the law. As such, the worker center movement shares a common heritage with the 1960s civil rights movement: in the earlier struggle, participants waged a political and legal fight for equal treatment under the law, and a social fight to eliminate a system of second-class citizenship. Today's marginal and often undocumented foreign workers share this cause and also wage their fight on these levels.

Therefore, it is not surprising that worker centers have made recourse to civil rights rhetoric and tactics to improve the conditions of the workers they support. Each of these tactics, including the publicized making of demands, the holding of rallies, consumer leafleting, and the initiation of lawsuits, have been accorded some degree of First Amendment protection. Looking at both the constitutional norms underlying worker center activities most likely to be challenged, as well as the purpose of the NLRA provisions most likely to be used to restrict those activities, I argue that the NLRB and the courts should be wary in subjecting worker centers to the limitations of the Act. However, in their protests, worker centers can easily be robbed of their cloak of civil rights petitioners to be left simple labor picketers. To the extent that worker centers approximate the functions and purposes of labor unions, this outcome seems appropriate.

Therefore, a principal goal of this paper is to provide guidance to worker centers on how to stay on the permissible side of the labor organization classification, as well as how to make the most of the protective aspects of labor law.

II. The Worker Center Movement

A. Defining the Worker Center

With over 130 worker centers in the United States today assisting low-wage workers and targeting employers in a variety of industries, the question of how the law conceives this somewhat novel organization remains unsettled.

Worker centers, at their most basic, are local nonprofit organizations that provide assistance to low-wage workers. Many are tied to specific ethnic communities and often focus on immigrant workers. Their missions vary: some are basic clinics that provide advice and legal services, others organize workers to become active advocates, still others mount campaigns to target specific employers, or to change state and local laws.

Although there is a long history in this country of community-based efforts to assist poor and immigrant workers, in the past thirty years worker center organizations, although disparate in form and focus, have coalesced into something of a movement. Janice Fine, in her 2006 book, *Worker Centers: Organizing Communities at the Edge of the Dream*, provides an in-depth overview of this emerging movement.⁹

⁹ JANICE FINE, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* (2006). Fine defines worker centers as "community-based mediating institutions that provide support to and organize among communities of low-wage workers." *Id.* at 11. According to Fine, there were 137 such worker centers in this country as of May 2005, 122 of which she identified as specifically catering to immigrants. This is a dramatic

There are two basic and interrelated explanations for the rise of worker centers. In part, these centers have emerged as a response to the increasing numbers of vulnerable immigrants working in industries that are abusive or at least fail to meet minimum employment standards set by law. Worker centers also have arisen to fill a vacuum of workplace leadership in industries in which unions have, for one reason or another, failed to establish any substantial presence.¹⁰

B. Worker Center Activities & Legal Status

As yet, the status of these new worker organizations is not clearly defined under existing labor laws. While all workers who qualify as “employees” under the NLRA have a protected right to engage in certain concerted activities,¹¹ some worker centers must worry about the negative side of labor law regulation—the possibility that some workers, because they engage in activity similar to that of traditional labor unions, will be subject to restrictive regulations affecting unions. However, for the most part, worker centers eschew the collective bargaining role common to traditional unions. In the words of Janice Fine, “most worker center, even those with a strong industry-specific focus, have not yet become full-blow unions. But perhaps a better way to understand today’s industry-based efforts of worker centers is that they are functioning as ‘preunions’ that are laying the groundwork for a more systematic union organizing effort.”¹²

For purposes of analyzing how labor laws bear on worker center activity, worker center organizing activity can be conceptualized as having a political face directed at social-movement building and an employer-directed face more focused on individual workplaces. Worker centers generally engage in three basic types of activities. First, centers deliver services, such as providing legal representation to recover unpaid wages, rights education, English classes, and access to community resources. Second, centers engage in advocacy, by publicizing information about low-wage industries, attempting to change the law, working with government agencies regarding enforcement of employment laws, and bringing lawsuits against employers. Third, centers organize workers, with the aim of building lasting organizations and developing leaders.¹³ Indeed, what makes worker centers unique is the way in which they bring these elements

increase from the 1990s, when there were as few as twenty-five worker centers nationwide. See Steven Greenhouse, *Immigrant Workers Find Support in a Growing Network of Assistance Centers*, N.Y. TIMES, Apr. 23, 2006, at A17.

¹⁰ For a description of worker center as filling the gap left by unions, see Saru Jayaraman and Immanuel Ness, *Models of Worker Organizing*, in *THE NEW IMMIGRANT WORKFORCE 71* (Saru Jayaraman & Immanuel Ness, eds. 2005). Fine recounts the emergence of African American worker centers in the South that arose in the late 1970s and early 1980s in response to the rise of manufacturing and “big box” retail, the lack of labor unions to organize them, and racism in employment. *Id.* at 9. She focuses particularly on immigrant worker centers, which have often emerged as offshoots of social service agencies or other nonprofits and have coincided with immigration waves and settlement patterns. In Fine’s survey, 23 percent of worker centers were founded by ethnic non-governmental organizations, 22 percent by churches, Catholic Charities, or other faith-based community organizing projects, and 27 percent by a combination of legal service organizations, social service agencies, and community-based organizations. Five percent grew out of Central America solidarity movements who assisted refugees from those countries, and a remaining 23 percent either grew out of unions and union organizing drives, or resulted from failed union drives. *Id.* at 14-15 & fig. 1.4

A first wave of flagship organizations grew up in several major cities in the 1970s and 1980s, followed by another crop in the late 1980s and 1990s with new groups of Latino and Southeast Asian immigrants in urban areas, and a third wave since 2000, which has spread the earlier model to more suburban and rural areas and among a greater range of ethnic groups. *Id.* at 9.

¹¹ See *infra* Section III discussing protected concerted activity.

¹² FINE, *supra* note 9, at 247.

¹³ *Id.* at 2.

together.¹⁴ By all accounts, worker centers are generally diverse multi-service organizations whose specific features often vary depending on the local context in which they operate.¹⁵

The organizational structure of worker centers and their relationships with other organization may also affect their treatment under the law. Worker center organizational structures vary widely, although most assume the form of non-profit organizations, and share a family resemblance with respect to their functions that makes discussion of a worker center “movement” appropriate. While worker centers operate for the most part independently of one another and in a local context, there are national networks of worker centers that are giving shape to a national identity for the movement.¹⁶ Some worker centers also have relationships with unions, but generally do engage in joint organizing campaigns.¹⁷

Of the organizations Fine surveyed, fifty-six percent engaged in industry-specific organizing, meaning they build organizations of workers and engage in campaigns intended to improve wages and working conditions in a particular industry and in some geographic area. The remaining forty-four percent organize workers in a specific geographic area but across a range of industries, and with actions that are not industry specific.¹⁸ Of those centers that organize by industries, the most common industries were: Day labor/Construction (25%), Hotel/Restaurant/Casino (19%), Agricultural (16%), Domestic Workers (13%), Healthcare (6%), Manufacturing (6%), Poultry (6%), Temporary workers (6%), and Workfare/welfare (3%).¹⁹

In order to distinguish the worker centers that I argue should not be subjected to labor law regulation, from those worker centers whose activities make such regulation appropriate, I have identified the following features that are relevant to the status of worker centers in making use of the rights, and subject to the restrictions, of traditional labor laws:

- “Employee” status under the Act
- Industry vs. non-industry focus
- Employer-targeting vs. general advocacy
- Tactics & use of Collective action
- Negotiation efforts

The next section examines worker center activity in each of these areas.

C. Worker Center Profiles

Because worker centers are diverse organizations based in local conditions, aggregate descriptions only go so far. To assess how labor laws may bear on worker centers, it is important to understand the actual dynamics of worker center activity. To this end, in this section I profile

¹⁴ According to Fine, it is “[t]he combination of *organizing* with service and advocacy [that] sets these centers apart from other worker centers and immigrant service organizations.” *Id.*

¹⁵ Fine has identified the following features that most worker center share: (1) hybrid organization; (2) service provision; (3) advocacy; (4) organizing; (5) place-based rather than work-site based; (6) strong ethnic and racial identification; (7) leadership development and internal democracy; (8) popular education; (9) thinking globally; (10) a broad agenda; (11) coalition building; (12) small and involved memberships. *Id.* at 12-14. *See also* The North American Alliance for Fair Employment (NAFFE), *Working Paper: Worker Center Strategies* (2002), available at http://www.fairjobs.org/fairjobs/reports/wcs_intro.php (identifying ten broad categories of worker centers).

¹⁶ Collectively, the three largest networks include fifty-one worker centers. *See id.* chapter 10. These networks are the National Day Laborer Organizing Network (NDLON), Enlace, and Interfaith Worker Justice. NDLON, which was founded in 2001, has twenty-nine day-laborer organizations as affiliates which the network convenes through regular conference calls and conventions, and recently entered into a partnership with the AFL-CIO.

¹⁷ *See infra* Section VII.

¹⁸ FINE, *supra* note 9, at 20, 23 fig 1.7.

¹⁹ *Id.* at 23 fig 1.7.

worker centers falling within three broad categories: immigrant day-laborer worker centers, ethnic community worker centers, and industry-based worker centers.²⁰

1. Immigrants in Day Labor: La Raza Centro Legal Day Labor Program

One prominent type of worker center organizes mostly immigrant workers engaged in “day labor”— generally short-term manual-labor projects in the construction and landscaping industries, but also farm work, cleaning, and moving.²¹ A 2004 study of the day labor industry concluded that over 100,000 workers work as day laborers. The vast majority congregate at informal hiring sites near home improvement stores, gas stations, and near busy thoroughfares and expressway onramps.²² About one fifth of these workers seek work through day-laborer worker centers that operate hiring halls to match employers with those seeking work.²³ The study’s authors identified sixty-three day-labor worker centers across the country, the majority having been established after 2000.²⁴ Of these, forty-three were operated by community organizations, ten by city government agencies, and ten by church groups.²⁵ The study also found that most day-laborer worker centers: (1) provide a defined space for workers to assemble, as well as a job-allocation system (either a lottery, list of available workers or some other selection mechanism) that imposes order or a hiring queue on the day-labor hiring process; (2) require job seekers and employers to register with center staff; (3) set minimum wage rates; and (4) monitor labor standards, employer behavior and worker quality.²⁶

a. The Day Labor Program of La Raza Centro Legal

La Raza Centro Legal, a thirty-five year-old Latino multi-function legal service organization in the heart of San Francisco’s Mission District, is typical of many worker centers

²⁰ Many articles and some books profile specific worker centers in depth. Jennifer Gordon profiles the Long Island Workplace Project in her recent book, *Suburban Sweatshops: The Fight for Immigrant Rights* (2005). See also Saru Jayaraman, *Letting the Canary Lead: Power and Participation Among Latina/o Immigrant Workers*, 27 N.Y.U. REV. L. & SOC. CHANGE 103 (2001-2002). (discussing evolution of the Workplace Project). In *Poor Workers’ Unions* (2005), Vanessa Tait situates worker centers more broadly within movements of poor workers, which she argues can revitalize the labor movement. Several worker centers were profiled in the Next Wage Organizing Symposium issue of the *New York Law School Law Review*. See, e.g., Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 N.Y.L.S. L. REV. 465 (2005-2006). Other sources have provided in-depth profiles of specific worker centers: PETER KWONG, *THE NEW CHINATOWN* (1996) (includes discussion of the origins and evolution of the Chinese Staff and Workers’ Associations (CSWA)); Steve Jenkins, *Organizing, Advocacy, and Member Power: A Critical Reflection*, Working USA, Fall 2002 at 56 (discussing campaigns by Make the Road by Walking, a nonprofit organization in Brooklyn, New York); Saru Jayaraman, “*ROCing*” the Industry: *Organizing Restaurant Workers in New York*, in THE NEW IMMIGRANT WORKFORCE, *supra* note 10; Dan La Botz, *Immigrant Restaurant Workers Hope to Rock New York: Following 9/11, displaced restaurant workers are transforming grief into action*, DOLLARS & SENSE MAGAZINE (Issue #251, January/February 2004) (profiling the Restaurant Opportunities Center in New York (ROC-NY)); Benjamin Marquez, *Organizing Mexican-American Women in the Garment Industry: La Mujer Obrera*, 15 WOMEN & POL. 65 (1995); Daisy Ha, *An Analysis and Critique of KIWA’s Reform Efforts in the Los Angeles Korean American Restaurant Industry*, 8 ASIAN L.J. 111 (2001) (profiling the Korean Immigrant Worker Advocates); Saladin Muhammad, *North Carolina Center Creates Alternatives for Black Workers in Union-Hostile South*, LABOR NOTES (September 2003) (profiling the Black Workers for Justice), available at <http://labornotes.org/node/742>.

²¹ See ABEL VALENZUELA, JR., ET AL., ON THE CORNER: DAY LABOR IN THE UNITED STATES 1 (Jan. 2006), http://www.sscnet.ucla.edu/issr/csup/uploaded_files/Natl_DayLabor-On_the_Corner1.pdf.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 6.

²⁵ *Id.* at 7.

²⁶ *Id.* at 7-8.

that work with day laborers.²⁷ The center launched its Day Labor Program in 1991. The program principally serves as a hiring hall for day laborers, and also gives classes in occupational health and safety, job skills, English, and political and rights education. The goals of the Day Labor Program are to increase economic and employment opportunities for its members, build collective power, and raise community awareness about the status of day laborers.²⁸ A Day Laborer Worker Association sets policies such as the minimum wage for the hiring hall as well as other terms of employment. In addition to the Day Labor Program, a program for domestic women workers, called the Women's Collective (*La Colectiva*), was launched in 2001 and operates on a similar job referral model.

In 2004, an experimental legal clinic was created as part of the Day Laborer Program. Like many worker centers, it focuses on the recovery of unpaid wages and remedies for other employer abuses through the legal process.²⁹ Most individuals who come to the clinic work in construction and the most common complaints are failure to pay the "time and a half" rate of overtime, payment of less than the minimum wage, or violation of state-mandated meal and rest breaks.

After legal clinic workers have spoken with the worker, they consult with the staff attorney, and proceed to advise the individual, often telephoning the employer to negotiate, and sending a demand letter to follow-up. When no settlement is possible, an official complaint is made with the state administrative agency that handles wage complaints. Since February 2005, La Raza has recovered approximately \$400,000 in wages for about 375 workers.

In addition to the clinic, members participate in other political campaigns of La Raza, which demonstrate the "social movement" face of the center. These have included a large campaign in 2006 with other local groups to advocate for immigration reform, a campaign to pressure the city to install public bathrooms near common sites where day laborers congregate, and a push to have a local developer sell a portion of land in the local neighborhood for the development of low-income housing and a renovated day laborer center.

b. La Raza's employer-directed campaigns

In addition to individual complaints, the legal clinic has planned more aggressive campaigns directed at employers who are unresponsive to settlement and administrative efforts to recover wages, as well as employers that mistreat multiple workers. It is activities such as these that suggest the type of "dealing" with employers which raises the question of whether day labor organizations like La Raza are labor organizations.

In one campaign, a local contractor stiffed ten workers who had come in to the clinic complaining of over \$20,000 in unpaid wages. After attempts to contact the contractor, and a hearing before the state department of labor standards enforcement, the contractor continued to elude the worker center's efforts to obtain payment. To ratchet up the pressure, La Raza held a rally outside of his office near downtown San Francisco, alerting those in the area and co-tenants in the building of the contractor's abusive employment practices. However, it was the threat of criminal prosecution that ultimately forced the contractor to repay his workers. La Raza worked

²⁷ La Raza Centro Legal website — <http://www.lrccl.org/>. In addition to its worker-oriented programs, the center has a senior law unit, a youth law project, a housing unit, and an immigration and naturalization unit.

²⁸ *See id.*

²⁹ What sets the clinic apart is that under the guidance of the project leader Hillary Ronen and some student volunteers, it is run by individuals who are themselves day laborers and domestic workers, and who in most cases became familiar with La Raza Centro Legal through some employment problem they faced. These legal defenders (*Defensores Legales*) are trained in employment and labor laws and learn how to interview and serve other workers who come to the clinic for assistance. Telephone Interview with Hillary Ronen, La Raza Centro Legal (Sept. 24, 2007).

with the district attorney who investigated and ultimately arrested the contractor for labor theft. This forced the contractor to settle with the La Raza for the stolen wages, while indictment proceedings continue on the criminal charges.

The clinic has also helped domestic workers improve conditions in their workplace. In 2005, a woman came into the clinic after being fired from the small cleaning agency she worked for. In addition to herself, she was concerned for the remaining women, mostly Latina, who suffered similar abuses as she at the hands of their employer: they were not paid overtime, not paid all wages, not afforded proper meal and rest breaks, and subject to verbal abuse and unsafe working conditions. On her behalf, the clinic sought to negotiate with the employer. Making little progress, the clinic filed a wage claim with the state enforcement agency, and staged a protest of over fifty workers at the proprietor's home, which was also the place of business. The clinic used the protest and wage claim—with its threat of further penalties under California law³⁰—as leverage to seek broader changes in the workplace. The employer relented and a settlement agreement was reached. In addition to over \$15,000 in back wages, the clinic and employer negotiated that the clinic would be able to present up to four workers rights presentations, on paid time, for the domestic worker employees, and the clinic would be paid a fee for the presentations. Although the agreement did not include additional oversight into the agency's working conditions, the clinic has received reports that working conditions have improved and overtime payment has been made regular.

On the whole, the clinic is still experimenting with ways to target employers directly beyond the settlement of individual cases.³¹ In doing so, the clinic faces some limits. First of all, the director reports that some 10–20 percent of workers who come to the clinic seeking payment for work performed are not protected by the law because of their status as independent contractors. Although many day labor workers are forced into nominal independent contractor relationships by larger firms in order to remove state and federal protections associated with employee status,³² some workers genuinely operate in this way, using their own materials and working to specifications without direct oversight, often for individual homeowners. Perhaps more constraining is the simple nature of the day labor and construction industries: with most day laborers working on short-term project based jobs, and often with only a handful of co-employees, there are not stable employment relationships and employers to target.

Several features of La Raza are significant for determining how traditional labor laws will affect the organization. Although it often deals with undocumented workers, its members and those it serves are nevertheless “employees” who may invoke the protections of labor law. Because it operates a hiring hall, La Raza also commonly interacts with employers, which raises the question of whether it is an NLRA “labor organization.” The hiring hall, which is nominally independent from La Raza and with policies set by members, has no legal separation from La Raza. Lastly, La Raza's model for the most part is based on individual representation, although collective action may arise in situations where mistreatment occurs to similarly-situated workers or where workers take up common cause with workers who have been aggrieved.

³⁰ The California Labor Code includes up to 30 days of pay in “waiting time” penalties for employers who have not paid workers the full amount entitled to them at the time of discharge. *See* CAL. LAB. CODE § 203 (year). This applies to missed overtime payments as well as failures to provide mandated meal and rest breaks.

³¹ For example, several women workers from the clinic have been referred to a women's organizing program run by another Bay area organization, POWER, which runs an intensive negotiations training to develop the ability of women workers to press their employers to improve working conditions, among other campaigns

³² Ronen further reports that such workers are sometimes vulnerable to liability because they are independent contractors working without the contractor's license required by state law for certain construction work. Interview with Hillary Ronen, *supra* note 29. Another function of the clinic is to determine if a worker, although labeled an “independent contractor,” is really an employee in the eyes of the law and therefore able to make claims for underpayment of wages and other violations.

2. Employer-targeting in ethnic communities

In addition to day laborer organizations that generally target immigrant workers and often Latinos, there are a host of worker centers that focus on workers in ethnic communities. In California there are worker centers operating in the Korean-American community, the Filipino-American community, and the Chinese-American community.³³ Like day laborer organizations, these groups often grew out of previous political and civil rights campaigns to improve the position of people of color.

Within this broad grouping of ethnically-oriented worker centers, some organizations have taken on worker organizing campaigns specifically targeting employers from the ethnic community, such as the Korean Immigrant Worker Advocates (KIWA) in Los Angeles and the Chinese Progressive Association in San Francisco. Other organizations, such as the Asian Immigrant Workers Association (AIWA), have targeted corporate employers that take advantage of workers in particular ethnic groups.³⁴ As an example of ethnicity-based organizations, I briefly discuss KIWA to highlight the ways in which worker centers may become entangled in NLRB processes.

a. Korean Immigrant Worker Advocates: Background

KIWA was established in 1992 with a mission “to empower low wage immigrant workers to develop a progressive constituency and leadership amongst low wage immigrant workers in Los Angeles that can join the struggle in solidarity with other underrepresented communities for social change and justice.”³⁵ Founded in the wake of the Los Angeles riots, the organization’s first major campaign was a successful effort to organize Korean and Latino workers to demand aid from the Korean American Relief Fund, which was disbursing funds for reconstruction and aid after the civil unrest.³⁶ Since then, KIWA has focused on organizing restaurant and grocery store workers in the Koreatown neighborhood of Los Angeles.³⁷ KIWA also emphasizes worker leadership development and education.³⁸

b. KIWA’s Employer-directed campaigns

KIWA originally represented individual restaurant workers in legal claims through its Workers’ Empowerment Clinic.³⁹ In 1997, it launched the Restaurant Workers Justice Campaign, whose focus was to increase compliance with minimum wage laws in the industry.⁴⁰

In 2000, KIWA created the Restaurant Workers Association of Koreatown (RWAK), which operates as a quasi-union, offering benefits to its members such as a medical clinic, English classes, and wage claim advice.⁴¹ Although RWAK is based at KIWA, it is an

³³ In addition to the Korean Immigrant Worker Advocates, *see infra*, the Pilipino Workers Center is a Los Angeles-based organization addressing the workplace and community needs of Filipino workers, and the Chinese Progressive Association is a longstanding Bay Area civil rights organization that also runs a worker center. *See FINE, supra* note 9.

³⁴ *See* discussion about AIWA’s campaign against Jessica McClintock, in which McClintock brought NLRB charges asserting that AIWA had engaged in illegal secondary activity, *infra* Section VI.C.1.c .

³⁵ Yungsuhn Park, *The Immigrant Workers Union: Challenges Facing Low-Wage Immigrant Workers in Los Angeles*, 12 *ASIAN L.J.* 67, 77 (2005)

³⁶ *Id.* at 78.

³⁷ FINE, *supra* note 9, at 25.

³⁸ Park, *supra* note 35, at 78.

³⁹ *Id.*

⁴⁰ FINE, *supra* note 9, at 25.

⁴¹ *Id.*

independent organization that had about 350 members in 2004.⁴² It works to build power in the industry by developing its members and engaging in direct action to improve industry standards. To this end, RWAK has conducted organizing-oriented trainings on the minimum wage and held protests outside a local non-complying restaurant on a weekly basis.⁴³

Also in 2000, KIWA launched a market workers' justice campaign, with the goal of organizing an independent union among the workers of the seven grocery stores in Koreatown.⁴⁴ In the words of KIWA's former organizing director, the organization had "a community based union idea as opposed to an industry-specific idea," which focused on the connections to Korean consumers and drawing public support for the grocery workers.⁴⁵ Nevertheless, KIWA developed all the accoutrements of an independent organization for the Immigrant Workers' Union (IWU), including a constitution and bylaws. In fall 2001, KIWA circulated authorization cards for an NLRB election at a prominent store, the Assi Super Market.⁴⁶ After first confronting competition from the United Food and Commercial Workers, KIWA next encountered a sophisticated employer-run antiunion campaign.⁴⁷ In March 2002, the intense ten-week organizational effort ultimately came to an unsuccessful end, in an extremely close vote.⁴⁸ After the failed vote, KIWA attempted to run a card check campaign, but support had been lost in aftermath of the employer's aggressive campaign, which included bringing in temporary replacements after suspending fifty-six workers who had received letters from the Social Security Administration (SSA) indicating that their social security numbers did not match the SSA's records.⁴⁹ A discrimination and wage and hour lawsuit against Assi was finally settled and approved by a federal judge in November 2007.⁵⁰

Subsequently, KIWA unveiled its new approach, which it has called the "Fair Share Campaign." The campaign hopes to achieve living wages in Koreatown markets through voluntary living wage agreements with private employers.⁵¹ In May, 2005, two markets signed an agreement setting a wage floor of \$8.50 per hour and committing to adjust the floor annually up to three percent based on the Consumer Price Index.⁵² The next goal is to make the living wage an industry standard and expanding to Koreatown's remaining supermarkets.⁵³ The campaign will also look at affordable housing as part of a strategy to deal with poverty in Koreatown.

KIWA's unique approach to employer-targeting presents difficult issues for how the organization should be treated under federal labor laws. Although the IWU was nominally independent, KIWA staff played an essential role in its creation and development. Nevertheless, the petition for an election was signed in the name of IWU, adding to the sense that it was its own organization. KIWA's "fair share" campaign also presents the question of whether KIWA is acting as a labor organization by negotiating with employers over wages and other conditions of employment.

⁴² *Id.* at 111.

⁴³ *Id.* at 112.

⁴⁴ *Id.* at 139.

⁴⁵ *Id.*

⁴⁶ *Id.* at 140.

⁴⁷ *Id.* at 141.

⁴⁸ *Id.* For an exploration of the union campaign and the causes of its defeat, see Park, *supra* note 35.

⁴⁹ Park, *supra* note 35, at 98-99.

⁵⁰ Telephone Interview with Yungsohn Park, Attorney, Asian Pacific American Legal Center (Dec. 11, 2007).

⁵¹ KIWA, KIWA ANNUAL REPORT 3 (2005-2006) [hereinafter KIWA, ANNUAL REPORT] (on file with Author).

⁵² KIWA, LIVING WAGES IN KOREATOWN SUPERMARKETS: A KEY STRATEGY IN THE COMMUNITY FIGHT AGAINST POVERTY 10 (2005) (on file with Author).

⁵³ KIWA, ANNUAL REPORT, *supra* 51, at 3.

3. Industry-based organizing

Worker centers that directly target specific industries in many ways resemble traditional labor organizations, and for this reason are those most likely to fall within the protections and restrictions of federal labor law. Below, I consider two organizations that focus on the restaurant industry: Young Workers United (YWU) and the Restaurant Opportunities Center of New York (ROC-NY).

a. Young Workers United

i. Overview

YWU is a San Francisco-based organization aimed at organizing young and immigrant workers in general, but it has focused its efforts on the restaurant industry.⁵⁴ Founded in 2002, YWU's organizers had a history of working with unions and from the beginning the organization has enjoyed a close working relationship with the local branch of the Hotel and Restaurant Employees union (HERE).⁵⁵ The four-employee organization is funded by private donations and works through a team of unpaid volunteers and an active core of committed members.⁵⁶ Unlike many other worker centers, YWU does not have any attorneys on staff.

YWU Members serve on four democratically-run committees that coordinate its programs and develop proposals to bring to general meetings to establish organization-wide policies. The titles of these committees suggest YWU's multi-prong approach to improve the restaurant industry: Worker Justice; Policy; Education; and Comité de Justicia para Trabajadores, which focuses on issues faced by Latino members. The committee structure fulfills YWU's philosophy of being a member-led organization and furthers its goals of leadership development. New members are brought in through YWU's political and workplace organizing campaigns, as well as through direct outreach at local colleges, culinary programs, and large restaurants.⁵⁷

ii. YWU Campaigns

YWU's organizing activities are split between efforts to pass legislation to improve working conditions and campaigns focusing on the workplace policies of specific employers. On the policy front, YWU members were actively involved in campaigning for several San Francisco laws affecting low-income workers, including a groundbreaking law requiring employers to provide paid sick leave.⁵⁸

⁵⁴ FINE, *supra* note 9, at 133. For a recent profile of YWU, see Colin Asher, *Victories in the New Labor Movement*, S.F. CHRON., Oct. 21, 2007, at P19, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/10/21/CM2SS2SN9.DTL>.

⁵⁵ Telephone Interview with Sara Flocks, Co-Director, Young Workers United (Oct. 3, 2007). Although the jurisdiction of HERE (now UNITE HERE!) includes restaurant workers, the union has focused its organizing efforts in the hotel industry and thus does not in any way "compete" with YWU. Although HERE has supported YWU's efforts, the two organizations operate independently without any overlapping leadership. However, staff members have supported each others' campaigns by attending protests and the two organizations have considered a joint project unrelated to worker organizing. See also FINE, *supra* note 9, at 134-35.

⁵⁶ Asher, *supra* note 54. YWU defines members as those who actively work for the organization, and does not require any dues. About 65 active members staff the committees, although the organization has an outreach list of over a thousand workers. Interview with Sara Flocks, *supra* note 55.

⁵⁷ New members often learn about YWU from their co-workers, as the industry has a high degree of lateral movement between restaurants. Interview with Sara Flocks, *supra* note 55.

⁵⁸ Asher, *supra* note 54. YWU was also involved in the campaign to raise San Francisco's minimum wage in 2003, a campaign against proposed changes to California's meal-break regulations, and a 2006 campaign to support an ordinance aiming to set up a comprehensive health care system for San Francisco's uninsured residents. In addition to ongoing political advocacy, YWU is also considering helping its members to seek elected office. Interview with Sara Flocks, *supra* note 55.

YWU has also led a number of organizing campaigns directed at specific employers over issues such as nonpayment of wages and overtime, failure to pay minimum wages, withholding of tips, and sexual harassment.⁵⁹ Campaigns begin when a worker comes to one of YWU's worker justice committees with a complaint.⁶⁰ The committee members, who have been trained to take employment claims through the California administrative enforcement process, first try to talk with the employer directly to resolve the dispute. If informal efforts are unsuccessful, they file an administrative claim while keeping continuing to seek negotiated options. As an initial step, a delegation of YWU members deliver a letter to the employer stating their settlement demands and asking for direct negotiations. YWU members progressively raise the level of employer pressure until the employer will negotiate.⁶¹

YWU's largest employer campaign to date involved the Cheesecake Factory in San Francisco. Beginning in May 2000, it eventually resulted in the filing of over 120 wage claims, participation in a statewide settlement of \$4.5 million, and policy changes at all of the Cheesecake factory's California restaurants.⁶² The campaign began with a core group of workers who filed claims with the state enforcement agency complaining that the restaurant had failed to give them meal and rest breaks required by California law—for which workers were entitled to one hour of pay for each missed break.⁶³ The Cheesecake factory responded with several unpopular changes to employee schedules but would not rectify past violations.⁶⁴

YWU encountered some of the workers who had filed complaints about a year later, during which time the state agency had yet to take any action towards resolving the claim. YWU trained the workers on campaign strategy, tactics, how to deal with the media, and their employment rights, and helped the workers to form an organizing committee. In the months that followed, the committee formulated three demands: payment in full, a promise not to retaliate, and reform of the “breaker system” by paying the relief waiter a higher hourly wage without tips.

The committee followed this demand with protest activities: delivering demand letters to the restaurant's general manager, reading the letter in the lobby during business hours, regularly leafleting customers, and staging protests in front of the restaurant. During the campaign, YWU members also designed a Code of Conduct⁶⁵ and called upon the Cheesecake Factory to sign the

⁵⁹ See Cases, Young Workers United, <http://www.youngworkersunited.org/article.php?list=type&type=22> (last visited November 27, 2007) (listing twenty-nine employers that YWU has targeted).

⁶⁰ While YWU prefers campaigns that involve workplace-wide policies, the committee has decided to also pursue individual employment claims as time permits. Interview with Sara Flocks, *supra* note 55.

⁶¹ *Id.* Despite this approach, YWU has yet to sign an agreement with any employer. Campaigns have succeeded, however, as employers have in various cases changed policies without formal acknowledgement.

⁶² The settlement was reached in a separate class-action lawsuit, although YWU's campaign against the restaurant was ongoing throughout the period leading to the agreement. For YWU's account of the campaign, see YWU, Cheesecake Factory, <http://www.youngworkersunited.org/article.php?list=type&type=12> (last visited November 27, 2007).

⁶³ See CAL. LAB. CODE § 226.7(b) (2006).

⁶⁴ The Cheesecake Factory first implemented a new scheduling system in which workers were required to report an hour earlier to do preparatory work and then take a thirty-minute break before beginning a six-hour shift with no other rest periods. When this system proved ineffective, the restaurant implemented a “breaker” system, designating relief employees to work a special “breaker” shift in which their only job would be to give breaks to co-workers, who would tip them out five dollars to take the break. See Rachel Brahinsky, *Unjust desserts*, S.F. BAY GUARDIAN, Aug. 17-24, 2004, available at http://www.sfbg.com/38/47/news_cheesecake.html.

⁶⁵ According to Janice Fine, the code of conduct was “similar to a union contract” and would have designated a “special master” to resolve disputes over its interpretation. The code included paid breaks, holidays and sick leave, and health benefits for employees who work more than twenty hours weekly. The code would also have had two provisions modeled after union collective bargaining agreements: the right of employees to be accompanied by “employee leaders” to disciplinary meetings, similar to *Weingarten* rights enjoyed by union employees, see *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), and an appeals process when disciplinary action is taken which the employee believes to be without just cause. See FINE, *supra* note 9, at 134. The company also appears to have

code in several highly-publicized protests, including a delegation to the San Francisco restaurant managers of over seventy workers with a popular local politician at the helm.⁶⁶

However, despite all of YWU's efforts, the Cheesecake factory management would not negotiate directly with YWU staff or its members over its demands.⁶⁷ Soon after the series of YWU protests in the summer of 2005, the Cheesecake Factory entered into separate settlement negotiations with lawyers representing a parallel class action lawsuit over the company's meal and rest break violations statewide.⁶⁸

Nevertheless, despite never acknowledging YWU's demands, the company implemented many of them and responded to their pressure in other ways. An unpopular supervisor that had become a focus of the campaign was demoted, assigned to a different location, and replaced by a Spanish-speaking Human Resources manager.⁶⁹ The "breaker" system was reformed statewide, by raising the wage of the breaker employee.⁷⁰ YWU also trained a team of workers to act as monitors to ensure that future violations do not occur, which has resulted in greater responsiveness by management to workplace grievances.⁷¹ For example, one issue raised by workers in the campaign was the employer's practice of "time shaving," in which workers were given work before being clocked in or clocked out by managers before being given additional closing tasks, in both instances not receiving compensation for this working time. Although the Cheesecake Factory vigorously contested the charge that it owed backpay for this practice in administrative proceedings, YWU's challenge and continual vigilance by workers has ensured that the practice does not continue.⁷² Another widespread complaint, the lack of sick days, became the impetus for the successful campaign to pass a city-wide paid sick leave law, in which YWU, and Cheesecake Factory workers specifically, played a prominent part.⁷³

Throughout its campaigns, YWU has specifically eschewed a collective bargaining role and seeks to play a complementary role with established labor unions.⁷⁴ Many of its efforts do not focus on particular workplaces but seek to improve the conditions of low-wage workers as a whole. YWU hopes to increase this broader industrial-focus by continuing to work on

treated YWU's campaign as similar to a union campaign, as it held captive audience meetings and employed other techniques typically used by employers to defeat union organization drives. Interview with Sara Flocks, *supra* note 55.

⁶⁶ See Carinna Acevedo, *Youth Workers Protest Cheesecake*, THE GOLDEN GATE [X]PRESS ONLINE, Oct. 2, 2005, available at <http://www.xpress.sfsu.edu/archives/news/001923.html>. Following this protest, a letter signed by prominent community leaders was delivered to the Cheesecake Factory for delivery to the company CEO. The letter is available on YWU's website. Letter to David Overton (undated), <http://www.youngworkersunited.org/downloads/Appeal%20for%20Justice%20FINAL.pdf>.

⁶⁷ The restaurant did, however, negotiate with a group of sixty line-cooks who spontaneously walked off the job in response to the firing of a fellow employee. After negotiating with management on the spot over the firing, the employee was rehired. Interview with Sara Flocks, *supra* note 55.

⁶⁸ See Kristi Dyes, *An Appeal For Justice to the Cheesecake Factory*, THE GOLDEN GATE [X]PRESS ONLINE, Sept. 2, 2005, available at <http://www.xpress.sfsu.edu/archives/breaking/004065.html>.

⁶⁹ Interview with Sara Flocks, *supra* note 55.

⁷⁰ *Id.* With the breaker's wage raised to \$15 per hour, workers seeking breaks no longer had to "tip out" the breaker five dollar to take a break. See *supra* note 36.

⁷¹ Interview with Sara Flocks, *supra* note 55.

⁷² *Id.*

⁷³ See *supra* text around note 58.

⁷⁴ Organizer Flocks has stated that YWU has considered various types of relationships it may have with HERE, such as affiliation or becoming an independent local, and that the possibilities remain open. See FINE, *supra* note 9, at 134-35. YWU however values the flexibility of not having to service union contracts and the power it achieves through the collective action of a strong minority of workers.

legislation, the development of portable benefits, and other ways to target the local restaurant industry as a whole.⁷⁵

Overall, YWU's activities share some similarities to traditional unions seeking to organize a workplace. Like unions, YWU helps workers to develop a list of grievances that will be presented to the employer for consideration and negotiation. However, YWU does not seek exclusive recognition and its campaigns are based in claims that the employer's policies violate existing employment laws, and are not simply efforts to raise the standard for employment policies that do not violate any laws. Moreover, to date, YWU has not entered agreements with employers concerning terms and conditions of employment. The following organization has done precisely this.

b. Restaurant Opportunities Center

i. Background

The Restaurant Opportunities Center (ROC-NY) is a non-profit worker center that seeks to organize restaurant workers in New York City. ROC was founded in the aftermath of 9/11 with assistance from Local 100, Hotel and Restaurant Employees (HERE). In the direct wake of 9/11, Local 100, had set up a temporary relief center for restaurant workers and their families, and later asked attorney Saru Jayaraman and a Fekkak Mamdou, a waiter who had worked at Windows on the World restaurant atop the World Trade Center, to develop a permanent workers center.⁷⁶

Today, ROC-NY is a dynamic organization that engages in a wide assortment of programs for its approximately 1,950 members and has led some of the most ambitious organizing campaigns of any worker center in the country.⁷⁷ In addition to traditional worker center programs, such as job-search assistance, classes, and assistance with individual legal claims, ROC-NY also engages in union-style campaigns against specific employers who have been found to violate the law. ROC-NY has also pushed the envelope in other ways, helping to launch an independent cooperative luxury restaurant in New York that operates as a restaurant worker training center in the day.⁷⁸

ii. Organizing Strategies

⁷⁵ To further the goal of developing a new type of industry worker organization, in June 2007, YWU began forming a California Restaurant Organizing Network with the Chinese Progressive Association, KIWA, and UNITE HERE Local 2's Restaurant Division. Interview with Sara Flocks, *supra* note 55.

⁷⁶ Jayaraman, *supra* note 20, at 143. Although ROC-NY initially used the 501(c)(3) organization that HERE Local 100 had set up as its fiscal agent, it established its own nonprofit entity within a few years, and did not receive additional funding from Local 100. Telephone Interview with Saru Jayaraman, Restaurant Opportunities Center of New York (Sept. 27, 2007).

⁷⁷ ROC-NY has stated as its objective to organize all unorganized restaurant workers in New York City. Jayaraman places this figure at around 99% of New York City's 165,000 restaurant. Jayaraman, *supra* note 20, at 143. For more information on the New York city restaurant industry, see ROC-NY & THE NEW YORK RESTAURANT INDUSTRY COALITION, BEHIND THE KITCHEN DOOR: PERVASIVE INEQUALITY IN NEW YORK CITY'S THRIVING RESTAURANT INDUSTRY (2005), http://www.rocny.org/documents/RocNY_final_compiled.pdf.

⁷⁸ ROC-NY is a part owner of the restaurant, known as Colors, whose non-managerial employees are union members in HERE. See John Lawrence, *COLORS Restaurant*, DOLLARS & SENSE MAGAZINE (Issue #251, July/August 2006), available at <http://www.dollarsandsense.org/archives/2006/0706colors.html>.

As of October 2007, ROC-NY has engaged in eight restaurant organizing campaigns.⁷⁹ Even in its early efforts, ROC-NY has focused on campaigns with the potential to effect workplace-wide change as opposed to simply assisting individual workers.⁸⁰ Indeed, staff attorney Saru Jayaraman explained that when a worker comes to the group complaining of unjust treatment, ROC helps them to develop a group that would take a stand in the restaurant, and would not move forward if the worker was not willing to organize a core group of advocates. ROC-NY also leverages its organizing efforts by focusing on high-end fine dining establishments that are influential in the restaurant industry and where their activities will generate large publicity.

ROC has formulated a three-prong strategy to reform the restaurant industry as a whole and improve the quality of restaurant jobs. First, through employer-targeted organizing campaigns ROC pressures “low-road” actors into becoming “high road” employers. Second, ROC publishes research reports that publicize conditions in the restaurant industry and pave the way for legislation.⁸¹ Third, ROC promotes “high road” practices directly by organizing employers who seek to improve conditions of workers in their industry into a group, known as the Restaurant Industry Roundtable, as well as by launching Colors.

The twenty-five members of the Restaurant Roundtable have signed on to a code of conduct through which they pledge to treat their workers well, guarantee a baseline of benefits, and agree to mediate any disputes over compliance with the code. By participating, employers also agree to allow ROC-NY member workers to give a training to workers in their establishments about the code of conduct, and their right to take any disputes to a mediation board in which a neutral party mediates disputes between the employer and worker-grievant. Through the roundtable, ROC-NY worked with other groups to put together a manual on how to comply with all applicable labor and employment laws which is distributed by the city to restaurant owners.⁸²

iii. Campaigns & ROC’s Use of the law

ROC’s confrontations with employers have required the organization to be a sophisticated legal actor, using the law both as sword and shield. After workers come to ROC with complaints of employer misconduct, ROC and the workers develop an employer-targeted campaign that seeks to pressure the restaurant to improve conditions through a combination of legal action, publicity, and public rallies,

⁷⁹ Interview with Saru Jayaraman, *supra* note 76. These include campaigns against the Smith & Wollensky Restaurant Group, which operates the Park Avenue Café and Cité; the SMJ Group, Inc, which operates Trattoria Dell’Arte & Brooklyn Diner; 65 Restaurant Opportunities, the operator of Restaurant Daniel; and the Fireman’s Hospitality Group, which runs Shelly’s Restaurant, Redeye Grill, and Café Fiorello, and several other establishments. *Id.*

⁸⁰ In an early campaign, ROC assisted 23 workers that worked for two restaurants that were part of the Smith & Wollensky Restaurant Group. The workers had complained of discrimination and lack of overtime payment. ROC achieved a \$164,000 settlement, which also included a new promotions policy, paid sick days, a new employee manual, and a job security notification system whereby the restaurants must give ROC three days notice before any dismissals and allow ROC to challenge such actions as improper retaliation. As part of the agreement, ROC promised not to hold rallies at the restaurants for five years, which had been part of its tactics in the campaign. See Steven Greenhouse, *Two Restaurants to Pay Workers \$164,000*, N.Y. TIMES, Jan. 12, 2005, at B3.

⁸¹ ROC recently pushed the New York City Council to introduce a bill that would require the City to review employment law violations when considering whether to renew a restaurant operating license. See Press Release, http://www.brennancenter.org/press_detail.asp?key=51&subkey=48671.

⁸² The manual was funded by the city and is offered by the New York City Department of Consumer Affairs. See MAYOR’S OFFICE OF IMMIGRANT AFFAIRS, CITY OF NEW YORK, NEW YORK CITY RESTAURANT OWNERS MANUAL (2006), available at http://www.nyc.gov/html/dca/downloads/pdf/NYC_restaurant_guide.pdf.

Many ROC campaigns begin with the threat of or filing of lawsuits, usually for discrimination as well as wage and hour violations. ROC has also successfully filed charges under the NLRA when workers are fired in retaliation for concerted activities.⁸³ In one campaign, ROC sought to pressure a restaurant opened by the former owner of Windows on the World to hire workers from his prior restaurant.⁸⁴

ROC has also faced a multitude of lawsuits for its activity,⁸⁵ including charges that it is a “labor organization” engaging in prohibited activities.⁸⁶ In response, ROC is careful to include a disclaimer on its signs whenever it engages in public pickets, disavowing any goal of collectively bargaining, stopping customers from entering the establishment, or interfering with deliveries.⁸⁷ In more recent campaigns, ROC-NY has eschewed pickets in favor of the distribution of handbills,⁸⁸ which is not subject to NLRA regulation.

However, ROC preferred mode of organizing is through private ordering. In addition to avoiding potential legal entanglements, ROC’s philosophy is that workers can build stronger organizations when they are their own representatives and do not depend on a government agency to negotiate for them. Moreover, through organizing ROC is able to achieve better results than through government-mediated processes, going beyond the minima the law guarantees and also building a culture of dignity and respect in the workplace.⁸⁹

In several major campaigns, ROC has achieved long-term settlement agreements, in which it promises not to protest an employer in exchange for certain job guarantees and a procedure for ensuring that these guarantees are followed. The process begins with worker demands. When a worker or group of workers comes to ROC complaining of workplace conditions, ROC educates them about the law and begins a dialogue about what else in their workplace they would like to see changed. When the employer is open to settlement, usually after a lawsuit is filed and picketing activity outside the establishment, ROC and the workers bring the demand list to the bargaining table.

⁸³ In September 2007, ROC won a large settlement after filing NLRB charges for retaliation in its campaign against the Fireman’s group. As part of the settlement, ten to fifteen workers of a group of 250 were reinstated with partial backpay, and the employer agreed to post the results in the workplace. Jayaraman says ROC has used the NLRB as a tool, despite the lengthy and imperfect process, when workers are retaliated against for their organizing activity. Interview with Saru Jayaraman, *supra* note 76. For more information on NLRA protections for concerted activity, see *infra* Section III.

⁸⁴ Jayaraman, *supra* note 20, at 145.

⁸⁵ In addition to such commonplace claims as defamation and unfair competition, ROC has also been sued for trademark infringement, based on its distribution of leaflets containing restaurant logos. See *SMJ Group, Inc. v. 417 Lafayette Restaurant LLC*, 439 F. Supp. 2d 281 (S.D.N.Y. 2006).

⁸⁶ This charge was first brought by the Smith & Wollensky restaurant group, and was followed up by the NLRB unfair labor practices charged by Redeye Grill, Fireman Hospitality Group and the proprietor of Restaurant Daniel. See *supra*. The Fireman group also attempted to have ROC’s 501(c)(3) status revoked, but received no response from the IRS. Interview with Saru Jayaraman, *supra* note 76.

⁸⁷ For example, the leaflets used by ROC when it targeted Trattoria Dell’Arte & Brooklyn Diner including the following text on the backside:

The Restaurant Opportunities Center of New York (ROC-NY) is a non-profit organization that seeks improved working conditions for restaurant workers citywide. ROC-NY assists restaurant workers seeking legal redress against employers who violate their employment rights. ROC-NY seeks to provide customers and the public with information about the litigation in this restaurant through these handbills, not to picket or interfere with deliveries. ROC-NY is not a labor organization and does not seek to represent the workers or be recognized as a collective bargaining agent of the workers at this restaurant.

SMJ Group, 439 F. Supp. 2d at 286.

⁸⁸ This is according to statements made by Saru Jayaraman in a seminar. See Alan Hyde, *What is Labour Law?*, in *BOUNDARIES AND FRONTIERS OF LABOUR LAW* 37, 44 n.20 (Guy Davidov & Brian Langille eds., 2006) [hereinafter Hyde, *What is Labour Law*].

⁸⁹ Interview with Saru Jayaraman, *supra* note 76.

The results have been impressive. In July 2007, ROC assisted workers in reaching a comprehensive settlement at Restaurant Daniel after years of regular picketing and legal actions.⁹⁰ The original plaintiffs in the action filed charges in 2005 with the EEOC alleging that the restaurant owner discriminated against them based on their race by promoting white French workers ahead of nonwhite workers even if more experienced, and using racist slurs. After an early effort at negotiations, settlement efforts broke down and both sides filed suit. However, after weekly protests by ROC and continued pressure, and with a city councilmember serving as a broker, an agreement was finally reached. Under the settlement, the restaurant will pay a total of \$80,000 to eight workers, will set up a promotions policy overseen by the EEOC and state attorney general's office, and will grant eight percent raises to busboys and runners. The restaurant management must attend a training in racial sensitivity and distribute employee manuals explaining their rights. The agreement, which will remain in effect for a period of five years during which time ROC has agreed not to hold any rallies against the restaurant, also has unique enforcement mechanisms. In addition to monitoring by the EEOC and the state attorney general, the agreement requires that when the restaurant wishes to fire an employee, it must give ROC's lawyers three days notice so that they may assess whether the motive is prohibited retaliation. Either party has the right to take disputes over compliance with the agreement to arbitration.⁹¹

ROC has sought similar agreements in other campaigns. The final settlement with Smith & Wollensky, in addition to \$164,000 to twenty-three workers who claimed they were discriminated against because they were Mexican and worked up to fifteen hours extra per week without pay, included the same provisions. The Smith & Wollensky settlement also included provisions requiring the restaurants to provide their employees with one week of vacation and three paid sick days per year.⁹²

Moving forward, ROC hopes to continue its work in the same vein, and is also examining the possibility of combining with like-minded groups to launch a national restaurant workers organization.

ROC has shown a sophisticated use of law in the pursuit of organizing. ROC has used, and is familiar with, the protections afforded by the NLRA. The success that ROC has claimed in its organizational activities has also opened the organization up to all kinds of lawsuits by targeted employers. Although ROC was found not to be a labor organization in recent charges, its settlement activities with employers have pushed the line of how worker centers can engage employers without being hamstrung by federal labor laws.

D. Summary: a typology of worker center activity

As discussed in the pages that follow, the manner in which worker centers pursue their goals bears on how they will be treated under federal labor laws. For example, ROC Staff Attorney Saru Jayaraman has described four reasons that ROC prefers not being classified as a "labor organization": to avoid the burdens of servicing contracts, arbitrating grievances and being held to a duty of fair representation; to avoid filing financial reports under the LMRDA; to avoid restrictions on organizational picketing; and, as a 501(c)(3) organization, to be able to partially own a separate business, the worker-run restaurant COLORS.⁹³ In addition to these restrictions on labor organization activity, other features of worker center activities, including the

⁹⁰ See *supra* Prelude.

⁹¹ Ellick, *supra* note 1.

⁹² See Greenhouse, *supra* note 80.

⁹³ See Hyde, *What is Labour Law*, *supra* note 88, at 44-45. Hyde disagrees that there are legal impediments to union involvement in employee ownership. See *id.* at 45 n.21.

types of workers they organize, will be determinative in whether their concerted activity will be protected by the NLRA.⁹⁴

Moreover, categorizing worker center activity may help to create a practical rubric for measuring whether a worker center should be subject to labor union regulations. To this end, the relevant features of the organizations profiled above are summarized in the following table.

<u>Organization</u>	<u>“Employees” under NLRA?</u>	<u>Industry-focus:</u>	<u>Employer-targeting?</u>	<u>Tactics & Collective action:</u>	<u>Negotiation efforts:</u>
La Raza Centro Legal	Yes	Day Labor Construction	Some targeting of employers who repeatedly violate the law.	Mostly individual cases, although some rallies in significant cases.	Relationships through Hiring Hall. Individual claim settlement.
KIWA	Yes	Grocery & Restaurant	Industry-wide targeting (seven main supermarkets).	Union-organizing drive. Voluntary “living wage agreement.” Protests	Seeking voluntary compliance with living wage standard.
YWU	Yes	Restaurant	Yes. Also individual representation and efforts to pass legislation.	Campaign-based. Visiting site and engaging in protest & distribution of information.	No direct negotiations. Efforts to seek compliance with “Code of Conduct.”
ROC-NY	Yes	Restaurant	Yes. Legislative lobbying.	Protests. Code of Conduct with Restaurant Roundtable members.	Claim settlement arising out of employment lawsuits leading to broader agreements.

III. How Worker Centers Can Use Employee Protections under the NLRA

As the portraits above make clear, despite their ambiguous legal status as “labor organizations,” worker centers do not exist in a legal vacuum. Indeed, most actively use federal, state, and local employment laws to protect the rights of precarious workers. Amidst the familiar cry that the nation’s system of labor law regulation is broken and unable to provide effective remedies to protect the rights it proclaims,⁹⁵ however, non-union workers and their advocates have generally avoided the national labor laws,⁹⁶ focusing their efforts instead on statutes concerning basic matters of wages and overtime pay, discrimination, and workplace safety. One scholar has even suggested that workers and their advocates have developed a new form of labor law through the use of such employment laws.⁹⁷

⁹⁴ See *infra* Sections III & IV.

⁹⁵ Many unions have responded by preferring private agreements with employers rather than face uncertain NLRB processes. The ineffectiveness of the NLRB’s remedial regime is based on both the content of its remedies and the long delays workers must wait to obtain relief. Punitive awards are not available. Moreover, according to the NLRB’s own statistics, the median length of time from the filing of a charge alleging employer misconduct to the issuance of a final Board decision was almost two years in 2006.

⁹⁶ There are important counterexamples of worker centers who have sought unionization. However, these experiments have usually not been successful. See, e.g., Yungsohn Park, *The Immigrant Workers Union: Challenges Facing Low-Wage Immigrant Workers in Los Angeles*, 12 ASIAN L.J. 67 (2005) (chronicling failed effort by Korean Immigrant Workers Advocates to create an independent union made up of workers at Korean grocery store). Nonetheless, some worker centers have successfully vindicated NLRA rights. See *supra* note 83 (discussing ROC-NY’s successful use of NLRB). Fine also reports that worker centers have made use of the NLRA in response to employee dismissals for concerted activity. FINE, *supra* note 9, at 160.

⁹⁷ See Ben Sachs, *Labor Law Renewal*, 1 HARV. L. & POL’Y REV. 375 (2007) (discussing worker center campaign in which Make the Road by Walking sought relief on behalf of, and received a prompt reinstatement offer for, a garment worker through the Fair Labor Standards Act when the worker was discharged in retaliation for her participation in a campaign to ensure that their employer paid statutorily-required overtime pay).

Either undiscovered or consciously ignored, the NLRA is a potential source of rights and protections for almost all workers. In this section I discuss the ways in which worker centers can enlist federal labor law on behalf of the workers they serve.

The enactment of the NLRA in 1935 was a watershed moment in modern American history, declaring for the first time a national labor policy favoring collective bargaining as a means of reducing industrial strife and increasing employee bargaining power.⁹⁸ The broad law covers most aspects of employer-union relations, from the organizing process to collective bargaining. These issues are overseen by the National Labor Relations Board (NLRB), which administers the certification process and adjudicates unfair labor practice charges under the Act. One way to understand the NLRA is to focus on what scholar Alan Hyde has described as three “crucial concepts” of the Act that are legally independent of each other: (1) the rights of “employees” to engage in “concerted activities for mutual aid or protection,” protected by section 7 of the NLRA; (2) the status of “labor organization,” defined by section 2(5) of the NLRA; and (3) the status of “exclusive representative for purposes of bargaining” given to “representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes,” regulated under section 9(a) of the act.⁹⁹

This theoretical legal independence is important because it suggests that worker centers that do not qualify as “labor organizations” may nevertheless encourage and promote the use of Section 7 rights among their members.¹⁰⁰ Because worker centers generally do not seek to become the exclusive representatives for collective bargaining purposes, I focus on the first two of Hyde’s concepts.

A. Concerted activity for mutual aid or protection

Section 7 protects the rights of employees to form, join, or assist labor organizations, and to bargain collectively with their employer “through representatives of their own choosing.” However, in addition to the unionization process, section 7 also grants employees the right “to engage in . . . concerted activities for the purpose of . . . other mutual aid or protection.”¹⁰¹ The

⁹⁸ ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 6 (2d ed. 2004).

⁹⁹ Hyde first enumerated these concepts in Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149, 163-64 (1993), in which discussed the tendency in traditional labor law pedagogy to merge the three concepts together: the labor union, as the preferred mode of labor organization, begins by organizing a unit of workers who initially develop inchoate forms of organization through the exercise of “concerted activities,” and then adopt the labor organization as the “exclusive representative,” when it has come to represent a majority of the employees in the unit. Hyde applied the same concepts to what he calls “alternative worker organizations,” a broad category that includes worker centers, in Alan Hyde, *New Institutions for Worker Representation in the United States: Theoretical Issues*, 50 N.Y.L.S L. REV. 385, 404 (2005-2006) [hereinafter Hyde, *New Institutions*]. The respective sections cited by Hyde are NLRA section 7, 29 U.S.C. §157, NLRA section 2(5), 29 U.S.C. §2(5), and NLRA Section 9(a), 29 U.S.C. §9(a).

¹⁰⁰ As discussed *infra* Section VIII, despite the legal independence of the exercise of section 7 right and the regulation of “labor organizations,” there are some unifying strands, and as a matter of practice it is possible that as the Board becomes familiar with groups that frequently file charges on behalf of their worker members, this could translate into an interest in regulating their behavior—at least when they engage in activities that the law prohibits of unions.

¹⁰¹ NLRA section 7, 29 U.S.C. § 157, also provides that employees 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, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

right to engage in concerted activity can encompass a wide range of actions and expressions of “common cause,” even when the employees involved have no goal of forming a union. Indeed, one labor law scholar has argued that “the scope of coverage of section 7 and its application to nonunion employees may have been one of the best-kept secrets of labor law.”¹⁰² Thus, there are many potential ways worker centers could assist employees in using section 7 rights, which are discussed in more detail below. Each of the rights guaranteed by section 7 are protected from employer interference, restraint, or coercion, and an employer may not discharge an employee for the reason that the employee has engaged in protected conduct.¹⁰³

1. Who is protected in the exercise of Concerted activity

However, only “employees” are protected in their exercise of section 7 rights. “Employee” is a term of art under the NLRA.¹⁰⁴ Although generally broad,¹⁰⁵ there are several important exclusions from the definition which have particular bearing on worker centers: agricultural laborers,¹⁰⁶ individuals who work “in the domestic service of any family or person at his home,” and independent contractors all lack protection under the Act. Notably, workers who lack legal status to work under our immigration laws are considered “employees,” under the Act, although their ability to reap the benefits of this status are limited by the unavailability of backpay and reinstatement remedies in the face of a discharge that violates the Act.¹⁰⁷

¹⁰² See William Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 267 (2002).

¹⁰³ NLRA section 8(a)(1) forbid employers to “interfere with, restrain or coerce” employees in the exercise of Section 7 rights. 29 U.S.C. §158(a)(1). In addition, section 8(a)(3) makes it an unfair labor practice for an employer, “by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C. §158(a)(3). Although phrased in reference to membership in a labor organization, the Board has extended the protection of section 8(a)(3) to non-union members, THE DEVELOPING LABOR LAW, Ch. 7.II.A, at 290 (John E. Higgins, Jr., ed., 5th ed. 2006), and to discriminatory discharges motivated by animus towards an employee’s protected conduct. See, e.g., Pollock Elec., Inc., 349 N.L.R.B. No. 69, at *3 (April 6, 2007) (“Under the Board’s decision in *Wright Line*, the General Counsel has the burden of proving by a preponderance of the evidence that animus against union activity or protected conduct was a motivating factor in an adverse employment action.” (emphasis added) (footnote call number omitted)). See also Giant Foods Mkts., 241 N.L.R.B. 727, 728 n.5 (1979) (stating that the Act, including section 8(a)(3), protects “members of the working class generally”).

¹⁰⁴ The NLRA defines the term “employee” to include:

any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

NLRA § 2(3), 29 U.S.C. § 152(3).

¹⁰⁵ The tautological definition begins with by defining “employee” as “any employee,” and proceeds with express exceptions. NLRA § 2(3), 29 U.S.C. § 152(3). No distinction is made between temporary and fulltime employees, the former category applying to many workers targeted by worker centers FINE, *supra* note 9, 23 fig. 1.7.

¹⁰⁶ According to FINE, 16 percent of worker centers that organize by industry target agricultural employees. FINE, *supra* note 9, 23 fig. 1.7. Although agricultural employees lack protection under the NLRA, several states have instituted collective bargaining statutes that cover them. See, e.g., California Agricultural Labor Relations Act, CAL. LAB. CODE §§ 1140-1167 (2006); Hawaii Employment Relations Act, HAW. REV. STAT. §§ 377-1 to 377-18 (1993) (defining “employee” broadly).

¹⁰⁷ The Supreme Court expressly upheld the Board’s construction that immigrant workers who lack authorization to work are nevertheless “employees” under the Act in *Sure-Tan v. NLRB*, 467 U.S. 883, 892 (1984) (“Since undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come

Several of the express exceptions bear on employees typically organized by worker centers. Domestic workers, whom Fine estimates are the target of thirteen percent of worker centers that organize by industry,¹⁰⁸ are normally without section 7 rights, unless they are not directly employed by a family or homeowner, but work for a company or other entity that provides in-home services.¹⁰⁹ Many immigrants, especially in construction, operate, at least nominally, as independent contractors and would thus be unable to invoke the NLRA to act in concert with other similarly-situated independent contractors.¹¹⁰ Notwithstanding these restrictions, the majority of workers in worker centers would likely be protected by the NLRA.

within the broad statutory definition of ‘employee.’”). Therefore, although unauthorized workers are entitled to the protections afforded by the Act, the Supreme Court later held in *Hoffman Plastic Compounds, Inc. v. NLRB* that such workers may not be awarded backpay (and, it follows, reinstatement) when discharged in violation of the Act, as such a remedy would contravene the policies of the Immigration Reform and Control Act of 1986. 535 U.S. 137 (2002). See Hyde, *New Institutions*, *supra* note 99, at 404 n.77.

Approximately 75% of day laborers are unauthorized workers. See ABEL VALENZUELA, JR., ET AL., ON THE CORNER: DAY LABOR IN THE UNITED STATES 4 (Jan. 2006), http://www.sscnet.ucla.edu/issr/csup/uploaded_files/Natl_DayLabor-On_the_Corner1.pdf. Moreover, Fine reports that the vast majority of worker centers were started to serve immigrant populations either predominately or exclusively, although they serve immigrants with work authorization as well as those without. FINE, *supra* note 9, at 18.

¹⁰⁸ FINE, *supra* note 9, at 23 fig. 1.7. This figure applies only to the 56 percent of worker centers overall that organize by industry, in Fine’s survey of 137 worker centers. *Id.* at 23. Although not statutory employees, domestic worker organizations have engaged in several significant campaigns to pass state and municipal laws that increase worker protections.

For example, in New York, Domestic Workers United helped pass the Domestic Workers Bill of Rights in New York city council, which requires employment agencies that place domestic workers to spell out in writing the terms and conditions of employment when placing workers on the job, and requires that the agency get the hiring employer to sign a statement laying out state and federal rights that protect domestic workers, such as the Fair Labor Standards Act. FINE, *supra* note 9, at 174-76.

¹⁰⁹ Domestic workers employed by a company, as opposed to an individual in the home, are “employees” under the NLRA; the Board analyzes the employment relationship by focusing on the “principals to whom the employer-employee relationship in fact runs and not merely on the . . . ‘domestic’ nature of some of the services rendered.” *Ankh Servs., Inc.*, 243 N.L.R.B. 478, 480 (1979) (finding that employees who were employed by privately-owned for profit corporation that provided in-home service workers, personal care and housekeeping services to aged and disabled individuals clients, who were paid by the employer rather than the clients, and who were controlled by the employer, were not exempted from the coverage of the Act by the “domestic service” exclusion); *30 Sutton Place Corp.*, 240 N.L.R.B. 752, 753 n.6 (1979) (“[T]here is a substantial difference between employment by a single homeowner and employment by a cooperative or condominium entity. In the first instance, an individual and personal relationship is created between the homeowner and the employee; in the second instance, the employee’s relationship with the employer, the cooperative or condominium entity, is no different from that of an employee performing similar work for an apartment house or office building entrepreneur. ‘Domestic service implies employment on an individual and personal basis and cannot be enlarged to include a maintenance crew or clerical staff for a [47] unit housing complex.’”); *Shore Club Condominium Ass’n, Inc. v. NLRB*, 400 F.3d 1336 (11th Cir. 2005) (upholding Board determination that five-person maintenance crew employed by nonprofit corporation that provides maintenance and security services to owners and residents of a condominium, which include a maintenance employee, a painter, and cleaning personnel, who mostly service common areas but occasionally enter individual units to perform specified services, were employees within the meaning of NLRA Section 2(3)). Although worker centers like La Colectiva act as a de facto union in setting minimum standards of work for workers who have individual employment contracts, it is conceivable that a worker center could act as a direct employer of domestic workers.

¹¹⁰ Although not covered by the act, there are examples of worker organizations composed entirely of independent contractors that have organized to improve their working conditions. For example, the New York Taxi Workers Alliance has a membership of over five thousand drivers that have been involved in actions very similar to that of a union. FINE, *supra* note 9, at 138. In principle, other independent contractors may organize to advocate for their interests in the face of government regulation or common large contractors. Although not protected by the Act, neither does the Act restrict such activity, although some activity by independent contractors may be violative of

Another restriction worth noting in the worker center context is the NLRB's discretionary limitation of its jurisdiction. Although the Act is worded broadly to give the NLRB the power to cover employers "affecting commerce," the Board has historically limited its reach to enterprises that exceed certain dollar minima. Announced in a 1958 case, these limits exclude have the potential to exclude from coverage some workers who work in very small operations— such as non-retail firms who have less than \$50,000 in annual flows of goods and services either purchased or sold, and retail firms who have less than \$500,000 annual gross volume of business.¹¹¹

2. What types of concerted activity is protected

Despite these restrictions, the potential coverage of section 7 rights is large. To be protected by section 7, the concerted activity must: (1) be concerted, (2) be for the objective of mutual aid or protection, and (3) not lose its protected status because of the objective sought or the manner in which the activity is conducted.¹¹²

To be concerted, activity must be undertaken by more than one employee, or taken by one employee either on behalf of other employees with their authority, or in other ways furthers group goals.¹¹³ In the case of unfair labor practice charges alleging that a discharge or lesser

antitrust laws. See Elizabeth Kennedy, *Freedom from Independence: Collective Bargaining Rights for Dependent Contractors*, 26 BERKELEY J. EMP. & LAB. L. 143 (2005).

¹¹¹ These standards were first announced in 1958 in *Siemons Mailing Serv.*, 122 N.L.R.B. 81 (1958), but by statute the Board cannot set the bar any higher to exert its jurisdiction. NLRA § 14(c)(1), 29 U.S.C. 164(c)(1). Although the dollar minima are not very high — and are not indexed to inflation—it is estimated that several million employees are excluded from the Act because of them. ARCHIBALD COX, ET. AL, *LABOR LAW: CASES AND MATERIALS* 95 (13th ed. 2001). For a list and explanation of the standards, see NLRB, *AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES §1-200* (2005), available at http://www.nlr.gov/publications/manuals/r_-_case_outline.aspx. See *id.* at 94-95; GORMAN & FINKIN, *supra* note 98, §3.2.

¹¹² Although the protections for concerted activity generally apply in the same way to all employees, the NLRB has held that only unionized employees enjoy the right—known as the *Weingarten* right—to insist upon the presence of an employee representative during an investigatory interview that the employee reasonably believes may result in disciplinary action. See *IBM Corp.*, 341 N.L.R.B. 1288 (2004).

¹¹³ Corbett calls concertedness "the most important requirement . . . because it is the one that is most likely not to be satisfied." Corbett, *supra* note 102, at 279. The concertedness prong is most easily satisfied if an activity is undertaken by more than one employee. However, single-employee action can also be "concerted" under other circumstances, such as when a group of employees designate an individual to act on their behalf. *Meyers Indus. (II)*, 281 N.L.R.B. 882 (1986). Notably, the NLRB has not protected as "concerted" single-employee action to enforce statutory rights without some evidence of explicit or tacit agreement from others, such as when an employee asserts a right rooted in a collective bargaining agreement. See *id.* (requiring that individual employees act "with or on the authority of" their fellow workers for their activity to qualify as "concerted," thus overruling *Alleluia Cushion*, 21 N.L.R.B. 999 (1975), which had found an employee's safety complaint made to the California Occupational Safety and Health Administration to be concerted based on implied consent). As some have noted, this restricts the ability of individual employees to act "concertedly" in the non-unionized workplace. See William R. Corbett, *The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability*, 27 BERKELEY J. EMP. & LAB. L. 23 (2006). However, the Board has protected activity by individuals that seek to induce group action, see, e.g., *Martin Marietta Corp.*, 293 N.L.R.B. 719 (1989) (finding that employee's action of posting a notice urging fellow workers to join him in appearing on local television to speak about the health conditions at their workplace was protected by section 7), or when "the concerns expressed by the individual are a logical outgrowth of the concerns expressed by the group." *Mike Yurosek & Son*, 306 N.L.R.B. 1037, 1038 (1992) (protecting refusal by individual members of a work group to work an additional hour as ordered, after the group had earlier protested collectively a reduction in work hours), *supplemented*, 310 N.L.R.B. 831 (1993), *enforced*, 53 F.3d 261 (9th Cir. 1995). See also *Timekeeping Systems, Inc.*, 323 N.L.R.B. 244 (1997) (finding that individual employee's sending of email to co-workers complaining about proposed vacation policy was protected concerted activity).

discipline violated 8(a)(3), the charging party must show that the employer had some knowledge—or reason to know—that the activity occurred and was concerted for a violation to be found.¹¹⁴

The courts and the NLRB have taken a broad view of what employee activity qualifies as “for . . . mutual aid or protection,” interpreting it to reach activity that supports employees generally, not just co-workers who work for the same employer, and to extend to political issues affecting workers that are outside of the direct control of the employer. Thus, in the principal case, *Eastex, Inc. v. NLRB*,¹¹⁵ the United States Supreme Court upheld the Board’s determination that the distribution of a union newsletter, which urged opposition to a state right-to-work law and criticized a presidential veto of a federal minimum wage law, was protected. The Court stated that section 7 extends to employee efforts “to improve terms and conditions of employment or otherwise improve their lots as employees through channels outside the immediate employee-employer relationship,”¹¹⁶ and applies to actions seeking to improve working conditions through administrative and judicial forums, as well as “appeals to legislators to protect their interests as employees.”¹¹⁷ The limiting principle, however, expressed in *Eastex* and elaborated in further cases, is that there must be some connection between the conduct and the interests of the employees as employees.¹¹⁸ Therefore, concerted employee activity regarding political issues unrelated to employee interests may not be protected.¹¹⁹ Furthermore, even when the issue involved concerns employment, it must nevertheless be collective rather than individual in nature to be protected.¹²⁰

¹¹⁴ Under the test established in *Wright Line*, the General Counsel has the initial burden of making a prima facie showing “sufficient to support the inference that protected conduct was a ‘motivating factor’ in the employer’s decision.” 251 N.L.R.B. 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981). The employer may rebut this case by showing that prohibited motivations did not play any role in its actions, or that the actions would have taken place regardless of the employee’s protected activity. *Id.*

The elements of the prima facie case are the existence of protected activity, knowledge of that activity by the employer, and union animus. THE DEVELOPING LABOR LAW, *supra* note 103, Ch. 7II.B.1 at 299. The knowledge element may be inferred from surrounding factors. *Id.* at n.68.

¹¹⁵ 437 U.S. 556 (1978).

¹¹⁶ *Id.* at 563.

¹¹⁷ *Id.* at 566.

¹¹⁸ *Id.* at 567-68. As the Court indicated, “some concerted activity bears a less immediate relationship to employees’ interests as employees than other such activity,” and “at some point the relationship becomes so attenuated that an activity cannot fairly” be viewed as within the meaning of mutual aid and protection. *Id.*

¹¹⁹ For example, workers whose concerted activity concerns interests not related to their employment may not be protected, as in the case of employees who distributed a proposal for an employee stock ownership plan, because the plan did not relate to the “interest of employees as employees,” but rather “advances employees’ interests as entrepreneurs, owners, and managers,” *Harrah’s Lake Tahoe Resort Casino*, 307 N.L.R.B. 182, 182 (1992). Similarly, activity may be unprotected if it appeals to agencies or forums that do not have any functions related to employee working conditions. *See Autumn Manor Inc.*, 268 N.L.R.B. 239 (1983) (finding no protection for two employees who were discharged after testifying, subject to subpoena, before a state regulatory agency about condition in the nursing home that employed them, because the agency performed no function relating to the employees’ working conditions).

¹²⁰ In *Holling Press, Inc.*, 343 N.L.R.B. 301 (2004), the Board found that an employee who complained to a state fair employment practice agency about her claim that a supervisor had sexually harassed her, and later asked – with a threat of a subpoena if they refused — a coworker and another employee to testify before a state agency on her behalf, was not protected from termination by her employer for coercing fellow employees. In a 2-1 decision, the Board reasoned that because the concertedness prong and the mutual aid prong are analytically distinct, it is not enough that the employee sought help from coworkers, because “inasmuch as the claim before the State was personal, that conduct was not for mutual aid or protection.” *Id.* at 302. The Board rejected the view of the dissent that the employee’s conduct was for mutual aid or protection because it might save other employees from future sexual harassment, stating: “The bare possibility that the second employee may one day suffer similar treatment, and may herself seek help, is far too speculative a basis on which to rest a finding of mutual aid or protection.” *Id.* at 303-04.

Another important principle elaborated in *Eastex* is that the mutual aid and protection clause applies to efforts “in support of employees of employers other than their own.”¹²¹ This recognition, based on a broad statutory definition of “employee,” allows workers to engage in acts of support for those employed elsewhere, as well as to take up common cause with employees on issues that transcend the individual workplace.¹²²

Employee activity that meets the concerted and mutual aid prongs nevertheless can lose its protected status in certain instances, either due to the objective sought by the employees or because of the means employed for carrying out the concerted plan.¹²³ Unprotected objectives include inducing an employer to violate the Act or other laws.¹²⁴ Concerted activity also loses its protection when it involves methods of protest that are considered unlawful. Examples include activities that violate federal law¹²⁵ or state criminal or tort law, cause excessive injury to the employer,¹²⁶ or are considered excessively vulgar or offensive,¹²⁷ insubordinate,¹²⁸ or disloyal. In addition to the elusive and potentially overlapping concepts of “disloyalty” and

¹²¹ *Eastex*, 437 U.S. at 564.

¹²² See DEVELOPING LABOR LAW, *supra* note 103, Ch. 6.III.A.3, at 208 n.630 (citing cases).

¹²³ GORMAN & FINKIN, *supra* note 98, § 16.5.

¹²⁴ *Id.* Some examples of concerted activity that induces the employer to violate the Act include forcing the employer discharge an employee who has criticized the union or bargaining with a union other than the certified one. See *id.* (citing Thompson Prods., Inc., 72 N.L.R.B. 886 (1947)).

¹²⁵ *Id.* § 16.7

¹²⁶ *Id.* § 16.10. Such cases include employee protests that cause excessive harm to employer property or endanger customers. For example, employees who staged an unannounced walkout when molten iron was being contained in a cupola that would have caused costly damage to equipment was deemed “irresponsible” and therefore unprotected in *NLRB v. Marshall Car Wheel Co.*, 218 F.2d 409 (5th Cir. 1955). To avoid losing protection for indefensible conduct, employees must take reasonable precautions to protect the employer’s plant, equipment, or products from foreseeable imminent damage due to their concerted activities. DEVELOPING LABOR LAW, *supra* note 103, CH. 6.III.C.3.c, at 249.

¹²⁷ GORMAN & FINKIN, *supra* note 98, § 16.11. In this area, adjudicators must balance whether employee activity has been presented to the employer in a manner that is so vulgar or abusive that discipline is justified. As one court explained, “[a] certain amount of salty language or defiance will be tolerated . . . in recognition of the fact . . . ‘that passions run high in labor disputes and that epithets and accusations are commonplace. . . . However, if the employee’s conduct becomes so flagrant that it threatens the employer’s ability to maintain order and respect in the conduct of his business, it will not be protected.’” *America Tel. & Tel. Co. v. NLRB*, 521 F.2d 1159, 1161 (2d Cir. 1975). The Board has also limited protection when concerted employee activity involves false or defamatory statements by an employee that are made knowingly or with reckless disregard for their truthfulness. GORMAN & FINKIN, *supra* note 98, § 16.12.

¹²⁸ GORMAN & FINKIN, *supra* note 98, § 16.11. Recognizing that much concerted activity is by its nature “insubordinate,” in that it challenges some management decision or policy, the Board has granted leeway when assessing employee expressions of displeasure. One of the major cases in this area is *NLRB v. Washington Aluminum Co.*, in which the United States Supreme Court reversed the court of appeals and enforced a Board order reinstating with backpay seven employees who were fired for walking off their jobs to protest the cold temperature in the shop. 370 U.S. 9 (1962). Even though the employer had a policy requiring permission to leave the premises during the workday, and the employees had walked out spontaneously “without affording the company an ‘opportunity to avoid the work stoppage by granting a concession to a demand.’” *Id.* at 13. Finding that the workers “took the most direct course to let the company know they wanted a warmer place in which to work,” *id.* at 15, the Court held that “[t]he language of § 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time a demand is made.” *Id.* at 14.

Employee walkouts have sometimes been deemed unprotected—despite the holding of *Washington Aluminum*—when they are unannounced or timed for maximum inconvenience or impact upon the employer, even though they do not cause damage to employer property. See GORMAN & FINKIN, *supra* note 98, § 16.10. One court has suggested a line between the impulsive and exuberant behavior that may occur in the organizing process and is protected, and acts taken in bad faith or that pose a great threat to the “employer’s authority” in the workplace, and thus lose their protected status. *Earle Indus., Inc. v. NLRB*, 75 F.3d 400, 406 (8th Cir. 1996).

“insubordination,”¹²⁹ certain methods of protest, such as sit-down strikes, partial strikes, slowdowns, and intermittent work stoppages are *per se* unprotected—although these types of work stoppages are difficult to define with any precision.¹³⁰ Employees also have a right to strike separate from section 7 rights, but exercise of that right carries greater risks than concerted activity short of a strike because of the permanent replacement doctrine.¹³¹

In the leading “disloyalty” case of *Jefferson Standard*, the United States Supreme Court held that television technicians who were on strike were not protected when they distributed leaflets criticizing the quality of programming offered to the public by the television station for which they worked.¹³² Part of the rationale in that case was that the handbills did not make any explicit reference to the labor dispute, so that the employees were properly dismissed “for cause.”¹³³ Although “disloyalty” is potentially an expansive concept, subsequent cases have suggested that the courts and NLRB will look at whether the employees efforts “to improve their wages or working conditions through influencing strangers to the labor dispute were pursued in a reasonable manner under the circumstances.”¹³⁴

¹²⁹ For an extended discussion of unprotected activity, see Calvin William Sharpe, “By Any Means Necessary”—*Unprotected Conduct and Decisional Discretion Under the National Labor Relations Act*, 20 BERKELEY J. EMP. & LAB. L. 203 (1999). Sharpe contends that the caselaw on unprotected activity is inconsistent, and proposes a rule-like standard to bring clarity and predictability to this area of law.

¹³⁰ The sit-down strike, in which employees refuse to work while occupying the workplace, is unprotected because such occupation usually amounts to a trespass under state law. See *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939). However, some brief refusals to leave the premises which fall short of a clear trespass may be distinguished from “sit-down” strikes and therefore protected. See *GORMAN AND FINKIN*, *supra* note 98, § 16.9.

Slowdowns, partial strikes (refusing to work on certain tasks while being paid), and “intermittent” strikes (a series of concerted refusals to work during a short interval, followed by a resumption of work) will not be protected when they are viewed as a “systematic scheme by employees to extract a concession from the employer.” *GORMAN AND FINKIN*, *supra* note 98, § 16.13, at 429. Although the rationale has been described as muddled, it is based in part on the idea that “work time is for work” and that such actions unfairly reap the benefit of continuous strike without assuming the risk of striker replacement. The Board has explained that work stoppages become unprotected when “the stoppage is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer.” *Polytech, Inc.*, 195 N.L.R.B. 695, 696 (1972). Single protests, as well as spontaneous protest activity by nonunionized employees—because they are less likely to be part of a systematic plan—have been more likely to find protection. See, e.g., *Mike Yurosek & Sons, Inc.*, 306 N.L.R.B. 1037 (1992) (single refusal of a group of nonunionized employees to work extra hour requested was protected). See also *GORMAN AND FINKIN*, *supra* note 98, § 16.13, at 431; *DEVELOPING LABOR LAW*, *supra* note 103, at 241-44.

For an in-depth discussion of the circumstances in which partial strikes may be protected, see W. Melvin Haas, III & Carolyn J. Lockwood, *The Elusive Law of Intermittent Strikes*, 14 LAB. LAW. 91 (1998). See also Michael C. Duff, *Days Without Immigrants: Analysis and Implications of the Treatment of Immigration Rallies Under the National Labor Relations Act*, 85 DENVER UNIV. L. REV. 93, 115-26 (2007).

¹³¹ See *THE DEVELOPING LABOR LAW*, *supra* note 103, Chapter 19. Economic strikers may not be discharged, but may be replaced permanently. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938). If such strikers make an unconditional offer to return to work, they are entitled to the job held prior to the strike or a substantially equivalent position when it becomes vacant. *Rose Printing*, 304 N.L.R.B. 1076 (1991).

¹³² *NLRB v. Electrical Workers (IBEW) Local 1229*, 346 U.S. 464 (1953).

¹³³ Section 10(c) of the Act provides in part that “No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.” 29 U.S.C. §160(c). Justice Frankfurter, who would have found the activity protected, in his dissent warned that the majority’s approach, which failed to set a standard for when concerted activity loses protection, would “open the door wide to individual judgment by Board members and judges [and] needlessly stimulate litigation.” 346 U.S. at 481 (Frankfurter, J., dissenting). Engaging in protected concerted activity is not a “cause” justifying discharge. *Washington Aluminum Co.*, 370 U.S. at 16-17.

¹³⁴ *Sierra Publishing Co. v. NLRB*, 889 F.2d 210, 220 (9th Cir. 1989) (enforcing board order that reinstated editorial employees of newspaper who had been discharged for writing a letter to the paper’s advertisers enlisting their support for the union, discussing the year and a half contract fight they had engaged in, and noting the declining state of the newspaper during this time).

The cases regarding unprotected conduct are many; in this area it must be remembered that the Act protects vigorous contestation,¹³⁵ although at some point, if one is too reckless, the fuzzy line separating protected from unprotected concerted activity may be crossed.¹³⁶

B. How worker centers can use section 7 rights

Worker centers can make use of the legal protections afforded by section 7 by educating workers about such rights, assisting employees in their exercise, and helping workers who have suffered discipline in response to their exercise to seek relief.¹³⁷

1. Prerequisites for protection

When planning concerted activity or evaluating employer discipline in response to such activity, the worker center should ensure the prerequisites to protection—discussed above—are in place. Thus, a worker center must ensure that the employer in question is subject to NLRA jurisdiction and that the employee is not a domestic worker, agricultural worker, or independent contractor and therefore protected by the Act. The worker center must evaluate whether the activity in question is concerted as opposed to individual, for “mutual aid or protection” or merely benefits an individual, and whether it has other characteristics that eliminate its protected status. Worker centers must also be cognizant of the limited remedies available to immigrant workers who lack authorization to work.

2. Types of activities

There are endless variations on the types of actions that will be protected as concerted activity for mutual aid or benefit.¹³⁸

The Ninth Circuit also suggested that where the product disparagement has a clear connection to a labor dispute whose existence is known or made clear to the public, and does not breach confidences nor threaten violence, it will likely be protected as not unreasonable. *Id.* at 219-20. Criticisms relating to product quality or safety are more likely to be protected when workers make the connection to a labor dispute. See Cynthia Estlund, *What do Workers Want? Employee Interests, Public Interests, and Freedom of Expression under the National Labor Relations Act*, 140 U. PA. L. REV. 921 (1992). However, the contours of the “disloyalty” test are unclear and some courts continue to take a harsh view of employee disloyalty. See Matthew W. Finkin, *Disloyalty! Does Jefferson-Standard Stalk Still?*, 28 BERKELEY J. EMP. & LAB. L. (forthcoming 2007) (discussing D.C. Circuit’s decision in *Endicott Interconnect Technologies, Inc. v. NLRB*, 453 F.3d 532 (D.C. Cir. 2006), in which the court found that employee’s communication, in press and on newspaper website was “detrimentally disloyal” and thus unprotected even though made in reference to a labor dispute and not misleading, reckless, inaccurate or malicious, reversing the Board’s contrary finding).

An employee may subject an employee to discharge without any protection from the Act when employee criticism of the employer proves defamatory or involves malicious falsehood. GORMAN & FINKIN, *supra* note 98, § 16.12.

¹³⁵ As recently as 2003, the Board has affirmed that there is not a requirement that concerted activity by employees employ “‘reasonable means’ to be protected. *Accel Inc.*, 339 N.L.R.B. 1052, 1052 (2003) (finding that employer violated the Act by discharging eight nonunion employees for walking off assembly line in protest of employer’s decision to deny them scheduled works breaks, and rejecting employer’s argument that work stoppage should lose protection because it was a “disproportionately disruptive response to a trivial grievance”).

¹³⁶ See Sharpe, *supra* note 129, for an appendix containing a “typology of unprotected conduct cases.” The limitations on protected activity are also discussed in THE DEVELOPING LABOR LAW, *supra* note 103, chap. 6, section III.A. 4 and section III.C, both entitled “Limits on Protection of Concerted Activity.”

¹³⁷ As discussed, some worker centers have successfully made recourse to the NLRB. See *supra* note 96.

¹³⁸ For a broad collection of cases, including those involving non-union employees, see Melissa K. Stull, Annotation, *Spontaneous or Informal Activities of Employees as “Concerted Activities,” Within Meaning of § 7 of National Labor Relations Act (29 USCS §157)*, 107 A.L.R. FED. 244 (1992 & Supp. 2006).

Some of the most basic ways in which worker centers could promote the use of concerted activity is through worker action inside the workplace. For example, it is protected for employees to send a delegation to the employer to present a workplace related grievance or petition.¹³⁹ Workers are also protected in sharing information that benefits employees collectively, and thus are protected in distributing information about workplace rights, or about the services of the worker center, so long as the activity takes place on nonworking time and in nonworking areas.¹⁴⁰ Workers may also challenge employer rules that prohibit the exercise of protected employee rights—such as rules prohibiting discussion of wages, or overly broad no-solicitation rules—and can take such complaints directly to the NLRB.¹⁴¹

Section 7 can also serve to supplement organizing activity pursuant to other rights. For example, employees may refuse work assignments that they deem unsafe, even though the employer would not be subject to a violation of federal or state workplace safety or whistleblower laws.¹⁴² In fact, by acting in concert, employee activity can be protected beyond the confines of these sometimes limited laws.¹⁴³ Employee action in protest against unlawful discrimination may also be protected, so long the concerted activity can be considered for mutual aid or protection, and not merely in aid of the victim of the alleged discrimination.¹⁴⁴

Lastly, section 7 protects appeals regarding employee interests that take place outside of the workplace. For example, as *Eastex* illustrates, employees may not be disciplined for “appeals to legislators to protect their interest as employees,” such as writing letters or otherwise engaging politicians.¹⁴⁵ Such appeals may also be protected when made to the press, although in this context the employees must be careful not to publicly disparage the employer.¹⁴⁶ Workers are also protected when they make “resort to administrative and judicial forums” in concert, such as by pursuing claims for unpaid wages or breaks or going before governmental agencies dealing with occupational safety, employment standards, or related concerns.¹⁴⁷ Although most employment laws include anti-retaliation laws for the employee filing the claim, section 7 allows a broader protection for other employees who assist in developing the claim or who publicize it among other workers.

3. Limits on protection

In addition to the concerted activities that involve expression and speech, employees also have a right to engage in more active protest activity. And as worker centers typically engage in both outside political efforts and “inside” organizing directed at employees, it is important to consider the subject matter of concerted activity in determining whether it will be protected. The important guideline is that the activity must relate to employee interests as employees to merit

¹³⁹ THE DEVELOPING LABOR LAW, *supra* note 103, Ch. 6.III.B.3 at 223.

¹⁴⁰ See *Eastex*, 437 U.S. at 572. Oral solicitation is protected from discipline even in work areas so long as it is not during working time. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). See also THE DEVELOPING LABOR LAW, *supra* note 103, ch. 6II.B.1.c, at 107.

¹⁴¹ See *Corbett*, *supra* note 102, at 291-95.

¹⁴² THE DEVELOPING LABOR LAW, *supra* note 103, Ch. 6.III.B.5, at 235-38.

¹⁴³ Professor Summer argues that use of concerted activity protections to find greater protection than other worker protection statutes is a key virtue of section 7 rights. See Clyde Summer, *Unions Without Majority—A Black Hole?*, 66 CHI.-KENT L. REV. 531 (1990).

¹⁴⁴ See *supra* note 120. THE DEVELOPING LABOR LAW, *supra* note 103, Ch. 6.III.B.6, at 238.

¹⁴⁵ *Eastex*, 437 U.S. at 566.

¹⁴⁶ However, such appeals should not excessively disparage the employer, which may bring them within the category of unprotected “disloyalty.” See *supra* note 134.

¹⁴⁷ *Eastex*, 437 U.S. at 566.

section 7 protection, and will not be protected if the activity concerns political issues that lack reference to workers' employment.¹⁴⁸

In addition to the subject matter, the escalation from employee speech—as in the newsletter distributed in *Eastex*—to greater disobedience entails the risk of loss of protection. Section 7 rights are at a maximum when they do not impinge on employer interests directly, such as through protests that occur off-duty and off the employer's premises, nor publicly exhibit disloyalty to the employer. Work stoppages and other refusals to work, although protected in theory, can lose protection under a variety of circumstances discussed above: if they are calculated to harm the employer's property, if they include excessively flagrant or insubordinate behavior, or include illegal methods such as sit-down strikes or systematically planned recurring work stoppages short of a strike.¹⁴⁹

Although no Board decision or court has so held, there appears to be support for the proposition that employee protests will not be protected if they take place away from work and concern subject matter which, although within the broad parameters of *Eastex*, are not subject to the employer's control.¹⁵⁰ That was the uniform approach of the NLRB General Counsel to firings resulting from worker participation in massive immigration rallies in 2006 that called upon Congress to reject a law that would have classified employees working without proper immigration documents as felons. Known as "days without immigrants," a number of the protests occurred on traditional work days and called upon workers to miss work to attend the rallies. In a series of Advice memoranda in response to NLRB challenges to the firing of workers who participated, the General Counsel avoided the direct question of whether attendance at such a rally was protected "concerted activity," but in each case found that other factors merited a loss of protection. While there is no clear rule that emerges from these cases, the memoranda suggest on the one hand that even if one's protest activity is itself protected, an employee may not miss work to take part in such activity outside of the workplace, because "[e]mployees have no Section 7 right to time off."¹⁵¹ On the other hand, another memorandum suggests that employees lack protection to exert "economic pressure"—such as through work stoppages—to advance issues over which the employer has no control, even if such employees

¹⁴⁸ For example, many issues concerning immigration status that bear on employment issues will likely be protected, such as concerted activity over the treatment of immigrants in the workplace. Broader appeals to Congress regarding the ability of immigrants to work in this country would also likely be protected. However, issues such as the ability of unauthorized immigrants to be granted drivers licenses by state authorities would likely not be protected, except perhaps in industries in which permission to drive is central to employment, such as trucking.

The NLRA has protected appeals to Congress by a group of engineers opposing the liberalization of the immigration of foreign engineers, as concerted activity for mutual aid due to a concern over job security. See *Kaiser Engineers*, 213 N.L.R.B. 752, *enforced*, 538 F.2d 1379 (9th Cir. 1979). Nevertheless, when the General Counsel was presented with numerous charges that workers who attended rallies aimed at persuading Congress not to criminalize were unfairly discharged, it punted the issue of whether the rallies come within the ambit of protected activity. See Wesley Kennedy & Angie M. Cowan, *A Touch of "Class"—Immigration and the Intersection of Politics and Protected Section 7 Activity*, 23 LAB. LAW. 99 (2007); Duff, *supra* note 130.

¹⁴⁹ See *supra* note 130.

¹⁵⁰ The surrounding circumstances and rationale on which these cases are based is thoroughly examined in Duff, *supra* note 130.

¹⁵¹ Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB, to Dorothy L. Moore-Duncan, Reg'l Dir., Region 4, NLRB, regarding La Veranda, Case 4-CA-34718, at 2 (November 15, 2006), *available at* http://www.nlr.gov/shared_files/Advice%20Memos/2006/4-CA-34718.pdf. Professor Duff argues that this conclusion is based on a misreading of prior cases and a failure to treat participation in the Day without Immigrants rallies using the same principles applying to "work stoppage" cases, such as *Wash. Alum., Co.*. See Duff, *supra* note 130, at 109-13.

would be protected if they promoted such issues through other methods of concerted activity (such as distributing information or writing letters).¹⁵²

Based on these cases, worker centers should be cautious with respect to off-site protests during the workday, and work stoppages over “political” issues that are out of the hands of the employer, until a clear holding emerges.

IV. Restrictions of Being a “Labor Organization”

In addition to protecting the organizational activities of employees, the federal labor laws also regulate the activity of organizations representing workers. The target of regulation applies to what the labor laws call a “labor organization,” which is defined expansively in both the NLRA and LMRDA. Those laws target labor organizations in different ways. The NLRA restricts organizational activity, boycotts, picketing, how a hiring hall may operate, the duties of the organization to its members, and various matters concerning elections. The LMRDA was passed in 1959 to target perceptions of union corruption, and, as its name suggests, requires labor organizations to make annual financial reports to the Department of Labor. Another main goal of the LMRDA is to promote union democracy: to this end it contains a union member bill of rights, requires voting for the election of officers, and creates causes of action for union members when these rights are violated.

The key question in determining whether worker centers will be subject to these restrictions is whether they shall be considered “labor organizations” under the act.¹⁵³ Although there are some neutral or ambiguous consequences of being recognized as a “labor organization,” unless a worker center is seeking to collectively bargain there are few discernable benefits to that status.¹⁵⁴

The NLRA defines labor organizations as:

any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.¹⁵⁵

The LMRDA has a similar definition, although it is structured differently.¹⁵⁶

¹⁵² See Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB, to Robert Chester, Reg’l Dir., Region 18, NLRB, regarding Reliable Maint., Case 18-CA-18119, at 2 (October 31, 2006), *available at* http://www.nlr.gov/shared_files/Advice%20Memos/2006/18-CA-18119.pdf. The memorandum suggests that support for this proposition draws from the prohibition on secondary boycotts, which has been interpreted to “shield unoffending employers” from economic pressure over disputes that do not originate with them. *Id.* In his article, Professor Duff closely scrutinizes the potential application of the secondary boycott provisions of Section 8(b)(4) to participation in the Day without Immigrants rallies. See Duff, *supra* note 130, at 126-42. Duff concludes that the expansive interpretation given to Section 8(b)(4) by the courts could subject a labor organization to liability if it directs workers to large-scale rallies that foreseeably threaten neutral parties with ruin or substantial loss, although the issue contains several areas of uncertainty. *Id.* at 137-40.

¹⁵³ This question, and the meaning of “labor organization” are discussed extensively, *infra*, in Sections V and VI.

¹⁵⁴ Even if employees seek to form a union, they do not need a “labor organization” to assist them. A petition seeking a representation election may be filed by “an employee or group of employees or any individual,” in addition to a “labor organization,” and an election will be directed if a sufficient showing of interest is made, normally demonstrated by signed cards by at least thirty percent of the employees in the unit. NLRA Section 9(c)(1)(A); 29 C.F.R. §101.18a.

¹⁵⁵ NLRA §2(5), 29 U.S.C. §152(5).

¹⁵⁶ The LMRDA has a general definition, followed by an enumeration of five specific types of organizations that “shall be deemed to be engaged in an industry affecting commerce,” thus meeting the statute’s jurisdictional requirements. The general definition “labor organization” uses broader language than the NLRA definition:

A labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which

The threat to a worker center of being classified a “labor organization” will not arise in a vacuum but most likely as an action brought by an employer that has been targeted by the center’s organizing activities. Therefore, the question of enforcement takes on some practical significance. Worker centers are most likely to see “labor organization” charges in response to aggressive action—rallies or picketing—directed against particular employers. In these circumstances, an organization’s status as a “labor organization” under the NLRA would arise in response to an unfair labor practice charge filed by the employer. In addition, while status as a “labor organization” under the LMRDA is determined by the U.S. Department of Labor and is in principle enforced at their discretion, nothing stops aggressive employers from raising the issue to the Department. Because of the separate enforcement regimes, the status of an organization under one scheme does not determine the organization’s status under the other.¹⁵⁷

employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or *other terms* or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization or local central body.

LMRDA Section 3(i), 29 U.S.C. §402(i) (2006) (emphasis added to note differences from NLRA definition). Section 3(j) lists particular types of labor organizations deemed to be under the jurisdiction of the Act, which include: (1) certified representatives under the NLRA or the Railway Labor Act; (2) national or international labor organizations, and “local labor organizations recognized or acting as the representative of employees”; (3) labor organizations that charter local labor organizations or subsidiary bodies which represent or seek to represent employees; (4) such chartered labor organizations or subsidiary bodies; and (5) “conference[s], general committee[s], joint or system board[s], or joint council[s],” that are subordinate to national or international labor organizations. Section 3(j), 29 U.S.C. §402(j).

Although the general definition is somewhat broader than the NLRA definition, in that it includes “employee . . . group[s]” and “association[s],” the specific provisions of section 3(j) suggest a focus on labor organizations that act in a representative capacity—i.e. through collective bargaining relationships—as well as national unions and so-called intermediate labor bodies. Indeed, one scholar, writing several years after the passage of the LMRDA, described the main purpose of the LMRDA’s expanded definition of “labor organization” as intended to reach intermediate labor bodies that are not necessarily composed of employees nor deal with employers. See Julius Rezler, *The Definitions of LMRDA*, in SYMPOSIUM ON THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 [hereinafter LMRDA SYMPOSIUM], at 263 (ed. Ralph Slovenko 1961). Rezler concluded that “[d]ue to the broad definition of a labor organization, only a few types of trade union organizations were exempted from” coverage, including state and central labor bodies, international and national unions composed entirely of government employees, and independent local unions which deal with employers but are not engage in industries affecting interstate commerce. See *id.* at 268. However, viewed in light of the LMRDA’s clear purpose of combating extant corruption in labor unions, an its focus on labor organizations acting in a representative capacity, it would not appear to reach organizations that disavow collective bargaining relationships. See discussion *infra* Section IV.C.

¹⁵⁷ This works both ways. The NLRB does not consider a union’s compliance with the LMRDA in determining whether it is a “labor organization” under the NLRA. *Desert Palace, Inc. v. Local 711 Union of Gaming*, 194 N.L.R.B. 818, 818 n. 5 (1972) (“The NLRB is not entrusted with the administration of the [LMRDA]. An organization’s possible failure to comply with that statute should be litigated in the appropriate forum under that act, and not by the indirect and potential duplicative means of our consideration . . .”). This issue has been unsuccessfully raised in several cases in which the employer argues that a labor union should not be entitled to an order directing an election because of internal problems or mob influence, evidenced by noncompliance with the LMRDA. See, e.g., *Alto Plastics Mfg. Corp.*, 136 N.L.R.B. 850, 851, 853 (1962) (holding that evidence of LMRDA compliance is “not relevant or material to the issue of [the Union’s] status as a labor organization,” as “theory underlying this type of remedial legislation [the LMRDA] is not to ‘illegalize’ the organization itself, but to afford protection to all parties concerned by creating specific Federal rights and remedies whereby the activities of the organization and its officers and agents are regulated and subjected to judicial review in vindication of those rights”). See also *Family Service Agency San Francisco v. NLRB*, 163 F.3d 1369, 1383 (D.C. Cir. 1999) (“Section 2(5) of the NLRA . . . makes no reference to [LMRDA] reporting requirements . . .”).

Likewise, the fact that the NLRB declines to exercise jurisdiction over a labor matter because the employer is not in its jurisdiction does not determine coverage under the LMRDA. *Hawaii Government Employees Ass’n, American Federation of State, County and Mun. Employees, Local 152 v. Martoche*, 915 F.2d 718, 727 (D.C. Cir.

A. NLRA: Restrictions on Organizing Activities

The restrictions on “labor organizations” under the NLRA mostly concern the types of organizing tactics that are permissible, specifically regulating boycotts and picketing.¹⁵⁸ This could affect worker centers because they often engage in protest activities. In addition, there are several NLRA requirements that impinge upon how a labor organization is operated, such as the manner in which it administers a hiring hall. This, too could affect worker centers, particularly day labor centers.

1. Restrictions on picketing

NLRA Section 8(b)(7) regulates picketing by non-certified labor organizations. It was passed as part of the 1959 Landrum-Griffin act to prevent what Congress had termed “extortion” or “blackmail” picketing.¹⁵⁹ Non-certified labor organizations may not picket or threaten to picket an employer for a “recognitional” or “organizational” object in three situations: (1) when the employer has already lawfully recognized another union and it is not an appropriate time to raise a representation question;¹⁶⁰ (2) when a valid representation election has occurred within the last twelve months (and presumably no union was chosen);¹⁶¹ and (3) when the picketing goes on for over thirty days without the filing of a petition seeking representation through an election.¹⁶²

Although the law does not define “picketing,” or threats to picket, the paradigmatic situation is when workers patrol the employer’s premises with signs. However, other activity can also constitute picketing, where it is aimed at inducing collective action.¹⁶³

The restrictions on picketing only apply, however, when the object of the picketing is “forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees” or “forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative.”¹⁶⁴ Although functionally similar, picketing with the first object is called “recognitional,” as it is directed towards the employer,¹⁶⁵ and picketing with the second object is generally called

1990) (“We perceive no error or injustice in binding Local 152 to the records-production requirement of the LMRDA while the Center remains free of regulation under the LMRA.”).

¹⁵⁸ These provisions were added by the Taft-Hartley Act. Labor Management Relations (Taft-Hartley) Act of 1947, 61 Stat. 136.

¹⁵⁹ See Robert D. Leiter, *LMRDA and Its Setting*, in *LMRDA SYMPOSIUM*, *supra* note 156, at 12-132.

¹⁶⁰ NLRA Section 8(b)(7)(A); 29 U.S.C. § 158(b)(7)(A). This provision does not apply when there is a lawful union in place but it is no longer inappropriate to raise a representation claim, such as after the three-year contract bar has expired. See GORMAN & FINKIN, *supra* note 98, § 11.8.

¹⁶¹ NLRA Section 8(b)(7)(B); 29 U.S.C. § 158(b)(7)(B).

¹⁶² NLRA Section 8(b)(7)(C); 29 U.S.C. § 158(b)(7)(C).

¹⁶³ See, e.g., *Teamsters Local 182*, 135 N.L.R.B. 851 (1962) (picketing found where signs placed near employer’s premises and union members were stationed nearby); *Teamsters Local 282*, 262 N.L.R.B. 528 (1982) (signals to take collection action aimed at employees, customers, or others entering the employer’s premises were picketing even without signs); *Lawrence Typographical Union Local 570*, 169 N.L.R.B. 279 (1968) (handbilling was picketing when accompanied by conduct suggesting a purpose of inducing collective action against the employer rather than to simply convey information).

¹⁶⁴ NLRA Section 8(b)(7); 29 U.S.C. § 158(b)(7). See also Annotation, *Organizational and Recognitional Picketing Provisions of National Labor Relations Act (§ 8(b)(7)) (29 U.S.C.A. § 158(b)(7))*, 15 A.L.R. Fed. 14 (1973, updated 2007 West).

¹⁶⁵ Recognitional picketing has been defined as “any picketing that seeks to establish a union in a continuing relationship with an employer with regard to matters which could substantially affect terms and conditions of employment.” *IBEW, Local 453 (Southern Sun Electric Corp.)*, 252 N.L.R.B. 719, 723 (1980) (quoting *NLRB v. IBEW, Local 265 (RP&M Electric)*, 60 4F.2d 1091, 10973 (8th Cir. 1979)). But see *Nat’l Packing Co. v. NLRB*,

"organizational," as it is directed at an employer's employees. Therefore, there is no prohibition on picketing when the goal is to obtain reinstatement of a discharged employee, to protest an unfair labor practice, or to force the employer to conform to area standard wage rates.¹⁶⁶ The Board will look at the totality of the circumstances, such as the language of pickets and prior and contemporaneous conduct of the labor organization, to determine if one of the objects of the picketing is recognitional or organizational.¹⁶⁷

The provisions of 8(b)(7) may not present a problem for worker centers even if they are considered labor organizations. Because worker centers generally disavow representation, any picketing they engage in will not be considered recognitional.¹⁶⁸ Moreover, even though such picketing may arguably have a purpose of "organizing" employees to join the worker center, it does not come within the proscribed object because is not directed at choosing the labor organization "as their collective bargaining representative."¹⁶⁹ However, the apparent lack of recognitional or organizational object will not necessarily keep the employer from filing charges.

In addition to these provisions, a labor organization commits an unfair labor practice

2. Restrictions on secondary activity

Section 8(b)(4) of the NLRA generally prohibits labor organizations or their agents from applying economic pressure upon a person with whom the union has no dispute regarding its own terms of employment, in order to pressure another employer—the primary employer—with whom the union does have such a dispute.¹⁷⁰ As discussed previously, "primary" disputes involving concerted activity, or even primary boycotts and strikes, receive some level of protection under the Act.¹⁷¹ It is not always clear, however, what constitutes prohibited

377 F.2d 800, 804 (10th Cir. 1967) (finding recognitional picketing even where labor organization did not seek to establish a continuing relationship).

¹⁶⁶ See HOW TO TAKE A CASE BEFORE THE NLRB 645 (eds. Brent Garren et. al, 7th ed 2000).

¹⁶⁷ See, e.g., *Graphic Communications Int'l Union Local 1-M* (Heinrich Envelope Corp.), 305 N.L.R.B. 603, 605 (1991).

¹⁶⁸ In fact, in the Advice Memorandum concerning ROC-NY's picketing of Daniel, the General Counsel found that even *assuming arguendo* that ROC-NY was a labor organization, its picketing did not have a recognitional object. See Kearney, *ROC-NY Advice Memo*, *supra* note 3, at 5-9. Instead, the General Counsel concluded that the object of the picketing was "to publicize the discrimination claims and pressure the Employers to engage in or resume settlement negotiations." *Id.* at 7. In making this conclusion, the General Counsel stated that a demand to resume settlement negotiations is not equivalent to forcing an employer to recognize and bargain with the labor organization, based in part on the differences between lawsuit activities and representation activities. *Id.* at 7-8.

¹⁶⁹ See, e.g., *Retail Clerks (J.W. Mays, Inc.)*, 145 N.L.R.B. 1091, 1094 (1964) ("Accordingly, on the foregoing facts, and in view of the admitted *organizational* objective prior to the picketing, I find and conclude that an object of the picketing in this case was to force or require the employees of Mays to accept or select Respondents, or one of them, as their collective-bargaining representative, and hence was violative of Section 8(b) (7) (C)."). Although decisional law prior to the passage of the Landrum-Griffin Act had distinguished "organizational" from "recognitional" picketing, section 8(b)(7) treats them as mirror images of each other, in each case requiring a demand for collective bargaining to apply. See Bernard D. Melzer, *Organizational Picketing and the NLRB: Five on a Seesaw*, 30 U CHI. L. REV. 78, 79 n.10 (1962) ("[C]ommentators have generally agreed that this distinction is essentially verbal and that both forms of picketing should be given identical treatment . . .").

¹⁷⁰ GORMAN & FINKIN, *supra* note 98, § 12.1. The law of Section 8(b)(4) is admittedly difficult and complex, and judicial interpretations of the law have in some ways lost their basis in the text of the statute. Therefore, careful attention must be paid to the details of the activity in question. See Richard A. Bock, *Secondary Boycotts: Understanding NLRB Interpretation Of Section 8(B)(4)(B) of The National Labor Relations Act*, 7 U. PA. J. LAB. & EMP. L. 905, 917 (2005) ("As set forth above, albeit in language that would make even the most experienced lawyer cringe, section 8(b)(4)(B) prohibits certain conduct which enmeshes parties neutral to the dispute between the union and its more direct target. The legislative purpose is to shield the unoffending party from pressure imposed due to controversies not its own.").

¹⁷¹ See *supra* note 131.

secondary activity, and in some situations boycotts have been found to be illegal even in the absence of a traditional primary target, because neutral parties were injured.¹⁷²

Two types of conduct are prohibited by the NLRA's secondary boycott provisions, so long as they are coupled with a forbidden objective.¹⁷³ The first type concerns work stoppages, strikes, refusals to handle goods, or acts that encourage such behavior. The second type concerns threats, coercion, or restraint of employees. The heart of the secondary boycott provision is the undertaking of such activity with a goal of inducing the secondary target to cease doing business with the primary employer. Secondary pressure is also prohibited if it seeks: (1) to force an employer or a self-employed person to join a union; (2) force an employer to enter into a "hot-cargo" agreement, i.e., an agreement not to handle the goods of another employer; (3) force another employer to recognize an uncertified union; (4) force any employer to recognize and bargain with the union if another union is certified; and (5) force the assignment of certain work to one union instead of to another.¹⁷⁴

Secondary boycott issues are mostly likely to arise for worker centers in industries in which subcontracting is common, or where the worker center targets the conditions in which a commercial product is made. For example, a labor organization would run into trouble if it picketed a building manager who hired a nonunion cleaning service, for this would be an attempt to coerce the manager to cease doing business with a nonunion contractor in violation of Section 8(b)(4).¹⁷⁵ In construction, a labor organization runs afoul of Section 8(b)(4) if it pickets not its employer or the entity with which it has a dispute, but other subcontractors or the general contractor at a construction site.¹⁷⁶ In the clothing industry, a labor organization that focuses on the conditions of garment factory work would engage in a secondary boycott if it were to picket all distributors of the clothing made.¹⁷⁷

¹⁷² See Duff, *supra* note 130, at 129 n & n.204 (discussing application of secondary boycott provision in *International Longshoremen's Ass'n v. Allied International, Inc.*, 456 U.S. 212 (1982)); see *infra* note 178.

¹⁷³ NLRA Section 8(b)(4) makes it an unfair labor practice for a labor organization or its agents:

to engage in, or to induce or encourage any [employee] to engage in, a strike or a refusal in the course of his employment to use. . . or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce . . . where in either case an object thereof is-

- (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e); (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work.

29 U.S.C. § 158(b)(4).

¹⁷⁴ See *id.*

¹⁷⁵ See, e.g., *Service Employees Union Local 87*, 312 N.L.R.B. 715 (1993).

¹⁷⁶ *NLRB v. Denver Bldg & Constr. Trades Council*, 341 U.S. 675 (1951).

¹⁷⁷ For example, in 1995 the organization Sweatshop Watch held various public demonstrations targeting retailers that did business with an infamous garment sweatshop, the "El Monte Sweatshop," where seventy-two Thai

Labor organizations are also restricted in their attempts to target suppliers. In the restaurant industry, for example, a labor organization would be prohibited from picketing food suppliers. Labor organizations can also be found in violation of section 8(b)(4) if they engage in boycott activity in protest of political issues that embroil neutral employers who have no control over resolution of the dispute.¹⁷⁸ Under this rationale, when a labor organization organizes employees to stop work for political purposes, such as to attend a rally, concerning issues beyond the control of the employer, the secondary boycott prohibition may apply if substantial loss to the unoffending employers is foreseeable.¹⁷⁹

The Act does not proscribe non-picketing appeals to consumers, such as by handbilling, which urge consumers not to patronize a neutral employer but fall short of coercion.¹⁸⁰ It is not completely clear, however, if the secondary boycott prohibitions apply to conduct that falls in between handbilling and picketing, such as mock funerals, and the displaying of giant rat balloons and large banners. While such protests have been found to be prohibited secondary conduct in some instances,¹⁸¹ they are arguably protected by the First Amendment so long as they do not coerce neutral parties to take or refrain from taking some action.¹⁸² Moreover, “product” picketing that seeks only to persuade consumers not to buy merchandise of a primary employer with whom a labor organization has a dispute will be protected, unless it “reasonably can be expected to threaten . . . neutral parties with ruin or substantial loss.”¹⁸³

Worker centers should be very concerned to avoid these prohibitions. In response to a secondary boycott, an employer may file an unfair labor practice charge, seek injunctive relief from the NLRB in federal court,¹⁸⁴ and pursue a claim for damages in federal court under section 303 of the Labor Management Relations Act.¹⁸⁵ As a practical matter, it would be wise for worker centers to avoid secondary boycott activities, because the generally-recognized

immigrants worked in slave-like conditions. Lora Jo Foo, *ASIAN AMERICAN WOMEN: ISSUES, CONCERNS, AND RESPONSIVE HUMAN AND CIVIL RIGHTS ADVOCACY* 43 (2003)

¹⁷⁸ See *Allied International*, 456 U.S. 212 (holding that refusal, by members of the Longshoreman’s Association union, to handle cargoes arriving from or destined for the Soviet Union, in protest of Russian invasion of Afghanistan, was prohibited secondary boycott as it targeted neutral employers—the importer, the owner of the ships, and the stevedoring company employing longshoreman to do the unloading who brought the charge).

¹⁷⁹ This argument is developed and analyzed in Duff, *supra* note 130, with reference to workers who missed work to participate in large-scale rallies to protest Congressional immigration proposals.

¹⁸⁰ *Edward J. DeBartolo Corp. v. Building & Construction Trades Council*, 485 U.S. 568 (1988). Note that if additional tactics are added to the handbilling, it may be construed as unlawful picketing. See *K Mart Corp.*, 313 N.L.R.B. 50 (1993) (holding that handbilling, when joined with other tactics, such as skits, question and answer exercises, and chanting may be deemed picketing in violation of Section 8(b)(4)).

¹⁸¹ The NLRB has declared a mock funeral which involved the patrolling by members in front of a hospital to be in violation of the secondary boycott ban, but its decision was overturned by the D.C. Circuit. *Sheet Metal Workers’ Int’l Ass’n, Local 15 v. NLRB*, 491 F.3d 429 (D.C. Cir. 2007) (reversing NLRB and holding that union’s secondary mock funeral was constitutionally protected speech). Although the NLRB has not decided the legality of displaying rat balloons and large banners, several administrative law judges have found them to be akin to picketing and thus in violation of Section 8(b)(4)(ii)(B). The cases are discussed in Kate L. Rakoczy, Comment, *On Mock Funerals, Banners, and Giant Rat Balloons: Why Current Interpretation of Section 8(b)(4)(ii)(B) of the National Labor Relations Act Unconstitutionally Burdens Union Speech*, 56 AM. U. L. REV. 1621, 1644-45 & nn. 139 & 140 (2007).

¹⁸² See Rakoczy, *supra* note 181, at 1637-46.

¹⁸³ *NLRB v. Retail Store Employees (Safeco)*, 447 U.S. 607, 614 (1980). The caveat applies when the “neutral” employer relies heavily on the products of the primary employer subject to the labor dispute. In *Safeco*, the union had a dispute with Safeco, an insurance underwriter. Safeco filed an unfair labor practice charge after the union picketed five land title insurance companies that only sold insurance underwritten by the Safeco. Concluding that this picketing left “responsive consumers no realistic option other than to boycott the title companies altogether,” the Supreme Court agreed with the Board that the picketing was unlawful under Section 8(b)(4)(ii)(B). *Id.* at 613.

¹⁸⁴ NLRA Section 10(j), 29 U.S.C. § 160(j).

¹⁸⁵ Monetary damages are available when a labor organization is shown to have violated Section 8(b)(4) of the NLRA and the violation is shown to have resulted in monetary damages. 29 U.S.C. § 187 (2006),

objectionable nature of such boycotts would make it more likely that adjudicators would err on the side of caution in the “labor organization” analysis, taking a looser view in order to apply the restrictions to perceived wrongdoers.

B. NLRA: Restrictions on Organizational Form and Operations

1. Regulation of hiring halls

A hiring hall is an arrangement in which a labor organization serves as a job-referral service and a clearinghouse between employees and employers regarding the assignment of jobs. They are common in industries characterized by irregular and short-lived employment opportunities, such as construction and day labor.

Labor organizations that run “exclusive” hiring halls—those in which the employer may not reject persons referred by the hall and may not hire from other sources—must be careful not to violate the anti-discrimination provisions of NLRA Sections 8(a)(3) and 8(b)(2).¹⁸⁶ It is prohibited discrimination, under these provisions, for a union or the employer to require membership in the labor organization as a condition of referral and employment. However, labor organizations that operate “non-exclusive” hiring halls—which is much more likely in industries like day labor where there are not common employers—are not subject these restrictions.¹⁸⁷

Even if a worker center operates an exclusive hiring hall, it may avoid the NLRA’s strictures by ensuring the hall’s operation does not discriminate in a way that encourages membership in the labor organization. NLRB caselaw has also revealed the types of factors that may be relied upon by labor organization-run hiring halls in granting referral preferences. In the construction industry for example, an exclusive hiring hall may use such factors as “minimum training or experience,” seniority with an employer or in the industry, and residency, among others.¹⁸⁸

2. Other restrictions

In addition to regulations of hiring halls, labor organizations are subject to several other restrictions regarding their manner of operation. Certified labor organizations owe a duty of fair representation on their members to “represent fairly the interest of all bargaining-unit members during the negotiation, administration and enforcement of collective bargaining agreements.”¹⁸⁹ It is unlikely, however, that the duty applies to worker centers that do not seek to become exclusive representatives. The duty, which has no statutory basis, is a judicial creation developed as a corollary to the status of exclusive representative under NLRA Section 9(a).¹⁹⁰ Therefore, it is unlikely to when such status does not exist.

¹⁸⁶ Section 8(a)(3) forbids the employer “by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3). Although it contains a “closed shop” proviso, which allows the labor organization and the employer to agree to make membership in the labor organization a condition of employment, any such agreement must give the employee thirty days after the beginning of employment to join, a condition which is would defeat the purpose of any such requirement in an industry where most jobs do not last that long. Section 8(b)(2) forbid the union “to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender” dues and initiation fees. 29 U.S.C. § 158(b)(2).

¹⁸⁷ See GORMAN & FINKIN, *supra* note 98, § 28.11-.12. A labor organization may lawfully refuse to refer nonmembers of the organization in a non-exclusive setting. Carpenters Local 537, 303 N.L.R.B. 419 (1991).

¹⁸⁸ These factors are expressly permitted by NLRA Section 8(f), 29 U.S.C. §158(f). For further discussion of permissible factors and NLRB caselaw, see THE DEVELOPING LABOR LAW, *supra* note 103, Ch. 26.V.A.

¹⁸⁹ Electrical Workers (IBEW) v. Foust, 442 U.S. 42 (1979).

¹⁹⁰ THE DEVELOPING LABOR LAW, *supra* note 103, Ch. 25.I.A.

Moreover, if worker centers are characterized as “labor organizations,” both the organization and its officers will be unable to receive funds or loans from employers, regardless of the purpose.¹⁹¹

C. The LMRDA: Reporting Requirements and Members’ Rights

Worker centers should also be concerned about being classified as a “labor organization” under the LMRDA. However, as the text and legislative history show, the LMRDA was not intended to, and should not apply to such small grassroots organizations as worker centers.

1. Background

The LMRDA, also known as the Landrum-Griffin Act, was passed in 1959 as the “first comprehensive regulation by Congress of the conduct of internal union affairs.”¹⁹² The stage for the law was set with a series of highly publicized investigations into union corruption and racketeering that revealed a series of labor union abuses—the misuse of union funds by labor leaders, bribes by union officials in return for “sweetheart” contracts, violence and fraud in union elections, and more—that provided the impetus for reform.¹⁹³

The declaration of findings, purposes, and policy in section 2(a) of the LMRDA links the original purposes of the collective bargaining laws to the importance of adherence by labor organizations, employers, and their officials to “the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.”¹⁹⁴ Based on this language and the surrounding context, it is clear that the LMRDA was aimed at regulation of labor unions.

In addition to several amendments to the NLRA concerning boycotting and picketing, the LMRDA’s remaining six titles concern the rights of union members and regulation aimed at curbing union abuse. Title provides a bill of rights of members of labor organizations; Title II concerns required reports from labor organizations, officers, and employees of labor organizations; Title III governs union trusteeships; Title IV regulates union elections; title V declares fiduciary responsibilities of union officers; and Title VI deals with investigations and other matters.

¹⁹¹ See Labor Management Relations Act § 302(a); 29 U.S.C. § 186(a) (“It shall be unlawful for any employer . . . to pay, lend, or deliver, or agree to pay, lend or deliver, any money or other thing of value . . . “ to any employee representative, labor organization, or its officers).

¹⁹² *NLRB v. Allis-Chalmers Mfg.*, 388 U.S. 175, 193 (1967).

¹⁹³ The legislative history and surrounding political atmosphere are discussed in detail in Michael J. Nelson, Comment, *Slowing Union Corruption: Reforming the Landrum-Griffin Act To Better Combat Union Embezzlement*, 8 GEO. MASON L. REV. 5237, 528-42 (2000). The McClellan Committee exposed corruption in five unions, which included “underworld connections,” misappropriation of funds, fraudulent union elections, and employer-union collusion. *Id.* at 532-37. See also Benjamin Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851 (1960) (reviewing law and tracing legislative history). Congressional findings included in the Act also explain the practices that led to the law’s enactment:

The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

29 U.S.C. § 402(b) (2004).

¹⁹⁴ 29 U.S.C. § 402(a).

In addition to civil and criminal enforcement of some of its provisions, the Secretary of Labor is charged overall with investigatory authority regarding violation of any parts of the law.¹⁹⁵

2. Provisions potentially affecting worker centers

If worker centers were construed to be “labor organizations” under the Act, it would be subject to LMRDA regulation. For our purposes, such regulation can be broken down into the following categories: Reporting requirements, Members’ rights, Fiduciary duties, and Elections.¹⁹⁶

a. Reporting

Title II of the LMRDA imposes certain reporting requirements upon labor organizations. Labor organization must adopt a constitution and bylaws which must be filed with the Secretary of Labor.¹⁹⁷ Labor organizations must also file annual financial reports “in such detail as may be necessary accurately to disclose its financial condition and operations for its preceding fiscal year.”¹⁹⁸ Labor organizations with over \$250,000 in annual receipts must file a detailed LM-2 form; those with less than that amount may file the shorter LM-3 form; and those with less than \$10,000 in total annual receipts may file the abbreviated LM-4 form.¹⁹⁹ Labor organizations must retain a variety of records necessary to verify these annual reports for at least five years after the reports are filed.²⁰⁰ These reports must be shared with members with good cause²⁰¹ and are public information subject to the Freedom of Information Act.²⁰²

Willful violations of the reporting requirements, as well as false statements and willful false entries, subjects the responsible individual to fines of up to \$10,000, and imprisonment of up to one year.²⁰³

b. Members’ right

Title I of the LMRDA, which has been called the “Union Bill of Rights,” provides a variety of statutory rights to those who qualify as “members” of a labor organization.²⁰⁴ If a worker center admits workers as “members” and is interpreted to be a “labor organization,” it would need to afford such members equal rights and privileges with respect to participation in internal union affairs, the right to run for office, the right “[t]o meet and assemble with other members . . . and to express any view regarding the affairs of the labor organization, “due-process”-type protections in any discipline meted out by the worker center, and limited rights to

¹⁹⁵ See 29 U.S.C. § 601; 29 C.F.R. § 451.1(c).

¹⁹⁶ For a comprehensive source on LMRDA regulation, see LABOR UNION LAW AND REGULATION (ed. William W. Osborne, Jr. 2003).

¹⁹⁷ 29 U.S.C. § 431(a).

¹⁹⁸ *Id.* § 431(b).

¹⁹⁹ 29 C.F.R. § 403.1-.4.

²⁰⁰ 29 U.S.C. § 436.

²⁰¹ 29 C.F.R. § 403.8

²⁰² 29 U.S.C. § 205. See also 29 C.F.R. Part 70. Most reports are available for purchase from the Office of Labor-Management Standards in the Department of Labor. *Id.* §70.53.

²⁰³ 29 U.S.C. § 439.

²⁰⁴ The Act defines “member” to include

any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.

LMRDA Section 3(o); 29 U.S.C. § 403(o).

information about the labor organization.²⁰⁵ The Secretary of Labor may enforce any action for violation through a civil suit in federal court.²⁰⁶

c. Fiduciary Duties

Title V of the LMRDA imposes various duties upon labor organization officers. Officers have a fiduciary duty to the labor organization's members, and must hold money and property "solely for the benefit of the organizations and its members."²⁰⁷ The fiduciary duty may also extend more broadly to the manner in which the labor organization officers comply with provisions of the labor organization constitution and respect members' rights under the LMRDA.²⁰⁸ A labor organization member may sue for breach of fiduciary duties and recover damages.²⁰⁹ Embezzlement or unlawful conversion of the funds of the labor organization subjects an officer to up to five years imprisonment and a fine up as high as \$10,000.²¹⁰

Title V also requires that the officers and employees of any labor organization with more than \$5,000 in property and annual receipts must who handle union funds or property must be bonded to provide protection against losses by acts of fraud or dishonesty.²¹¹ There are also restrictions for the making of loans to labor organization employees.²¹²

d. Elections

Title IV of the LMRDA requires that labor organizations hold elections of officers. National or international labor organizations must hold elections every five years whereas local labor organizations must have elections every three years.²¹³ The LMRDA generally prescribes election by secret ballot for local labor organizations if officers are not running unopposed.²¹⁴ Every member in good standing is eligible to run for office.²¹⁵ The Act also has a series of campaign safeguards that considerably regulate the election process.²¹⁶ In addition to enforcement by the Secretary of Labor, labor organization members may sue for violations of the election requirements.²¹⁷

3. "Labor organization" in the LMRDA

As discussed, the LMRDA defines "labor organization" in somewhat broader terms in an effort by Congress to reach intermediate labor organizations, such as conferences, general committee joint system boards, and joint councils in which employees do not directly participate.²¹⁸ However, despite the definition, the structure and text of the statute as well as its purpose suggest that it should not apply to organizations like worker centers.²¹⁹

²⁰⁵ *Id.* §431(c).

²⁰⁶ *Id.* § 440.

²⁰⁷ 29 U.S.C. § 501(a).

²⁰⁸ *See* LABOR LAW AND REGULATION, *supra* note 196, Ch.2.III.C.2.b.

²⁰⁹ 29 U.S.C. § 501(b).

²¹⁰ *Id.* § 501(c).

²¹¹ *Id.* § 502.

²¹² *Id.* § 503.

²¹³ *Id.* § 401.

²¹⁴ *Id.*; 29 C.F.R. §452.28.

²¹⁵ 29 U.S.C. § 401(e).

²¹⁶ *See* LABOR LAW AND REGULATION, *supra* note 196, Ch.3.IX.

²¹⁷ 29 U.S.C. § 402.

²¹⁸ *See supra* note 156.

²¹⁹ The section that follows discusses whether worker centers are "labor organizations" under the NLRA, an analysis that applies to some extent to the LMRDA based on the shared language of the two acts. *See supra* Section IV. However, because of the distinct text, legislative history, purpose, and enforcement of the LMRDA, analysis under the LMRDA raises separate questions that are treated here.

First of all, the text of the general definition of LMRDA Section 3(i) differs in several ways from its NLRA counterpart. The definition begins by stating that “‘Labor organization’ means a labor organization engaged in an industry affecting commerce,” before listing the general definition of what is included in the term. Unlike the NLRA, the LMRDA contains a further provision following the general definition that delineates five specific categories of “labor organizations” that “shall be deemed to be engaged in an industry affecting commerce.”²²⁰ The structure of the statute indicates that the latter provision, Section 3(j), should be construed to act as a limitation on the general definition.²²¹ In fact, although the Secretary of Labor has indicated that the term “labor organization” will be interpreted broadly,²²² the Secretary has also suggested that a “labor organization” must meet the general definition of Section 3(i) as well as one of the specific categories of Section 3(j) to be subject to the requirements of the LMRDA.²²³ Applying the LMRDA only to enumerated 3(j) organizations also makes sense because it would avoid the absurd results of finding that ephemeral groupings of workers, that in some cases have been considered NLRA “labor organizations,”²²⁴ must meet the LMRDA’s structural and reporting requirements.

²²⁰ The remainder of the general definition includes some terms suggesting it is broader than the NLRA definition. While both laws include in the general definition “any organization of any kind” which exists for the purpose of “dealing with employers,” the LMRDA definition includes two terms that are not in the NLRA: employee groups and employee associations. However, these terms, which are included in the phrase “any agency, or employee representation committee, group, association, or plan,” appear to be directed towards participatory employee representation schemes set up within the workplace and not by outside groups. The terms “employee representation committee or plan,” contained in NLRA Section 2(5), have been interpreted to refer to a specific type of company union that the drafters of the NLRA intended to outlaw. *See* *Electromation, Inc.*, 309 N.L.R.B. 990, 999-1002 (Devaney, Member, concurring) (discussing specific reference in debates by Senate committee to “employee representation committees” and “employee representation plans”); *see infra* Section VI.B.1.a. Therefore, the canon of statutory interpretation known as *nosciatur a sociis* (“a thing shall be known by its associates”) suggests that the addition of the words “group” and “association” in this context are meant as further elaborations of this general category, and not to affect a drastic expansion. Of course, despite the way the basic entity that is a labor organization is set out, the critical factor in both definitions is the meaning of “dealing with” the employer over the enumerated subjects.

²²¹ This conclusion would be supported by the well-recognized canon of statutory interpretation that specific terms in a statute trump general ones. Moreover, the language of Section 3(j) is not expressed in illustrative terms, but rather appears to be a clarifying provision defining the universe of which “labor organizations” will be “deemed to be engaged in an industry affecting commerce”—using the terms “if it” meets one of the five groups rather than a broader term such as “including.” Therefore, so long as a “labor organization” meets the general definition of Section 3(i), the principle of *expressio unius est exclusio alterius* (“the expression of one thing suggests the exclusion of all others”) would counsel that the organization must also fit into a specific categories of Section 3(j) to be subject to the Act, because by including a specific list Congress meant to exclude all other types of organizations not listed.

²²² The Secretary of Labor has released interpretive regulations stating that “[i]n accordance with the broad language used and the manifest congressional intent, the language will be construed broadly to include all labor organizations of any kind other than those clearly shown to be outside the scope of the Act.” 29 C.F.R. § 451.2 (Westlaw, 2006). The regulations concerning the term “labor organization,” track the statutory language but also indicate that the definition “is deemed sufficiently broad to encompass any labor organization irrespective of size or formal attributes.” 29 C.F.R. § 451.3(a). Courts have also acknowledged the role of the Secretary in interpreting unclear terms. *See, e.g., Shultz v. Employees Fed’n*, 74 LRRM 2140, 2143 (S.D. Tex. 1970) (“The term ‘local’ labor organization, although used in various sections of the Act, is nowhere defined therein nor in the legislative history. Congress intended to leave the determination of whether a labor organization should be classified as ‘local’ to the expertise of the Secretary of Labor, taking into consideration its structure, the ordinarily accepted meaning of the term ‘local’ and the purposes of the Act.”). These interpretations are issued upon the advice of the Solicitor of Labor, and “indicate the construction of the law which will guide [the Secretary] in performing his duties unless and until he is directed otherwise by authoritative rulings of the courts” or subsequently released interpretations. 29 C.F.R. § 451.1(c).

²²³ 29 C.F.R. §451.4(a).

²²⁴ *See infra* Section VI.B.2.

Under this interpretation, whether or not a worker center qualifies as a “labor organization” subject to the LMRDA depends on whether it meets the description under Section 3(j)(2) of a labor organization that is not certified, as specific types of labor organizations clearly would not apply to worker centers that eschew a collective bargaining role. Although the term “local labor organization” is not defined, Section 3(j) applies to any “local labor organization recognized or acting as the *representative* of employees of an employer or employers engaged in an industry affecting commerce.”²²⁵ For several reasons, this definition would not appear to apply to worker centers. First of all, although the word “local” is not defined in the statute or regulations, it likely referred to *union locals*, the constituent part of a larger parent union that operates in a specific geographic locale or represents a particular bargaining unit.²²⁶ Secondly, the definition’s use of the phrase “recognized or acting as the representative of employees,” rather than mere “employee participation” as found in NLRA Section 2(5), suggests that a local labor organization is one that represents employees for the purposes of collective bargaining, by seeking exclusive representation through the processes specified in NLRA Section 9.²²⁷ The reference to “recognition,” a term the NLRA also uses in the context of seeking exclusive representative status,²²⁸ bolsters this interpretation. Indeed, some courts seem to have equated the “representative” aspect of this definition with the purpose of collective bargaining.²²⁹ However, “representative” can also be construed more broadly so as to refer to organizations that represent employee for the looser purpose of “dealing with employers” as set out in NLRA Section 2(5).²³⁰ For this reason, it is possible that the LMRDA definition of “local labor

²²⁵ 29 U.S.C. § 403(j)(2) (emphasis added).

²²⁶ In *Donovan v. National Transient Division*, the court, discussing the need to construe the term “local” in light of its ordinary meaning and congressional purpose, interpreted the term “local labor organization” with reference to the “typical union structure [of] a three-tier hierarchy,” explaining that a national or international organization is made up of subordinate locals, which “provide day-to-day services to the membership, such as policing collective bargaining agreements, disposing of grievances, collecting membership dues and disciplining dissident members.” 736 F.2d 618, 622 (10th Cir. 1984) (citing THEODORE KHEEL, LABOR LAW § 3.01, 3.03[1] (1980)). See also BLACK’S LAW DICTIONARY 1568 (8th ed. 2004) (defining “local union” as “a union that serves as the local bargaining unit for a national or international union”).

²²⁷ Section 9 of the Act regulates the process by which a labor organization may become the exclusive representative of a group of employees, see 29 U.S.C. § 159; NLRA Section 8(a)(5) imposes upon employers the duty to bargain with the exclusive representative in good faith. 29 U.S.C. § 158(a)(5).

²²⁸ NLRA Section 8(b)(7) restricts “recognitional” picketing in certain circumstances. See *supra* notes 164 & 165 and surrounding text.

²²⁹ In *Rodriguez v. Haynes*, the district court held that a local labor union is not subject to LMRDA regulation if it merely has employees within its membership, but does not represent them. 341 F. Supp. 2d 416, 423 (S.D.N.Y. 2004). The court employed a purposive analysis, stating that “unless a union’s leadership is susceptible to abusing power, power that was created as a result of its representation of private sector employees, the Act’s protection is unnecessary.” *Id.* Such power was equated with the right to bargain collectively and to use economic weapons to gain concessions from employers. *Id.* See also *Wright v. Baltimore Teachers Union*, 369 F. Supp. 848, 856 (D.C. Md. 1974) (“The purpose of a labor union is to *represent employees in collective bargaining* with their employer. This fact is emphasized in Section 402(j) wherein the several subparagraphs speak to the representation of employees. It is evident, then, that the concept of ‘representation’ encompasses far more than just ‘membership.’” (emphasis added)).

Most courts analyzing whether an organization is a “local labor organization” assume that it is a “labor organization,” and consider the question only for the purposes of voting regulations which apply differently depending on whether the labor organization is a “local,” or a “national” or “international” labor organization. The Department of Labor’s methods for making this distinction may change in the future. See *Union Organization and Voting Rights: Criteria for Characterizing a Labor Organization as a “Local,” “Intermediate,” or “National or International” Labor Organization*, 69 Fed. Reg. 64234-01 (Nov. 3, 2004) (requesting information from the public to assist Department of Labor in evaluating its methods for determining when labor organization constitutes a “local,” “intermediate” or “national or international” labor organization).

²³⁰ Indeed, some courts have interpreted the term “representative” in this way. See *Donovan*, 736 F.2d at 621-22 (“[I]f the organization represents its members regarding grievances, labor disputes, or terms or conditions of

organization” will be treated as coextensive with the NLRA’s definition of “labor organization,” based on a broad reading of the terms “local” and “representative.” However, in addition to the several textual factors weighing against this interpretation, this result is not consistent with the purposes of the LMRDA.

The LMRDA was passed in direct response to the abuses revealed by the McClellan Committee, and union corruption on the scale observed was certainly the “evil” which Congress intended to correct.²³¹ From a purposive perspective at least, it is clear that Congress did not intend the LMRA to regulate non-profit worker center organizations that do not have collective bargaining relationships with employers. In the McClellan Committee’s first interim report, the committee made five legislative recommendations, including a law to regulate union pensions, to regulate and control union funds, and to insure union democracy.²³² Both legislative bodies made clear reference to this backdrop in passing the LMRDA, with the Senate Committee on Labor and Public Welfare referring to “[t]he problems of this now large and relatively strong institution [the labor union],”²³³ and the House Committee on Education and Labor discussing the abuses in some segments of the trade union movement and the growth of “bureaucratic tendencies and characteristics.”²³⁴ In short, the evil sought to be rectified by the LMRDA is a far cry from the growing group of often struggling non-profit organizations that for the most part lack mandatory dues-paying members and do not have established relationships with employers. Moreover, organizations with 501(c)(3) tax status are already regulated in some fashion by the tax code.²³⁵

Nevertheless, even if the general definition controls, worker centers who do not engage in collective bargaining should not be interpreted to be subject to the LMRDA, for the same reasons the NLRA definition should not be construed to encompass worker centers, as discussed later in this paper.²³⁶

D. Labor organization status and other legal consequences

In addition to these laws which directly regulate labor organization activity, several areas of law make special accommodations for disputes affecting labor relations. Two prominent

employment, the organization is subject to the Act regardless of its formal attributes, or the extent of its representative activities.” (citations omitted)). In any case, a local labor organization under Section 3(j) must also meet the general definition of a labor organization under Section 3(i), which requires “dealing.”

²³¹ See *Church of the Holy Trinity v. United States*, 143 U.S. 457, 463 (1892) (“[A]nother guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body.”).

²³² See S. REP. NO. 86-187 (1959), reprinted in 1959 U.S.C.C.A.N. 2318, 2318 (listing five recommendations).

²³³ *Id.* 1959 U.S.C.C.A.N. at 2322.

²³⁴ H.R. REP. NO. 86-741 (1959), 1959 U.S.C.C.A.N. 2318, 2428. The House report also discussed the growth of trade unions from “relatively small, closely knit associations of workingmen” to unions whose members numbered in the hundreds of thousands, and in some cases over one million members at the time of the law’s passage. *Id.*

²³⁵ Under the Internal Revenue code, organizations that are organized and operated for charitable or educational purposes, commonly known as “nonprofit” organizations, are exempt from federal income taxes, Internal Revenue Code § 501(c)(3), as well as many state taxes. See HOWARD L. OLECK & MARTHA E. STEWART, *NONPROFIT CORPORATIONS, ORGANIZATIONS, & ASSOCIATIONS* Ch. 12 (6th ed. 1994). Contributions to 501(c)(3) organizations are tax-deductible. *Id.* However, along with these tax benefits are important limitations: 501(c)(3) organizations will lose their tax-exempt status if they directly or indirectly attempt to influence legislation or become involved in political campaigns for public office. *Id.* By contrast “social welfare organizations,” under Section 501(c)(4), may lobby and can provide incidental social benefits for pleasure or recreation of members. *Id.* See Oliver A. Houck, *On The Limits Of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 69 BROOKLYN L. REV. 1 (2003).

²³⁶ See *infra* Section VI.

examples are labor preemption and labor exceptions to antitrust laws.²³⁷ Because it may bear on the protections afforded to concerted activity by worker centers, below I discuss whether antitrust law imposes any obstacle on worker centers.

1. Overview of Antitrust liability for labor activities

Before modern labor laws, labor unions were often considered illegal conspiracies and their activities found to violate antitrust laws.²³⁸ Partially in response to such cases, Congress in 1914 enacted the Clayton Act, which affirmed that human labor was not a commodity or article of commerce, and contained provisions prohibiting injunctions against specified labor activity.²³⁹ In 1932, Congress passed the Norris-LaGuardia Act, which limits the jurisdiction of federal courts to issue injunctions, in cases involving labor disputes, against certain types of protest methods.²⁴⁰ Although some activity by labor organizations continues to be subject to state and federal antitrust laws, the courts have developed two “labor exceptions” to antitrust liability. The first, known as the “statutory” labor exemption, reads “interlacing” sections of the Clayton and Norris-LaGuardia Acts as exempting from antitrust liability practices that the Norris-LaGuardia Act protects from injunctions, “[s]o long as a union acts in its self-interest and does not combine with non-labor groups”.²⁴¹ The second, “nonstatutory” labor exemption, is rooted in the judicial effort to harmonize the policy favoring collective bargaining with antitrust policy, and accordingly applies to agreements between unions and employers that “are intimately related to the union’s vital concern of wages, hours and working conditions.”²⁴²

Although a full discussion of the complex topic of antitrust liability is beyond the scope of this paper, some preliminary comments may be made regarding the applicability of antitrust laws to worker center activity.

2. Whether worker center activity would be within the prohibitions of the antitrust laws

The first question to ask in assessing whether worker center activity would be subject to the antitrust laws is whether the activity falls within their prohibitions and thus potentially subject to civil and criminal liability.²⁴³ Section 1 of the Sherman Act make unlawful “every contract, combination . . . or conspiracy in restraint of trade or commerce among the several states.”²⁴⁴ Section 2 of the Sherman Act outlaws attempts at monopolization.²⁴⁵ Moreover, Section 3 of the Clayton Act prohibits exclusive-dealing arrangements that substantially reduce competition.²⁴⁶

Without any exemption, these antitrust laws may cover concerted refusals to deal, group boycotts, and other exclusive dealing arrangements. Even if covered, however, a practice that is

²³⁷ If worker centers are considered “labor organizations,” then the various preemption doctrines would likely apply to eliminate state regulation of their activities. The effect of such preemption would be uncertain, as most state law either has no special provisions for worker centers or does not clearly tilt either in support or against their activities.

²³⁸ LAWRENCE A. SULLIVAN & WILLIAM S. GRIMES, *THE LAW OF ANTITRUST* §14.3a (2006); *Loewe v. Lawlor*, 208 U.S. 274 (1908) (finding that Danbury Hatters Union was acting in restraint of interstate commerce when it struck Loewe’s factory and urged the public to boycott both the hats and those who sold them).

²³⁹ Clayton Act §§ 6, 20, 15 U.S.C. § 17, 29 U.S.C. § 52 (2006). Despite the broad category of activities protected from injunctions under these sections, the Supreme Court soon limited the exemption to “legitimate” union activities, thus excluding the secondary boycott. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).

²⁴⁰ Norris-LaGuardia Act, 29 U.S.C. §§101-10, 113-15.

²⁴¹ *United States v. Hutcheson*, 312 U.S. 219, 232 (1941).

²⁴² *H.A. Artists & Associates v. Actor’s Equity Ass’n*, 451 U.S. 704, 716 n.19 (1981).

²⁴³ Treble damages are available under section 4 of the Clayton Act, 15 U.S.C. § 15 (2006), and injunctive relief under section 16, *id.* § 26. Violation of section 1 of the Sherman Act is a felony. 15 U.S.C. § 1 (2006).

²⁴⁴ 15 U.S.C. §1 (2006).

²⁴⁵ *Id.* §2.

²⁴⁶ 15 U.S.C. § 14 (1988).

a restraint of trade does not automatically lead to antitrust liability.²⁴⁷ Unless considered a per se violation, a plaintiff in an antitrust action must show that he has suffered an “antitrust injury,” one that results from anti-competitive effects in a particular relevant market,²⁴⁸ and which reduces competition in the market in general rather than merely as to the plaintiff.²⁴⁹

In considering the activities of worker centers, the primary antitrust concerns are with respect to some types of boycott activities and exclusive hiring halls.²⁵⁰ However, only effects on commercial product markets—rather than labor markets—are within the purview of the Sherman Act.²⁵¹ Therefore, even when nonexempt labor activity restrains trade in some way, it will not necessarily lead to antitrust liability if its effects on competition are negligible.

3. Whether the statutory labor exemption applies to worker centers

If an antitrust allegation is alleged, it is likely that the “statutory” labor exemption would apply to worker centers, even if they were not considered “labor organizations.”²⁵² Under the statutory labor exception, which is based in Section 20 of the Clayton Act and the policy expressed in the Norris-LaGuardia Act, antitrust immunity extends to all cases “involving or growing out of any labor dispute.”²⁵³ Labor dispute was defined by the act to include “any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.”²⁵⁴

Notably, the Norris-LaGuardia Act is not directed at “labor organizations,” a term which does not appear in the Act. Moreover, in several cases a “labor dispute” has been found in the absence of a labor union. In *New Negro Alliance v. Sanitary Grocery Co.*, the Supreme Court considered whether the New Negro Alliance, “a corporation composed of colored persons, organized for the mutual improvement of its members and the promotion of civic, educational, benevolent, and charitable enterprises” could be enjoined for picketing and boycotting the

²⁴⁷ The Sherman Act only applies to restraints of trade that are unreasonable. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). Some restraints, such as price-fixing arrangements, are considered “per se” antitrust violations because they are certain to stifle competition and have long been treated as such. *See* *Nw. Wholesale Stationers, Inc. v. Pac. Stationers & Printing Co.*, 472 U.S. 284, 289-90 (1985). Other practices are analyzed under a “rule of reason,” that considers “a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint’s history, nature, and effect.” *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

²⁴⁸ *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

²⁴⁹ *See, e.g., Tigard Electric, Inc. v. National Electrical Contractor Ass’n*, 790 F. Supp. 1498, 1503 (D. Or. 1992) (holding that plaintiffs’ alleged lost income resulting from exclusion from market was insufficient to establish antitrust injury).

²⁵⁰ The courts have not been completely consistent about whether nonexempt group boycott activity is ever a per se violation, but in most cases will consider whether the group in question has market power, whether the activities will have an effect on the price of a product, and any procompetitive effects of the activity. *See, e.g., Larry V. Muko v. Sw. Pennsylvania Building & Construction Trades Council*, 670 F.2d 421 (3d Cir. 1982) (finding no per se violation where restaurant chain made agreement with two labor organizations that the chain would not grant construction contracts to any non-union contractor, and no anticompetitive effect under “rule of reason”). *See also* Daralyn J. Durie & Mark A. Lemley, Comment, *The Antitrust Liability of Labor Unions for Anticompetitive Litigation*, 80 CAL. L. REV. 757, 771-75 (1992).

²⁵¹ *Actor’s Equity*, 451 U.S. at 715 n.16.

²⁵² Because the nonstatutory exemption is an attempt to harmonize labor policy and antitrust policy when considering agreements between employers and labor groups, it is unlikely to apply to worker centers that eschew a collective bargaining role.

²⁵³ *Norris-LaGuardia Act* § 4, 29 U.S.C. § 104 (2006). The origins of the statutory exemption are explain in *Actor’s Equity*, 451 U.S. at 713-15.

²⁵⁴ *Norris-LaGuardia Act* §13(c), 29 U.S.C. § 113(c) (2006).

plaintiff's grocery stores in pursuit of its demand that the company "engage and employ colored persons in managerial and sales positions in the new store and in various other stores."²⁵⁵ Stating that "[t]he act does not concern itself with the background or the motives of the dispute,"²⁵⁶ the Court concluded that the case arose out of a "labor dispute" and that the parties were all persons interested in the dispute. The injunction was overturned. Therefore, *New Negro Alliance* indicates that organization need not be a "labor organization" to be engaged in a "labor dispute" protected by the Norris-LaGuardia Act.²⁵⁷

These principles were applied in a modern setting in *Adolph Coors Co. v. Wallace*, a case growing out of a coordinated consumer boycott of Coors beer products initiated by a coalition known as the Coors Boycott Committee (CBC) and a union not party to the lawsuit.²⁵⁸ After CBC threatened to picket San Francisco's public radio station in protest of a planned "Coors Day," during which Coors' volunteers would help the station in fundraising activities, Coors canceled the event and sued CBC, a gay rights organization, and two individuals, alleging violation of the Sherman Act. The district court dismissed Coors' claim against CBC based on what it called the "statutory 'labor group' exemption."²⁵⁹ Without reaching the question of whether or not CBC was a "labor organization," the court reasoned that CBC was within the exception because the controversy involved a "labor dispute" and CBC had concerns related to terms and conditions of employment, such as Coors' "union busting" activities.²⁶⁰ The radio station protest and the boycott were both prompted by an earlier strike, and thus were clearly part of a "labor dispute" as defined by the Norris-La Guardia Act.

Therefore, so long as an organization's involvement grows out of a "labor dispute" and concerns some condition of employment, it appears that it may claim the statutory exemption, although no court has decisively stated this to be the case.²⁶¹

²⁵⁵ 303 U.S. 552, 554 (1938).

²⁵⁶ *Id.* at 561.

²⁵⁷ The court made clear that protection runs to all persons "participating . . . in a labor dispute" including anyone having a "direct or indirect interest therein." *Id.* at 560 (quoting Norris-LaGuardia Act § 13(b), 29 U.S.C. § 113(b)). The court interpreted these definitions to be broad. *Id.* at 560-61 ("It is to be noted, however, that the inclusion in the definitions of such disputes, and the persons interested in them, serves to emphasize the fact that the quoted portions were intended to embrace controversies other than those between employers and employees; between labor unions seeking to represent employees and employers; and between persons seeking employment and employers.")

²⁵⁸ 1984 WL 2944, 115 L.R.R.M. 3100 (N.D. Cal. February 17, 1984).

²⁵⁹ *Id.* at *7. The reference to CBC as a "labor group" likely stems from the exception to the statutory exemption, under which an exemption is lost when one "combines with a nonlabor group." *Amer. Fed. of Musicians v. Carroll*, 391 U.S. 99 (1968) (holding that orchestra leaders were a "labor group" and thus the union was within the statutory exemption when it created bylaws and rules regulating the terms on which leaders could engage in one-time musical engagements).

²⁶⁰ Although the court had noted that CBC's boycott was also directed at Coors' support for "ultra-conservative political and social causes," it discussed only CBC's employment-related concerns when applying the statutory exemption. *Id.* at *1.

²⁶¹ A footnote in *Actor's Equity* can be read as a limiting gloss on the statutory exemption, in which the court stated: "Of course, a party seeking refuge in the statutory exemption must be a bona fide labor organization, and not an independent contractor or entrepreneur." 451 U.S. at 716 n.20. However, it is apparent from the context that the Court's reference to "labor organization" was only meant to ensure that the exemption applied to associations of employees and not business persons acting under a "labor organization" label. *See Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143 (1942) (denying statutory exemption to association of independent fishermen that set terms of sale, because of clear difference between "a dispute among businessmen over the terms of a contract for the sale of fish" and controversies over terms of employment, and based on the public policy of the Norris-LaGuardia Act to aid "the individual unorganized worker" indicating that it was directed towards disputes having some bearing on "the employer-employee relationship").

Even in one case that denied the statutory exemption because an organization was found not to be a "labor organization" under the NLRA as it had claimed, the reason was that it was in reality an association of independent contractors. *Spence v Southeastern Alaska Pilots Ass'n*, 1991-1 Trade Cases (CCH) ¶ 69,453 (D. Alaska 1990).

Lastly, it must be considered whether the statutory exemption is unavailable because a labor group “combine[s] with a non-labor group” or if its activity is not in pursuit of its “legitimate” self-interest.²⁶² Neither exception to the exemption is likely to apply to worker centers. A combination with a non-labor takes an act outside of the labor exemption only when it is a conspiracy with non-labor *business* groups competing in the relevant market, and does not apply to combinations with other labor or nonprofit groups.²⁶³ The “self-interest” prong of the statutory exemption concerns “whether the ends to be achieved are among the traditional objectives of labor organizations.”²⁶⁴ Even if worker centers are not considered “labor organizations,” their goals and means of pursuing them will be protected if traditional. Thus, so long as a worker center does not conspire with business competitors, and ensures that its activities are linked to employment concerns and pursued using means traditionally employed by labor unions, their activities should be immune from antitrust liability.

V. The “Labor Organization” Question

As the preceding section makes clear, whether or not a worker center is a “labor organization” has critical consequences for the types of organizing activities it may undertake and the regulations to which it is subject. To answer this question, I explore the statutory definition of “labor organization” and a variety of approaches to statutory construction that inform how the broad category should be understood. I discuss the ways the definition of labor organization might be analyzed using traditional methods of statutory interpretation and identify three distinct approaches that the NLRB may use in answering the question.

A. “Labor Organization” and Methods of Statutory Interpretation

The organization in *Spence* was an association of pilots that was sued by a member for antitrust violations when the member was suspended for thirty days. The court ruled that in the absence of an employer-employee relationship between the pilots and ships’ agents, the association was not entitled to the statutory exemption. *Id.* Therefore, despite the court’s application of the “labor organization” definition, based on the argument raised by the association, it is clear that the reasoning is consistent with other cases limiting the exemption to employees and others engaged in labor disputes rather than independent businessmen seeking to limit competition.

²⁶² *Hutcheson*, 312 U.S. at 232 (“So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under [Section] 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.”); *USS-POSCO Indus. v. Contra Costa County Building & Construction Trades Council*, 31 F.3d 800 (9th Cir. 1994) (explaining the two exceptions).

²⁶³ *POSCO Indus.*, 31 F.3d at 806 (“To constitute a non-labor group for purposes of the statutory labor exemption, therefore, the entity in question must operate in the same market as the plaintiff to a sufficient degree that it would be capable of committing an antitrust violation against the plaintiff, quite independent of the union’s involvement.”). *See also Adolph Coors*, 115 LRRM at 3107 & n.14 (CBC’s joining with other non-labor parties, including several civic and political groups, did not remove protection of statutory exemption); James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEX. L. REV. 889, 971 (1991) (discussing “nonlabor” exclusion’s inapplicability to social or political groups).

²⁶⁴ *POSCO Indus.*, 31 F.3d at 808. The court explained the contents of such traditional objectives in part by the enumerating activities that are clearly not legitimate: “forc[ing] employers to funnel money into a commercial enterprise from which the union derives profits;” “forc[ing] the employer to hire the union president’s spouse;” “involve[ment] in illegal activities unrelated to its mission, such as dealing drugs or gambling.” *Id.*

The court will also look at whether the means employed suggest that the activity is out of the ordinary, and not legitimately within the union’s interest. *See id.* (“[W]here a union engages in activities normally associated with labor disputes, these will be presumed to be in pursuit of the union’s legitimate interest absent a very strong showing to the contrary.”). The court also listed certain union activities considered to be traditional ones by dint of protection afforded to them in the Norris-LaGuardia act, such as picketing and handbilling. *Id.* at 808-09 & n.7.

This inquiry begins with the NLRA definition of “labor organization.” Although the term is defined somewhat differently in the LMRDA, for reasons I have discussed meeting the NLRA definition is a minimal threshold for LMRDA coverage in the context of worker centers.²⁶⁵

Section 2(5) of the NLRA defines “labor organization” as

any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.²⁶⁶

There are many potential ways to analyze this definition. The traditional schools of statutory interpretation may broadly be grouped into the categories of textualism, intentionalism, and dynamic statutory interpretation. A textualist analysis would focus on the meaning we ascribe to each of the words in the definition, and seek to create a larger meaning based on these words. Rather than a strict adherence to the text, an intentionalist analysis reaches for a broader notion of what the definition is intended to cover. Another intentionalist approach might focus on the words as understood by the members of Congress who sponsored and passed the law in 1935. Lastly, recognizing the great length of time that has passed since the NLRA was created, a dynamic analysis may search for the best way to accommodate the statute’s definition to modern circumstances and intervening development.

Textualists, including leading proponent Justice Antonin Scalia,²⁶⁷ focus on the statute’s text, either as the best evidence of legislative intent or as the only authoritative basis for statutory interpretation.²⁶⁸ Textualists distrust intentionalist theories as leaving too much discretion in the hands of unelected judges, and reject reliance on legislative history as equally open-ended.²⁶⁹ Textualist interpretation, therefore, is limited to the text, its context within a statute, and text-based canons of statutory construction that elucidate the meaning of the words provided.²⁷⁰

Intentionalists believe the goal of statutory interpretation is to discern the legislative intent behind a given law.²⁷¹ One of the main justifications for intentionalist theories is that they seek to capture the democratic will of the people as expressed by the legislature.²⁷² Intentionalists also look to the consequences of a particular construction and ask whether it is consistent with what the legislature would have wanted.²⁷³ One school of intentionalism focuses on the “specific intent” of the legislature that enacted the law under consideration.²⁷⁴ Another approach, known as “imaginary reconstruction,” the interpreter tries to discover “what the law-maker meant by assuming his position, in the surroundings in which he acted, and endeavoring to gather from the mischiefs he had to meet and the remedy by which he sought to meet them, his intention with respect to the particular point in controversy.”²⁷⁵ A third group, those who rely on

²⁶⁵ See *supra* Section IV.C.3.

²⁶⁶ NLRA §2(5), 29 U.S.C. §152(5).

²⁶⁷ See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

²⁶⁸ WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRET, *LEGISLATION AND STATUTORY INTERPRETATION* 223 (2000) [*Hereinafter* ESKRIDGE, ET AL.].

²⁶⁹ *Id.* at 227-29.

²⁷⁰ *Id.* at 249-85.

²⁷¹ *Id.* at 213.

²⁷² STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 99 (2005) (“An interpretation of a statute that tends to implement the legislator’s will help to implement the public’s will and is therefore consistent with the Constitution’s democratic purpose.”).

²⁷³ *Id.* at 100-01.

²⁷⁴ ESKRIDGE, ET AL., *supra* note 268, at 214-18. There are several much-discussed problems with this approach: Can a body of legislators have one intent? Did the majority in one house of Congress have the same intent as the majority of the other? Can the statements of some legislators or committees be attributed to the body as a whole? See *id.*

²⁷⁵ *Id.* at 218-19 (quoting Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1908)).

“general intent,” or purposivism, reach to a higher level of generality to discover the broad goal sought by a law’s drafters.²⁷⁶ Purposivism focuses on questions about which there may have been a greater degree of consensus in the enacting legislature.²⁷⁷ It is often more adaptable to new or unforeseen circumstances. Under each of these intentionalist theories, a result grounded in the text alone may be considered outside the bounds of the legislative intent of the statute.

Finally, “dynamic” theories of statutory interpretation, apply pragmatic considerations and view statutory regimes as evolving over time.²⁷⁸ They therefore stand opposed to the “originalist” nature of textualist and intentionalist theories, which fix a statute’s meaning at the time of enactment. Dynamic theories have proliferated in the academy as a means of explaining changing judicial interpretation over time, but have generally failed to achieve explicit endorsement by the courts.²⁷⁹ Under one such theory, developed by Professor William Eskridge,²⁸⁰ an interpreter must consider the text, the original legislative expectations, and what Eskridge terms the “evolutive perspective,” which refers to “the subsequent evolution of the statute and its present context, especially the ways in which the societal and legal environment of the statute has materially changed over time. . . .”²⁸¹ If “neither the text nor the historical context of the statute clearly resolves the interpretive question, and the societal and legal context of the statute has changed materially . . . the evolutive context controls.”²⁸² Thus, where social and legal circumstances have changed in unanticipated and material ways since the statute’s enactment, Eskridge suggests that the interpreter may “consider current values, such as ideas of fairness, related statutory policies, and (most important) constitutional values” in construing the statute.²⁸³

When interpreting the meaning of “labor organization,” each of these methods of statutory interpretation will likely yield different outcomes. Therefore, it is important to understand which methods will be applied by adjudicators facing the question of whether worker centers are “labor organizations,” as well as which method *should* be applied.

B. Statutory Interpretation and the Labor Board

Because the NLRB is the forum most likely to hear complaints that a worker centers is acting as “labor organizations,”²⁸⁴ and because its determinations are afforded a certain amount of deference by reviewing courts, it is particularly important to understand the way the Board might approach the question.²⁸⁵ In a recent article, Professor Daniel P. O’Gorman addressed the manner in which the NLRB should approach questions of statutory interpretation.²⁸⁶

²⁷⁶ *Id.* at 220-22. This approach is exemplified in *Holy Trinity*, 143 U.S. 457, discussed *supra* at note 231.

²⁷⁷ ESKRIDGE, ET AL., *supra* note 268, at 221.

²⁷⁸ *Id.* at 236-43.

²⁷⁹ ESKRIDGE, ET AL., *supra* note 268, at 237. *See, e.g.*, *Harris v. United States*, 536 U.S. 545, 556 (2002) (rejecting “a dynamic view of statutory interpretation, under which the text might mean one thing when enacted yet another if the prevailing view of the Constitution later changed”).

²⁸⁰ William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

²⁸¹ *Id.* at 1483. The dynamic approach is comfortable considering varying perspectives based on the statute in question. Therefore, where the text is clear with respect to the issue at hand, it will likely govern. *Id.* at 1496. Likewise, when the historical expectations of the legislature are evident, often because the text is detailed, and applicable, because the social norms and practices have not changed substantially since the law’s enactment, it will govern. *Id.*

²⁸² *Id.*

²⁸³ William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 359 (1990).

²⁸⁴ In fact, it already has. *See infra* note 300.

²⁸⁵ As an executive-branch agency, the Secretary of Labor is subject to many of the same principles in its administration of the LMRDA. Moreover, Board consideration of these questions is more predictable, as employers

O’Gorman acknowledges that the Board does not follow his proposed model, but instead employs divergent methods of statutory interpretation that appear more outcome-driven than anything else.²⁸⁷ O’Gorman believes that this policymaking “under the guise of statutory interpretation” is a result of the Board’s insistence on approaching issues of statutory interpretation as would a court, and ultimately undermines its policymaking role.²⁸⁸

According to O’Gorman, because administrative agencies are designed to make policy choices, they should not be limited to textual or intentionalist approaches to statutory interpretation.²⁸⁹ O’Gorman believes that Eskridge’s dynamic model is most suited to agency decision-making, because such decisions may be properly sensitive to changing circumstances and influenced by the incumbent administration’s policy views.²⁹⁰ However, O’Gorman believes that an administrative agency’s role in interpreting statute is fundamentally different from that of courts, such that even the dynamic model does not apply fully.²⁹¹

Instead, O’Gorman suggests that an administrative agency like the NLRB can fulfill its policymaking role when interpreting statutes by working within the confines of *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*:²⁹² first identifying the range of permissible

may bring unfair labor practices charges which the Board is required to investigate. The power to investigate LMRDA compliance, on the other hand, lies for the most part with the Secretary of Labor, whose power may be exercised “when he believes it necessary in order to determine whether any person has violated or is about to violate any provision of” the LMRDA. LMRDA Section 601(a), 29 U.S.C. § 521. Only “members” of labor organizations may enforce the provisions of the LMRDA Union Bill of Rights, LMRDA Section 101-105; 29 U.S.C. §§ 411-415, and “members” may also file complaints with the Secretary regarding violations of the LMRDA’s election provisions. LMRDA Title IV; 29 U.S.C. §§ 481-484.

²⁸⁶ Daniel P. O’Gorman, *Interpreting the National Labor Relations Act: The NLRB and Methods of Statutory Interpretation*, 81 TEMPLE L. REV. (forthcoming 2008).

²⁸⁷ *Id.* at ___. O’Gorman discusses the inconsistent approaches applied by the Board in two cases. In *Brown University*, 342 N.L.R.B. 483 (2004), in which the Republican-appointed majority adopted a liberal, purposivist/intentionalist approach to conclude that the definition of “employee” does not apply to graduate students, while the Democratic-member dissent adopted a conservative, textualist approach to find otherwise. The hats switched in *Oakwood Healthcare, Inc.*, 348 N.L.R.B. No. 37 (2006), where the conservative majority felt bound to a strict textualism when interpreting the meaning of supervisor under the act, in contradistinction to the Democratic minority, which applied a more intentionalist approach.

²⁸⁸ *Id.* at 30.

²⁸⁹ *Id.* at ___.

²⁹⁰ *Id.* at ___ (page 16-18.)

²⁹¹ *Id.* at ___. Nevertheless, NLRB adjudication is marked for its sensitivity to evolving trends in industrial relations, and the Supreme Court has acknowledged that labor law may be properly development through an evolutionary process. See *NLRA v. J. Weingarten, Inc.*, 420 U.S. 251, 265 (1975) (“The nature of the problem, as revealed by unfolding variant situations, invariably involves an evolutionary process for its rational response, not a quick definitive formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way . . . and has modified and reformed its standards on the basis of accumulating experience.” (quoting *Electrical Workers v. NLRB*, 366 U.S. 667, 674 (1961))).

It is at this stage that the dynamic model of statutory interpretation is most relevant. The development of labor law through evolutionary process has been acknowledged and approved by the Supreme Court. See *NLRA v. J. Weingarten, Inc.*, 420 U.S. 251, 265 (1975) (“The nature of the problem, as revealed by unfolding variant situations, invariably involves an evolutionary process for its rational response, not a quick definitive formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way . . . and has modified and reformed its standards on the basis of accumulating experience.” (quoting *Electrical Workers v. NLRB*, 366 U.S. 667, 674 (1961))).

²⁹² *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Applying “*Chevron* deference,” as it has been called, a reviewing court will apply the following two-part test to agency interpretations of the statutes they administer:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines that

interpretations available to it under *Chevron* and then adopting the interpretation that the agency, as an expert in the subject matter, believes to be the best policy choice.²⁹³ In O’Gorman’s view, at the second stage of *Chevron*, having found some statutory term to be ambiguous, an agency has wide discretion to interpret the term to further policy objectives. In the case of the NLRB that discretion is bounded only by the limitation that the Board act to effectuate the purposes of the NLRA, which are broad policies oriented towards the collective bargaining process, and unlikely to be decisive in a particular case.²⁹⁴ O’Gorman notes as well that it is not improper for the Board to take into consideration the views of the executive branch, and that the Board should not feel bound by the doctrine of *stare decisis* to the same extent as the courts.²⁹⁵

Therefore, O’Gorman shows that while the Board in practice employs a mix of approaches to questions of statutory interpretation, Board members in reality act as policymakers who base their decisions on their interpretation of the policies of the Act, their view on the state of industrial relations, and their policy preferences as political appointees. This is as it should be, O’Gorman believes. However, rather than policymaking as subterfuge, O’Gorman believes the Board can be more upfront about its role as policymaker once it satisfies the limitations of the first step of *Chevron*.

Applying these insights to the question of how the Board should address the “labor organization” status of worker centers, the clearest conclusion one may draw is that the Board is unpredictable. However, O’Gorman identifies some guideposts. First, the Board must comply with the first step of *Chevron*, identifying the interpretations of the definition of “labor organization” that are permissible to the extent not precluded by the clearly expressed intent of Congress or prior Supreme Court precedent.²⁹⁶ Outside of this constraint, the Board has broad discretion to interpret the meaning of “labor organization,” with reference to its interpretation of the Act’s policies and other considerations such as the history and purpose of the Act and the current labor relations context.

C. Three Approaches to the “Labor Organization” Question

With these principles in mind, we may take a closer look at how the Board and the courts have approached the “labor organization” question. With an eye to the broad policymaking

Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

Id. at 842-43.

²⁹³ O’Gorman, *supra* note 286, at *18 (“The agency’s policy choice must be premised on an intent to promote the statutes’ purpose, but not in the sense of determining how the enacting legislature would have wanted the statute to be interpreted.”). In appropriate circumstances, the Board must also consider policies outside the Act itself. *See S. Steamship Co. v NLRB*, 316 US. 31 (1942).

²⁹⁴ *Id.* at ___. These policies include the encouragement of collective bargaining, the protection of section 7 rights, and the right of employees to decline to engage in such activities. *See NLRA Section 1*, 29 U.S.C. § 151.

²⁹⁵ O’Gorman, *supra* note 286, at *18. While this is evidently true with respect to prior Board precedent, the NLRB must follow *judicial* constructions that definitely interpret the terms of the NLRA. *See NLRB v. Lechmere*, 502 U.S. 527, 536-37 (1992) (“Once we have determined a statute’s clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency’s later interpretation of the statute against our prior determination.”).

²⁹⁶ The Supreme Court has repeatedly made clear that *Chevron* applies in the context of Board policymaking through adjudication. *See, e.g., Holly Farms Corp. v. NLRB*, 517 US 392 (1996). Pre-*Chevron* judicial constructions of the Act, however, may preclude the NLRB from adopting contrary constructions based on the principle of *stare decisis*, even though such constructions may be reasonable. *See Lechmere*, 502 U.S. 527, *supra* note 295.

discretion that the Board may legitimately wield, I identify three broad approaches that adjudicators may apply to this question, each of which suggests how worker centers should be treated when the question of their status as labor organizations is presented. I call these approaches the “traditional” approach, the contextual-purposive approach, and the constitutional-purposive approach.

The traditional approach consists of a simple textualism that reads the term “labor organization” as a fixed definition that applies consistently across the different legal and social contexts in which the question may be raised. It has two variants: a plain meaning textualism under which many worker centers would be considered “labor organizations” because of their broad purposes, and a more restrictive reading that applies the definition—and more specifically the question of what constitutes “dealing with employers”—consistently with the interpretations of “labor organization” that have been adopted in the “company-union” context.²⁹⁷

What I have labeled the contextual-purposive approach is based on a recognition that adjudicators may approach the “labor organization” question differently depending on the precise legal question presented. Thus, while there is the dominant jurisprudence of “labor organization” in the “company union” context, cases concerning union unfair labor practices, the notice requirements for strikes at health care institutions,²⁹⁸ as well as those in the representation area, suggest other concerns that may guide the “labor organization” inquiry. In each case, the Board and the courts appear to approach the labor organization question with an eye to the purpose of the NLRA provision at issue.

Lastly, I discuss what I call the “constitutional-purposive” approach, which applies a broad purposive notion to the question of what constitutes a labor organization coupled with a constitutionally-based cautionary approach to the regulation of social-movement organizations. The former concern, grounded in an intentionalist approach to the Act, asks whether the organization in question is of the same or similar type of organization as that to which Congress intended the NLRA and subsequent enactments (the Taft-Hartley Act & the LMRDA) to apply. The constitutional concern, based in the First Amendment value of unfettered political expression of associations, counsels that adjudicators construe the definition of “labor organization” narrowly to avoid regulation of the free speech rights of worker centers, both regarding expressive protest and litigation activity.²⁹⁹

When confronted with worker centers and other organizations that resemble them thus far, the Board seems to prefer the “traditional” approach. Strikingly, in the few cases on point, it has applied that approach to find that the worker centers in question were *not* labor organizations.³⁰⁰ The additional approaches I suggest are unlikely to gain explicit adoption by the Board, because they are unconventional and inconsistent with the Board’s self-image as a court-like body. However, their value lies in explaining what the Board actually does, and suggesting reasons the Board will approach worker centers cautiously, even when facially applying the “traditional” law of what makes one a “labor organization.”

²⁹⁷ I use the term “company union context” to refer to those cases that consider whether a “labor organization” has been unlawfully dominated or assisted by the employer under NLRA Section 8(a)(2), 29 U.S.C. § 158(a)(2). *See infra* Section VI.B.1.

²⁹⁸ Section 8(g) specifies that a labor organization must give a ten-day notification, to both the employer and the Federal Mediation and Conciliation Service, “before engaging in any strike, picketing, or other concerted refusal to work at any health care institution.” 29 U.S.C. § 158(g). *See infra* Section VI.B.2.b.

²⁹⁹ This is an application of the familiar canon of construction that statutes be construed to avoid constitutional questions, which has been applied to the NLRA. *See Edward J. DeBartolo Corp. v. Building & Construction Trades Council*, 485 U.S. 568 (1988). *See infra* Section VI.C.2.

³⁰⁰ *See Kearney, ROC-NY Advice Memo, supra note 3; infra* Section VI.C.1.c (discussing memorandum concluding that Asian Immigrant Women Advocates was not a labor organization).

VI. Worker Centers as “Labor Organizations”

A. The Traditional Approach

The Board has not been entirely consistent in how it defines “labor organization.” Rather, as perhaps intended by the Act’s framers, interpretation of the term has involved over time and in light of experience.³⁰¹ What I call the “traditional” approach is based on a straightforward interpretation of the basic elements of this definition. It is traditional in that seeks to define labor organization in mostly ahistorical and decontextualized terms. There are two variants of this approach. One, the “plain meaning” variant, simply looks at the words of the statute and applies their common meaning to end up with a very broad definition of labor organization. The second variant relies more on caselaw interpretation of the text, but is traditional in the sense that it contemplates a stable meaning of the term “labor organization” that does not depend on the legal context in which the question is raised or the social context of the organization.

As will be seen, the most important element of the “labor organization” inquiry is the question of what constitutes “dealing with employers.” In a series of cases in the 1990s, the Board has moved towards a definition in which “dealing” depends on a bilateral back-and-forth exchange that persists over time. Although these cases considered the issue in the context of whether an employee-group was an employer-dominated labor organization, according to the traditional approach the Board will apply this more-precise definition across the board regardless of context. The result is to exclude from the “labor organization” definition many worker centers that might be considered to “deal with” employers under a broader understanding of the term.

1. the basic elements

The traditional approach starts with the text of the statute and begins by dividing the statute into elements.³⁰² In this case, “labor organization” can be broken up as follows:

- (1) an organization of any kind (or any agency or employee representation committee or plan)
- (2) in which employees participate
- (3) and which exists for the purpose, in whole or in part, of dealing with employers
- (4) concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.³⁰³

The first, second, and fourth element are usually of trivial concern in defining a labor organization. The “organization” requirement has been construed broadly, with numerous cases holding that even informal organizations that lack a constitution, by-laws, officers, dues, or any formal structure, can qualify as labor organizations.³⁰⁴ However, there must be *an*

³⁰¹ See *infra* Section VI.B (discussing contextual factors affecting how Board answers “labor organization” question).

³⁰² The text is laid out *supra*, at text surrounding note 266.

³⁰³ Many cases overlook the “organization” requirement because it is generally obvious and not at issue. The Board in *Electromation, Inc.* included the other three factors, and also added an additional factor of employee representation in the case of an “employee representation committee or plan,” a special type of labor organization that exists only within a particular firm. 309 N.L.R.B. 990, 997 (1992). The committee or plan specie of labor organization is discussed *infra* Section VI.B.1.

³⁰⁴ See, e.g., *Columbia Transit Corp.*, 237 N.L.R.B. 1196 (1978); *Yale New Haven Hospital*, 309 NLRB 363, 363 (1992) (“[I]t is well established that ... structural formalities are not prerequisites to labor organization status.”).

organization,³⁰⁵ and for this reason the courts have rejected the idea that a single person can constitute a labor organization,³⁰⁶ and in some cases have found that ad hoc groupings of employees that arise spontaneously are not “organizations.”³⁰⁷ Worker centers are clearly “organizations.”³⁰⁸

The requirement of “employee” participation is also relatively uncontroversial. First, the organization must be composed of statutory employees.³⁰⁹ Although some worker centers represent workers who are not employees under the Act, such as domestic workers and independent contractors, the “employee” requirement is met as long as *some* worker center participants are employees.³¹⁰ The “participation” aspect of this prong is not rigorous, and there is little caselaw on the question, although some cases equate participation with the admission of employees as members.³¹¹ Most worker centers would satisfy the “employee participates” element even if the participation aspect were given a rigorous interpretation, because worker centers are often membership-based or otherwise aspire to include workers in their programs and decision-making processes.

The fourth requirement, which lists the statutory subjects of bargaining, is likewise unlikely to apply except in the rarest cases, because most dealing with employers pertains to the

³⁰⁵ E. Chi. Rehabilitation Ctr., Inc. v. NLRB, 710 F.2d 397 (7th Cir. 1983) (stating that while informality is no obstacle to finding that a “labor organization” exists, “there must be an organization, such as the employee committee,” citing Pacemaker Corp. v. NLRB, 260 F.2d 880, 883 (7th Cir.1958)).

³⁰⁶ E.g. Bonnaz v. NLRB, 230 F.2d 47 (D.C. Cir. 1956); Schultz v. NLRB, 284 F. 2d 254 (D.C. Cir. 1960) (opining that omission of the word “individual” from the definition of “labor organization” indicated a clear Congressional intention to exclude an individual from the broad definition).

³⁰⁷ See *infra* Section VI.B.2. In *East Chicago*, Judge Richard Posner found that a spontaneous walk-out by 17 hospital employees, who were represented by a union but acted on their own following a meeting in which management announced a restrictive lunch policy, was not an act of a “labor organization,” both because of the lack of organization and the lack of a dealing-with purpose. 710 F.2d at 399-400. In one case, the NLRB described a group of seventeen employees who had drawn up a list of written demands to present to the employer, and had signed authorization cards to be represented by a health care Union, as in the “process of organizing” but not yet having “attained the status of a labor organization.” Long Beach Youth Center, Inc., 230 N.L.R.B. 648, 650 (1977).

Other cases set the bar for “organizational” status very low. In *National Packing Company v. NLRB*, 377 F.2d 800 (10th Cir. 1967), the Tenth Circuit found that a group of employees who struck and picketed constituted a labor organization that engaged in illegal recognitional picketing in violation of 8(b)(7)(B). The action came in the aftermath of a failed union campaign and a series of confrontations and meetings by an employee committee with management. When twenty slaughterhouse employees walked out to protest dangerous working conditions, the company shut down the plant for several days, upon which the employees set up a committee that met with management. After the initial committee was dissolved, a second committee formed and met with management several times, reaching what its member believed was a company promise for a wage increase. When the next paycheck did not reflect this increase, “a group composed mostly of men from the kill floor struck and began picketing,” which the Tenth Circuit found to be a labor organization because the group of employees, although lacking the organic structure of a typical union, “were a group which acted in unison to obtain mutual objectives by combined efforts... [which] existed and acted to deal with the Company.” Cf. *Local Unions Nos. 8505, 8915, 5899, 8877, and 8161 v. Harold Fuel Co.*, 146 N.L.R.B. 652, 659 (1964) (adopting findings of administrative law judge, which found that it “apparent” that two groups of roving pickets “were organizations of some sort,” although ultimately concluding that they did not constitute labor organizations because they lacked a dealing-with purpose).

³⁰⁸ In the context of worker centers, the “dealing” question is paramount. Moreover, as demonstrated by the *East Chicago* case, the “organization” question, if it arises, will often overlap with the “purpose of . . . dealing with employers” question, because a lack of organization is consistent with a lack of purpose.

³⁰⁹ See *supra* Section III.A.1.

³¹⁰ See *Oak Ridge Hosp.*, 220 N.L.R.B. 49 (1975); *Air Line Pilots Ass’n*, 345 N.L.R.B. No. 51 (2005).

³¹¹ See *Coinmach Laundry Corp.*, 337 N.L.R.B. 1226, 1286 (2002) (“[A]n incipient union which is not yet actually representing employees may, nevertheless, be accorded 2(5) status *if it admits employees to membership* and was formed for the purpose of representing them.” (emphasis added)); *Butler Independent Union*, 167 N.L.R.B. 308, 308 n.2 (1967). The Board has on one occasion declined to address whether “a union need be democratic to constitute a labor organization.” See *Harrah’s Marina Hotel*, 267 N.L.R.B. 1007, 1007 n.2 (1983).

enumerated subjects. The Board has found that even organizations that exist primarily for charitable social, and recreational purposes can be “labor organizations” if they deal to some extent with the employer on collective-bargaining subjects,³¹² and once found that a picnic committee that talked with the employer about extra holidays and wash-up time was a “labor organization.”³¹³ Without addressing whether worker centers “deal” with employers, it is clear that they address the listed subjects.

As this brief analysis of the definition illustrates, the determinative question is the dealing-with purpose.

2. “which exists for the purpose . . . of dealing with employers”

In order to be a labor organization, the entity must have the purpose of “dealing with employers” concerning the enumerated subjects. Nearly all of the cases interpreting the “dealing with” requirement arise in the “company union context” of 8(a)(2), a fact which, as I later argue, may be reason to limit the broader definition to that context.³¹⁴ Nevertheless, under the traditional approach that I examine in this section, the meaning of “dealing with” is stable across different legal contexts.

A preliminary question in the analysis is whether the employer is a statutory “employer.” Thus, some organizations will be excluded because, although they “deal,” the employing entity is part of the public sector or certain trades covered by the Railway Labor Act, and thus not within the statutory definition of “employer.”³¹⁵ However, worker centers do not typically target workers in these sectors. I will therefore concentrate on the “dealing with” aspect of “dealing with employers.”

a. Purpose vs. practice

The decisive question is the meaning of the “dealing with” purpose. First, it should be noted that it is not *dealing* per se that is required, but that an organization has dealing as its purpose. The Board has held that the purpose inquiry concerns what the organization was set up to do, and may be shown by “what the organization actually does.”³¹⁶ Moreover, it is enough that “dealing with” be merely *one* of the organization’s purposes, meaning that multi-faceted organizations can be labor organizations if their purpose, “in part,” is dealing.³¹⁷ Therefore, the *purpose* aspect of the definition alone is usually of trivial importance because adjudicators will look to actual activity. However, the purpose aspect may come into play to include as “labor organizations” incipient organizations that intend to but have not yet had the chance to deal with employers.³¹⁸ Another logical possibility is that an organization that does not have the purpose of dealing may be excused for “dealing” on one or two occasions for incidental reasons unrelated to its overall purpose.

³¹² See *Raybestos-Manhattan, Inc.*, 80 N.L.R.B. 1208 (1948); *NLRB v. Jas. H. Matthews & Co.*, 156 F.2d 706 (4th Cir. 1946)

³¹³ *Walker Process Equip., Inc.*, 163 N.L.R.B. 615 (1967).

³¹⁴ See *infra* Section VI.B.1.

³¹⁵ 29 U.S.C. § 152(2).

³¹⁶ *Electromation*, 309 N.L.R.B. 990, 996 (1992).

³¹⁷ See text around notes 312 & 313. One court has stated that “[i]f [the organization] existed, even in small part, for the purpose of dealing with employers concerning grievances or disputes, or conditions of work it was a ‘labor organization.’” *Local No. 2, OPCMIA v. Paramount Plastering, Inc.*, 310 F.2d 179, 187 (9th Cir. 1962).

³¹⁸ See *Coinmach*, 337 N.L.R.B. 1286 (upholding Regional Director’s decision directing an election for Petitioner Local 729, Coalition of Democratic Employees, a newly formed union, raised by intervenor union that had a collective-bargaining agreement encompassing the petitioner-for unit and claimed that petitioner was not a labor organization within the meaning of Section 2(5)).

b. *Cabot Carbon*: “Dealing with” as broader than collective bargaining

The critical question under most approaches is what activities of the organization will qualify as “dealing with” the employer. While this term—clearly broad and ambiguous—would be left to the Board to clarify in the first instance, the Supreme Court long ago gave its own broad reading of the meaning of “dealing with,” a reading which limits the range of permissible interpretations the Board may choose under *Chevron*.³¹⁹ In the 1959 case, *NLRB v. Cabot Carbon Co.*, which arose in the company union context, the Court held that the term “‘dealing with’ should [not] be limited to and mean only ‘bargaining with,’” so that the employee committees in questions still qualified as labor organizations despite the absence of bargaining.³²⁰

At issue in *Cabot Carbon* was whether certain “employee committees” established at several of the employer’s manufacturing plants and supported by the employer were “labor organizations” such that the employer’s domination and interference with the organizations constituted a violation of Section 8(a)(2).³²¹ The employee committee had been established for the purpose of “meeting regularly with management “to consider and discuss problems of mutual interest, including grievances, and of handing ‘grievances at nonunion plants and departments.’”³²² In addition to these purposes, which were stated in the committees’ bylaws, the committee made and discussed various proposals and requests of management related to the terms and conditions of employment, and the requests were sometimes granted.³²³ At some plants where certified labor organizations existed and had negotiated collective bargaining agreements, the functions of the employee committee were reduced “to plant efficiency, production promotion and the handling of grievances for employees who are not included in the bargaining units.”³²⁴ Based on these activities, and the Court’s conclusion that “dealing with” was broader than “bargaining with,” the Court determined that the employee committees were statutory labor organizations.³²⁵

c. “Dealing with” as a “bilateral mechanism”

This broad definition is potentially problematic for worker centers. However, while the *Cabot Carbon* decision indicated that “dealing with” was a broad term, it did not do more to indicate its contours. Indeed, as one Board member has observed: “*Cabot Carbon*’s rejection of the notion that ‘dealing with’ is synonymous with collective bargaining failed to delineate the lower limits of the conduct: if ‘dealing with’ is less than bargaining, what is it more than?”³²⁶

The *Cabot Carbon* definition was refined in the 1990s in a way that would exclude most worker centers from its ambit. The NLRB revisited the meaning of “dealing with” in two modern “company union” cases, in which the debate had shifted from the sham unionism of the Act’s early days to a climate in which many were promoting labor-management cooperation as a

³¹⁹ See *supra* note 296. This limitation on the Board’s discretion was explicitly recognized by Board Member Raudabaugh with reference to *Cabot Carbon* in his concurring opinion in *Electromation*. See 309 N.L.R.B. at 1007 (Raudabaugh, Member, concurring).

³²⁰ 360 U.S. 203, 211 (1959).

³²¹ Section 8(a)(2) makes it an unfair labor practice for an employer “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.” 29 U.S.C. § 158(a)(2).

³²² *Cabot Carbon*, 360 U.S. at 204.

³²³ *Id.* at 207-08. Such proposals were made both by the plant committees themselves and by a “central committee” consisting of the chairmen of the several plant committees, who met annually at the head office of the employer’s Director Industrial Relations where such proposals were made. *Id.*

³²⁴ *Id.* at 209.

³²⁵ The Court also rejected the employer’s argument that there was no dealing because the proposals and requests made by the committees were only recommendations, with the final decision remaining in the employer’s hands. *Id.* at 214. This, the Court noted, “is true of all such ‘dealing’” by labor organizations. *Id.*

³²⁶ *Electromation*, 309 N.L.R.B. at 1002 (Devaney, Member, concurring).

way to increase the competitiveness of U.S. firms. In the process, the Board made clear that back-and-forth communication between labor organization and employer, what it termed a “bilateral mechanism,” was a key to the meaning of “dealing with.” In this sense, the Board narrowed the definition of “dealing with” in order to accommodate the shift in favor of cooperative management.

The first and most famous of these cases was *Electromation, Inc.*, in which the Board found (and the Seventh Circuit agreed) that five “action committees” established by the employer were labor organizations that were dominated by the employer in violation of 8(a)(2).³²⁷ The facts of *Electromation* illustrate the bilateral mechanism in practice. The employer had set up five action committees—which addressed Absentism/Infractions, No Smoking policy, Communications Network, Pay Progression for Premium Positions, and Attendance Bonus Policy—each made up of six employee volunteers, and two to three members of management. The President of the company explained to the employees that the action committees “would meet and try to come up with ways to resolve . . . problems; and if they came up with solutions that were, that we believed were within budget concerns and that they generally felt would be acceptable to the employees, that we would implement those suggestions.”³²⁸ Although management discontinued active participation on the committees after the Teamsters—who brought the 8(a)(2) charge that was the genesis of the case—petitioned for an election, some continued to function. One committee, the Attendance Bonus committee, submitted a first proposal to the company, which the company considered but rejected, and thereafter developed a second proposal which was not considered because of the union campaign.³²⁹

In concluding that the “action committees” engaged in “dealing with” the employer, the Board paid special attention to the circumstances in which the committees were created (in response to employee’s disaffection concerning changes in conditions of employment) and the bilateral process they pursued.³³⁰ In a footnote, the Board specified that “dealing with” involves “a bilateral mechanism involving proposals from the employee committee concerning the subjects listed in Sec. 2(5), coupled with real or apparent consideration of those proposals by management.”³³¹ Unilateral mechanisms, such as a suggestion box, brainstorming groups or other information exchanges, were not “dealing with.” The Board also made clear that an organization whose purpose is managerial or adjudicative was not a “labor organization.”³³²

This “bilateral mechanism” language was elucidated further in *E.I. Du Pont De Nemours & Company*,³³³ decided six months after *Electromation*. The Board in *Du Pont* specified that the bilateral mechanism “ordinarily entails a pattern or practice in which a group of employees, over

³²⁷ *Electromation, Inc.* 309 N.L.R.B. 990 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994). All five members of the Board in *Electromation* were unanimous in finding that the “action committees” were labor organizations—in an opinion signed by each of the five. Nevertheless, the opinion generated three separate concurrences, by Members Devaney, Oviatt, and Raudabaugh.

³²⁸ *Id.* at 991.

³²⁹ *Id.* at 991-92.

³³⁰ *Id.* at 997.

³³¹ *Id.* at 995 n.21.

³³² *Id.* at 995. *See, e.g.*, *Mercy-Memorial Hospital Corp.*, 231 N.L.R.B. 1108 (1977) (holding that joint employee-employer grievance committee did not deal with employer although committee discussed individual employee grievances and in some cases engaged in dialogue with management officials).

³³³ 311 N.L.R.B. 893 (1993). The facts of *Du Pont* were similar to those in *Electromation*: the company had established several committees to deal with safety issues and workers’ recreation, without negotiating with the incumbent union. The committees were “labor organizations” according to the Board, and an 8(a)(2) violation was found.

time, makes proposals to management, management response to these proposals by acceptance or rejection by word or deed, and compromise is not required.”³³⁴ Accordingly, the Board made clear that “isolated instances in which the group makes ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed” does not constitute “dealing with.”³³⁵ The Board also contrasted “dealing” with situations in which a committee or group does not make specific proposals but merely seeks to share information with the employer.³³⁶

Later cases have confirmed that to qualify as “dealing with,” the organization in question must have a “pattern and practice” of relations with management rather than mere “isolated instances.” In *Vons Grocery Co.*,³³⁷ the NLRB found that there was no dealing where a quality circle group, which usually considered operational concerns and problems, ended up discussing a dress code and an accident point system, topics which the union had pursued in the past in bargaining. The Board stated: “we do not believe that this one incident should transform a lawful employee participation group into a statutory labor organization.”³³⁸ Similarly, in *Stoody Co.*,³³⁹ the NLRB found that a single one-hour meeting of an employer-created handbook committee, in which concerns about vacation time were presented to attending managers, was not a pattern or practice of any kind, and thus that the committee did not constitute a “labor organization.”³⁴⁰ Even written complaints concerning management decisions, followed by action in protest, will not transform a concerned group of employees into a labor organization. In *Vencare Ancillary Services*, a group of employees met and “decided to draft a memo to the [employer] about [its] decision to cut their wages,” and began a work stoppage.³⁴¹ The Board, noting that the committee was formed in response to a single issue and incident, found that there was no “pattern or practice.”³⁴²

The Fourth Circuit has summarized the “general principles” of the “bilateral mechanism” analysis as follows:

(1) while the term “dealing with” connotes activity which is broader than collective bargaining, an employer does not necessarily “deal with” its employees merely by communicating with them, even if the matters addressed concern working conditions; (2) “dealing” occurs only if there is a “pattern or practice” over time of employee proposals concerning working conditions, coupled with management consideration thereof; (3) isolated instances of the conduct described in number two do not constitute “dealing;” and (4) management may, in certain circumstances, gather information from employees about working conditions and may even act on that information without necessarily “dealing with” them.³⁴³

Understanding “dealing with” as requiring some type of “bilateral mechanism” recasts the purpose question as well. In light of *Electromation* and its Board progeny, an organization

³³⁴ *Id.* at 894.

³³⁵ *Id.*

³³⁶ *Id.* at 894-95.

³³⁷ 320 N.L.R.B. 53 (1995).

³³⁸ *Id.* at 54.

³³⁹ 320 N.L.R.B. 18 (1995).

³⁴⁰ *Id.* at 19.

³⁴¹ 334 N.L.R.B. 965, 966 (2001).

³⁴² *Id.* at 968 (“Here, the record reveals no such ‘pattern or practice.’ Rather, the five employees coalesced in response to the announced wage cuts, they presented their memo to management on this single issue, and they began a work stoppage. This isolated incident fails to establish the element of ‘dealing with.’”).

³⁴³ NLRB v. Peninsula General Hosp. Med. Center, 36 Fed 1262, 1271-72 (4th Cir. 1994).

only has a purpose of dealing with employers if its goal, realized or not, is to engage in this type of back-and-forth bilateral mechanism with the employer.³⁴⁴

3. worker centers and “dealing”

Thus, the question for worker centers is whether they engage in or are likely to engage in activities that would qualify as “dealing with employers,” and thus qualify the centers as statutory labor organizations under *Cabot Carbon* and the *Electromation* cases. Several commentators have suggested that worker centers do “deal with” employers.³⁴⁵ However, I believe that defining most worker center activities as “dealing with” takes an overly broad view of “dealing” under NLRB precedent and the statutory purpose of the NLRA.

There are two ways, using traditional means of analysis, to approach the “dealing with” issue in the context of worker centers. One approach starts from *Cabot Carbon*’s instruction that “dealing with” is broader than “bargaining with,” to reach the conclusion that the phrase includes any activities directed at the employer that fall within a commonsense understanding of “dealing”—even though *Cabot Carbon* did not establish a threshold of activity that constitutes dealing.³⁴⁶ Rather than following the “bilateral mechanism” theory elaborated in *Electromation* and *Du Pont*, this approach reverts to a more colloquial sense of the term “dealing,”³⁴⁷ or backs away from the bilateral requirement by focusing on whether it is the organization’s *purpose* to deal.³⁴⁸ This plain meaning approach surely takes too broad a view of “dealing,” and ignores the role of the Board to give meaning to the ambiguous term.

³⁴⁴ This proposition, although never stated explicitly by the Board, follows logically from its cases. Some previous cases seem to be based on an assumption that the requisite purpose of dealing with required less than the envisioning of such bilateral relations. *See, e.g., East Chicago Rehabilitation Ctr., Inc. v. NLRB*, 710 F.2d 397, 404 (7th Cir. 1983) (describing a case in which seventeen employees drew up a list of demands for the employer as having the requisite purpose but lacking the “organization” element).

The pattern and practice logic has been questioned, however, because it appears to put the employer in charge of whether “dealing” occurs, as the employer may refuse to meet with or implement the proposals received from employees, thus eliminating the possibility of a bilateral mechanism. *See* David Rosenfeld, Review Essay, *Worker Centers: Emerging Labor Organizations—Until They Confront the National Labor Relations Act*, 27 BERKELEY J. EMP. & LAB. L. 469, 488-91 (2006). Indeed, the “bilateral mechanism” analysis makes the distinction between purpose and practice elusive. Assuming worker centers do not want to be considered labor organizations, and consistent with that desire overtly eschew the bilateral relations elaborated in *Electromation* and its progeny, analyzing practice may be the best and only way to get at purpose, as is done in other contexts where motive must be assessed.

³⁴⁵ *See* Hyde, *New Institutions*, *supra* note 99, at 408; Duff, *supra* note 130, at 133-36 (suggesting that settlement agreement between ROC-NY and employer constituted “dealing”); Rosenfeld, *supra* note 344. Julie Yates Rivchin, on the other hand, suggests that worker centers for the most part would not be considered labor organizations under the holding of *Center for United Labor Action*. Julie Yates Rivchin, *Building Power Among Low-Wage Immigrant Workers: Some Legal Considerations for Organizing Structures and Strategies*, 28 N.Y.U. Rev. L. & Soc. Change 397 (2004).

³⁴⁶ *See supra* text at note 326.

³⁴⁷ For example, although Professor Hyde acknowledges that the line is elusive, he suggests that “rais[ing] grievances with particular employers on behalf of particular employees” is enough to constitute dealing, and singles out the Workplace Project and ROC-NY as likely to be statutory labor organizations because they play this role. *See* Hyde, *New Institutions*, *supra* note 99, at 408.

Rosenfeld’s analysis similarly suggests that a worker center likely engages in “dealing” when it pursues administrative claims on behalf of employees, because such claims usually involve associated talks with the employer regarding litigation and settlement, and because these claims are often pursued as part of a broader effort to improve working conditions. *See* Rosenfeld, *supra* note 344, at 496-98. Rosenfeld also suggests that a “pattern or practice” may be established where a worker center deals with multiple employers, because the definition uses a plural object (*employers*) in discussing with whom a labor organization deals. *Id.* at 494, 498.

³⁴⁸ Duff at one point implies that ROC-NY has a purpose of “dealing” based its website reviews the campaigns it has led to assist restaurant workers and advises restaurant workers to contact the organization if they “ha[ve] problems

A second approach is to view “dealing with” through the lens of the “bilateral mechanism” concept, which is traditional for a different reason: it relies on a stable meaning of “labor organization” that can be transferred from one social or legal context to another.³⁴⁹ The General Counsel applied such an approach when it determined that ROC-NY was not a labor organization by virtue of its protest and settlement activities directed at three New York Restaurants.³⁵⁰

The General Counsel framed the issue as whether “in its role as legal advocate, ROCNY’s attempt to settle employment discrimination claims has constituted ‘dealing with’ the Employers over terms and conditions of employment under Section 2(5).”³⁵¹ Applying the “bilateral mechanism” language of *Electromation* and the “pattern or practice” interpretation of *Du Pont*, the Advice memo concluded that ROC-NY’s “attempts to negotiate settlement agreements with the Employers” were “discrete, non-recurring transactions” that, “[a]lthough stretching over a period of time . . . were limited to a single context or a single issue,” and thus did not constitute “dealing.”³⁵² The General Counsel noted that the agreement was limited to the dispute at hand, namely the resolution of ROC-NY’s “attempts to enforce employment laws,” and that “settlement of lawsuits is not generally something that can be accomplished in a single meeting.”³⁵³ The memo concluded that nothing in the tentative agreement “implies an ongoing or recurring pattern of dealing over employment terms and conditions, beyond the resolution of the current dispute.”³⁵⁴

Attending to the fact that the proposed settlement agreement with Restaurant Daniel contained arbitration provisions allowing the parties to raise alleged contract violations for adjudication by a third party, the General Counsel characterized these provisions as “merely contract enforcement mechanisms that do not imply a continuing practice of ‘dealing.’”³⁵⁵ Noting that the provisions did not entail further “back and forth” between the parties nor contemplate the consideration of new proposals, the Advice memo compared them to adjudicatory functions that the Board has previously found not to constitute dealing.³⁵⁶

The ROC-NY Advice Memo suggests that mere efforts to influence an employer do not constitute “dealing,” and that the “bilateral mechanism” concept will be rigorously applied to worker center activity. In this application, the General Counsel indicated that the notion of “pattern or practice” will be paramount—and substantive; such a pattern is not established merely by repeated meetings or meetings over a prolonged period. Rather, the conferring must extend beyond a single issue or dispute, and have some recurring character.³⁵⁷ While this

with [their] employer,” without advertent to the bilateral mechanism requirement. *Duff, supra* note 130, at 135. (Duff goes on to address whether ROC-NY’s settlement activities evince a bilateral mechanism.)

Taking a different tack, Rosenfeld focuses on the purpose language in Section 2(5) and criticizes the Board’s bilateral mechanism requirement as inconsistent with this language, because it leaves the question of whether an organization engages in “dealing” in the hands of the employer, who may or may not take up the offer of an organization that appears to have a dealing-with purpose. *Id.* at 494. While there is certainly tension between requiring actual dealing as opposed to a purpose of dealing, it must be specified that the requisite purpose would be to engage in a bilateral mechanism with the employer, not simply to “deal” in various amorphous ways with the employer such as by making demands and protesting.

³⁴⁹ See *infra* Section VI.B.

³⁵⁰ See Kearney, *ROC-NY Advice Memo, supra* note 3, and surrounding text.

³⁵¹ *Id.* at 2.

³⁵² *Id.* at 3.

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 3-4. See *supra* note 332 and surrounding text.

³⁵⁷ One commentator has described the General Counsel’s approach as creating a “safe harbor for worker centers to negotiation with employers over terms and conditions of employment without becoming section 2(5) labor

memorandum does not establish binding precedent, it suggests the way the Board may develop these issues, and, importantly, may indicate that the General Counsel will not likely bring charges asserting that worker centers are “labor organizations.”³⁵⁸

Therefore, even under what I term the “traditional” approach most worker center activity will not be considered “dealing with” the employer so as to bring the center under the “labor organization” definition.

B. The Contextual-purposive approach: Labor organization as a socio-legal construct

Furthermore, the fact that the bulk of the caselaw interpreting the meaning of “labor organization” arose under the company union context of alleged 8(a)(2) violations raises the question of whether the definition is linked to the policy underlying the latter section. Indeed, there is evidence from the legislative history that the definition of labor organization in Section 2(5) was intentionally enlarged to address the issue of company-dominated unions.³⁵⁹ Therefore, it is worth considering the context in which the “labor organization” question is raised, and what this contextual adjudication says about how the Board will consider the question in yet another novel context— that of the worker center.

For the most part, the Board has applied the term “labor organization” consistently throughout the Act. However, the context in which the “labor organization” inquiry is adjudicated could matter for two reasons. First, the legal context in which the question arises brings into play different parts of the Act and thus differing purposes that Congress intended the Act to achieve. Such purposes, as discussed, can guide courts engaging in statutory construction of the Act and form part of the policy base from which the Board may draw when interpreting ambiguous provisions pursuant to its policymaking role. Second, even if adjudicators do not explicitly advert to contextual considerations, the legal and factual setting in which they are forced to determine if an organization is a “labor organization” likely shades the manner in which they interpret the question. For example, one interpretation of the General Counsel’s approach to the ROC-NY case is that it found ROC-NY not to be a “labor organization” in part because it did not believe it would have been violating the Act even if it were a labor organization.³⁶⁰

As the following examples illustrate, the way in which the existence of a “labor organization” may be influenced by the broader legal question in dispute. Moreover, the Board

organizations.” Kent Y. Hirozawa, Member Column, *2(5) or Not 2(5): A Question for Worker Centers*, AFL-CIO Lawyers’ Coordinating Committee Newsletter (July 2007). Hirozawa also suggest that “[d]iscussion of a multi-issue lawsuit should also be safe,” noting that ROC-NY’s original complaint against the Redeye Grill contained over ten cause of action. *Id.*

³⁵⁸ This interpretation, of course, is only an advice memorandum and does not constitute Board law. Professor Duff questions the utility of the pattern or practice approach taken by the General Counsel because it fails to give organizations like ROC-NY an indication of where the labor organization threshold lies. Duff, *supra* note 130, at 136. Duff also criticizes the determination that ROC-NY’s settlement agreement did not evidence “dealing,” because of statements on ROC-NY’s website that Duff interprets as a sign that ROC-NY will continue in its activities of pressuring the employer if future discrimination arises even after the settlement agreement. *Id.* Nevertheless, even in such an event, the General Counsel’s “pattern or practice” approach may still insulate ROC-NY’s tactics to the extent they are enforcing the settlement agreement and do not open up a broader recurring “back and forth” process of conferring over terms and conditions of employment.

³⁵⁹ See *infra* Section VI.B.1.a.

³⁶⁰ In a later letter in response to the employer’s motion for reconsideration in the ROC-NY case, the General Counsel suggested that the earlier conclusion that ROC-NY was not “labor organization” was less definitive, but focused on the fact that even if it were a labor organization it did not violate NLRA § 8(b)(7). See Letter from Ronald Meisburg, General Counsel, NLRB, to Thomas W. Budd, Esq., Clifton, Budd and DeMaria, LLP (Aug. 23 2007) (on file with author) [hereinafter, Meisburg, *ROC-NY Reconsideration Letter*].

appears to have exercised some policy-making discretion to ensure that its interpretation of whether a “labor organization” exists is guided by the policy underlying the provision of the NLRA being adjudicated.

1. Section 8(a)(2): The “company union” context

Analysis of the treatment of the “labor organization” definition in the context company unions must begin with the realization that elimination of the company-dominated union was a key motivation of the drafters of the Wagner Act, and was amply discussed by those involved in the Act’s passage. The legislative history of the Act makes clear that the definition of “labor organization” was intended to be broad in order to encompass all forms of existing company unions within the prohibition of 8(a)(2). The NLRB and the courts have consistently construed section 8(a)(2) cases in light of this broad purpose. This centrality of the company union context to the legislative history of Section 2(5), buffered by subsequent consistent construction by those interpreting the Act, suggest that one should be cautious in exporting the principles behind the definition of “labor organization” to organizations like the worker center, which exist in an entirely different legal and social context.

a. Company Unions and the passage of the Wagner Act

The attention paid by the drafters of the NLRA to the problem of company unions has been well documented by scholars of labor law and history.³⁶¹ Numerically, the company union movement had grown to become a sizable competitor to independent labor unions in the decade prior to the Act’s passage, at the same time as labor’s fortunes declined. This growth occurred in two movements: company unions had tripled in their reach from 1919 to 1932, at which time they represented 1.2 million members; and ballooned to 2.5 million members by 1935 after the passage of the National Industrial Recovery Act (NIRA) in 1933.³⁶²

The history of organized employer efforts to stop the spread of collective bargaining begins early in the twentieth century, when the National Association of Manufacturers launched the “American-plan” campaign to promote the “open shop.”³⁶³ With the advent of World War I, and concern about labor unrest threatening wartime production, the employer movement shifted gears to espouse organizations that could serve as a substitute for collective bargaining—the “shop committee” and the “employee representation plan.”³⁶⁴ Whether such organizations were developed as a naked attempt by the employer to control a sham labor organization, or as an ostensibly well-intentioned effort to increase employee participation in the workplace, the term “company union” soon came to encompass both.³⁶⁵

³⁶¹ The legislative history and political context of the Act has been explored in Thomas Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C.L. REV. 499 (1986); Martin T. Moe, *Participatory Workplace Decisionmaking and the NLRA: Section 8(a)(2), Electromation, and the Specter of the Company Union*, Note, 68 N.Y.U. L. REV. 1127 (1993); and David Brody, *Section 8(a)(2) and the Origins of the Wagner Act*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW 29, at 41 (eds. Sheldon Friedman, et al, 1994) [hereinafter, *Brody*]. For a more thorough investigation of the ideological underpinnings of the Act’s drafters vis-à-vis the company union issue, see Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1381 (1993).

³⁶² Moe, *supra* note 361, at 1131. Organized labor suffered a forty percent loss of membership over between 1919 and 1932. In the words of Professor Kohler, “it is correct to say that from roughly 1915 until 1935, there were two labor movements in the United States, one consisting of self-organized employee associations, the other being the management sponsored ‘employee representation’ movement.” Kohler, *supra* note 361, at 526.

³⁶³ Kohler, *supra* note 361, at 519.

³⁶⁴ *Id.* at 522. The federal government influenced this shift, as the National War Labor Board has used shop committees as a dispute settlement tool, thus contributing to their popularity. *Id.* at 522-23.

³⁶⁵ See ARCHIBALD COX, ET AL., *LABOR LAW: CASES AND MATERIALS* 192 (13th Ed. 2001).

There were essentially two types of company unions. Prior to 1933, these organizations often took the form of joint committees on which both employee and employer representatives sat, although in almost all cases the terms of the organization were unilaterally set by the employer in advance.³⁶⁶ In practice, the committees or plans often focused on grievance and personnel matters, housekeeping and safety, and ways to improve production, rather than core concerns of collective bargaining such as wages, hours, or work rules.³⁶⁷ Even as to the limited areas that were discussed, their recommendations had only an advisory character.

A second type of company union was adopted by employers in response to the passage of the NIRA, which raised the specter of challenges to existing company unions. Thus post-NIRA company unions took the form of an employee-committee arrangement rather than joint-committees, and allowed for elected officers, bylaws, and formal membership.³⁶⁸ Although these employee committees bore greater resemblance to independent unions, in reality they remained a creation of management and lacked actual bargaining power.³⁶⁹ They typically met once a month during working hours, with management present.³⁷⁰ Few post-NIRA company unions achieved written agreements setting wages, hours, and other terms of employment.³⁷¹ In general, they did not charge dues and thus had no funds to finance independent employee action.³⁷² As Professor Kohler concludes, their dealings amounted to discussion rather than bargaining, and much of their work was devoted to grievance settlement and personnel matters.³⁷³

When, in 1934, Senator Robert Wagner set in motion the drafting process that would culminate in the NLRA, his intention to oust such company-dominated unions was clear from the outset.³⁷⁴ Thus, as historian David Brody recounts, this drafting process proceeded along two tracks: “one leading to a viable framework for free collective bargaining, the other to the expurgation of the rival workplace representation system.”³⁷⁵ The latter goal was to be achieved by Section 8(a)(2), which outlawed employer “interference” and “domination” of “labor organizations.” Thus, the more broadly Congress defined the term “labor organization,” the greater the number and types of company unions that would be within the protections against employer-control; or, in the words of Professor Brody: “Workplace organization is encompassed by 2(5) so that it can be excluded in 8(a)(2).”³⁷⁶

Thus, from the beginning, the definition of labor organization was shaped explicitly by the Congress’s intent to eliminate the company union. To achieve this goal, the language of Section 2(5) went through several iterations before becoming law. In the original draft of the NLRA, the term “labor organization” was limited to an organization which existed for the purpose of dealing with employers concerning wages, hours, or working conditions. In the revised draft that later became law, the definition was expanded to incorporate “grievances” and

³⁶⁶ *Id.* at 524-35.

³⁶⁷ *Id.* at 525-26. Some plans also delegated to employees responsibility for a variety of managerial tasks, including hiring, promotion and discharge, solicitation of orders, and determination of production schedules.

³⁶⁸ *Id.* at 528-29; Moe, *supra* note 361, at 1136.

³⁶⁹ Moe, *supra* note 361, at 1136-37.

³⁷⁰ Kohler, *supra* note 361, at 529.

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *Id.* at 529-30.

³⁷⁴ Upon introducing the first version of the Bill in 1934, Wagner stated that “the very first step towards genuine collective bargaining is the abolition of the employer-dominated union as an agency for dealing with grievances, labor disputes, wages, rules, or hours of employment.” *Id.* at 530 (quoting S. 2926, 73d Cong., 1st Sess. (1934), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 16 [hereinafter NLRA L.H.]).

³⁷⁵ Brody, *supra* note 361, at 39.

³⁷⁶ *Id.* at 41.

“labor disputes” as subjects pertaining to labor organizations.³⁷⁷ This change reflected an intent to ensure that the prohibitions on employer domination in Section 8(a)(2) would cover the many company unions that did not address issues of wages and hours, but restricted themselves to grievance and personnel matters.³⁷⁸ A more explicit change in the revised draft was the inclusion of the word “plan” among the list of organizational types, which was intended to reach a common form of company union known as the employee representation plan.³⁷⁹

Even the key phrase “dealing with” was intentionally made broad in order to cover company unions that seldom engaged in actual collective bargaining. During the 1935 Congressional session, Labor Secretary Frances Perkins suggested that the term “bargain collectively” replace “dealing with” in Section 2(5).³⁸⁰ Wagner’s key aide, Leon Keyserling, explained that effect of such an amendment would be that

most of the activity of employers in connection with the company unions we are seeking to outlaw would fall outside the scope of the Act. If, as employers insist, such “plans,” etc., are lawful representatives of employees, then employers’ activity relative to them should be clearly included, whether they merely “adjust” or exist as a “method of contact,” or engage in genuine collective bargaining. It is for this reason that the bill uses the broad term “dealing with.”³⁸¹

Therefore, as this history demonstrates, the legislative intent behind the broad definition given to the term “labor organization” in the NLRA was for the chief reason of prohibiting employer-domination through company unions.

b. The policy of a broad definition of “labor organization” outside of the company-union context

The vast majority of the cases adjudicating Section 2(5) issues arise in the context of alleged employer domination or interference under NLRA Section 8(a)(2), including *Cabot Carbon*, the chief Supreme Court case on the topic.³⁸² The NLRB in *Electromation* made extensive study of this aspect of the legislative history, acknowledging the prohibitions on company-dominated labor organizations as central to the overall purpose of “eliminating

³⁷⁷ Kohler, *supra* note 361, at 534-35.

³⁷⁸ *Id.* As a Senate Committee Report explaining the change commented, “The importance of this is that an employer is now not permitted to organize a shop committee to present grievances on questions of safety and other minor matters even though he does not use such shop committee as a subterfuge for collective bargaining on the essential points of wages and hours.” *Comparison of S. 2926 (73d Congress) and S. 1958 (74th Congress) Senate Committee Print*, in 1 NLRA L.H. at 1320. Because S. 2926, the 1934 version of the Wagner bill, was eventually passed over after two printings and a full set of hearings full set of hearings, Wagner redrafted the bill and re-introduced it in the 74th Congress as S. 1958. *See* Kohler, *supra* note 361, at 530 n.176.

³⁷⁹ The Senate Report included the comments of then-Chairman of the National Mediation Board William Leiserson, also a noted labor relations scholar. According to Leiserson, “it is clear that unless these plans, etc. are included in the definition, whether they merely ‘deal’ or ‘adjust’ or exist for the purpose of collective bargaining, most of the activity of employers in connection therewith which we are seeking to outlaw would fall outside the scope of the act. The act would thus be entirely nullified.” *Comparison of S. 2926 (73d Congress) and S. 1958 (74th Congress) Senate Committee Print*, in 1 NLRA L.H. at 1326. Leiserson also explained the inclusion of the terms “grievances” and “labor disputes” as follows:

In most cases employee representation plans or committees are nothing but agencies for presenting and discussing grievances or other minor matters, and do not address themselves at all to the fundamental issues of collective bargaining agreements as to hours, wages, and basic working conditions. To exclude the term “grievances” particularly would exclude from the provisions of this act the vast field of employer interference with self-organization by way of such plans or committees.

Id.

³⁸⁰ *See* Brody, *supra* note 361, at 41. This proposal is also recounted in *Cabot Carbon*, 360 U.S. at 211.

³⁸¹ *Id.* (quoting Leon Keyserling, undated memo (1935), Folder 9, Box 1, Keyserling Papers).

³⁸² *See Cabot Carbon*, 360 U.S. 203.

industrial strife through the encouragement of collective bargaining.”³⁸³ The Board recognized that the term “labor organization” was defined broadly precisely because of “the Wagner Act’s purpose to eliminate employer dominated unions.”³⁸⁴ Member Devaney, concurring, opined that Section 2(5) encompassed two general types of organizations: “first, an external organization or agency . . . and second, an ‘employee representation committee or plan’”³⁸⁵

Although the Board espouses a formal separation between the analysis of whether a labor organization exists and whether the organization has been dominated by the employer,³⁸⁶ it is evident that the concern for employer domination has influenced the broad reading of “labor organization” in the company-union context. Notably, to the extent that *Electromation* and its progeny have narrowed the “dealing with” element so as to allow for unilateral communication schemes in the workplace, it has been in service of another policy—allowing some range of employer-employee communication that falls short of employer-domination.³⁸⁷

Because the original purpose of the broad definition was confined to company unions and external organizations that normally engaged in collective bargaining, it is not clear how the company union cases should apply to organizations like La Raza, KIWA, YWU, or ROC-NY that fit neither category.

Analysis of the policies behind Section 2(5) do not provide any reason to believe Congress wished to regulate an organization like the modern worker center that eschews collective bargaining or even less formal back-and-forth dealing in the industrial relations context.³⁸⁸ On the contrary, the Act’s proponents were concerned with relationships within the workplace. For example, Professor Mark Barenberg has put forward the view that, in enacting Sections 8(a)(2) and 2(5), Wagner and his allies sought to enshrine “the principle of workers’ absolute free choice over modes of workplace governance.”³⁸⁹ These concerns with employer domination have little to do with how labor organization is defined outside of the company union context.

Nor are these policies easily translatable to organizations like worker centers. Professor Hyde, taking a different tack, has argued that the employer’s privilege to communicate with employees “might be reason to construe ‘labor organization’ narrowly” with respect to employee

³⁸³ *Electromation*, 309 N.L.R.B. at 992.

³⁸⁴ *Id.* at 993.

³⁸⁵ *Id.* at 1001 (Devaney, Member, concurring).

³⁸⁶ *Id.* at 996 n.26 (rejecting approach taken by the Sixth Circuit that “appeared to equate indicia of employer control—relevant only to the domination issue—with the indicia used to identify a Sec. 2(5) ‘labor organization.’”).

³⁸⁷ Both the Board and the courts have recognized this. *See, e.g.*, *Peninsula Gen. Hosp. Med. Ctr.*, 36 F.3d at 1272 (“[I]t is incumbent upon the Board and the courts to carefully make [the] distinction [between the communication of ideas and a course of dealing] in order to ensure not only the protection of employees’ § 7 rights, but also the protection of legitimate employer-employee cooperative efforts.”). In *Peninsula Gen. Hosp. Med. Ctr.*, the Fourth Circuit denied enforcement of the Board decision’s that the “Nursing Service Organization,” an organization whose original purpose was social and educational, had become a labor organization by virtue of its presentation of survey results concerning employment conditions at an NSO meeting in which the hospital’s vice-president of nursing was present. *Id.* at 1272-74.

Even in *Electromation*, each of the three concurrences written took pains to emphasize that under the refined definition of “dealing with,” many forms of employer-employee communication would be permitted. Nine years later, in *Crown Cork & Seal Co.*, the Board validated these predictions by finding an employee participation scheme that did not raise an employer-domination problem, because the employee committees were found not to be “labor organizations.” 334 N.L.R.B. 669 (2001).

³⁸⁸ As Professor Hyde acknowledges, “this area of law [Section 2(5)]. . . seems unhelpful in determining the rather different policy questions” about whether worker centers “should have to disclose their finances or be liable for unfair labor practices.” Hyde, *New Institutions*, *supra* note 99, at 407-08.

³⁸⁹ Barenberg, *supra* note 361, at 1450. Barenberg suggests that to achieve this free choice, Wagner believed the Act needed to undercut direct coercion of worker choice as well as the more subtle distorting effect that the company union structure could have on workers’ perceptions of their interests. *Id.* at 1458-60.

participation plans (i.e. modern company unions), but not with respect to worker centers or other outside groups who lack any such privilege.³⁹⁰ This observation likewise is limited to the Section 8(a)(2) context.

Lacking any basis to import these policy reasons into the question of worker centers status as “labor organization,” more fruitful comparisons can be made by examining how the “labor organization” question gets treated outside of the company union context.

2. The “Labor Organization” question in other contexts

For the most part, the NLRB has strived to apply the “labor organization” concept in the same way across the board. Such an approach is supported by the general presumption of consistency in how legislatures use their terms,³⁹¹ especially terms explicitly defined by the statute.³⁹² However, this rule has exceptions: “[i]dential words may have different meanings where ‘the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different.’”³⁹³ The term “labor organization” is employed across varying subject matter within the NLRA, and questions about its application arise in different conditions that raise distinct policy considerations.³⁹⁴ Moreover, the Board has even further leeway, as an administrative agency, to interpret the ambiguous term “labor organization” to comport with its view of labor policy.³⁹⁵

In the cases that follow, while the Board has adhered to a consistent meaning of “labor organization,” it has also taken a contextual and purposive approach to the question, drawing on other policy factors in conjunction with its traditional analysis of whether a labor organization existed.

a. Interpreting “Labor organization” to Protect Concerted Activity

³⁹⁰ Hyde, *New Institutions*, *supra* note 99, at 408.

³⁹¹ ESKRIDGE, ET AL., *supra* note 268, at 264-66. *See, e.g.*, *Commissioner v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993) (“It is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.” (citing *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427 433 (1932)); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995) (favoring an interpretation of a statute “as a symmetrical and coherent regulatory scheme, one in which the operative words have a consistent meaning throughout” (citing *Atlantic Cleaners*)).

³⁹² *See* 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 47:7 (7th ed. 2007); *Robinson v. Shell Oil Co.*, 70 F.3d 325, 328 (4th Cir. 1995) (“If a statute defines a term in its definitional section, then that definition controls the meaning of the term wherever it appears in the statute.”), *rev’d on other grounds*, 519 U.S. 337 (1997).

³⁹³ *Weaver v. U.S. Information Agency*, 87 F.3d 1429, 1437 (D.C. Cir. 1996) (quoting *Atlantic Cleaners*). *See also* *Vanscooter v. Sullivan*, 920 F.2d 1441, 1448 (9th Cir. 1990) (“Identical words appearing more than once in the same act, and even in the same section, may be construed differently if it appears they were used in different places with different intent.”). In *Atlantic Cleaners*, the Supreme Court interpreted the term “restraints of trade or commerce” to vary in its reach in two different sections of the Sherman Anti-Trust Act, because the use in each section was based on different constitutional grants of authority to Congress. 286 U.S. 427.

³⁹⁴ In fact, although in a case of somewhat old vintage, the D.C. Circuit invoked the context-dependency language of *Atlantic Cleaners* when interpreting the meaning of “labor organization” as a partial rationale for concluding that a single individual cannot be a “labor organization.” *See* *Schultz v. NLRB*, 284 F.2d 254, 259 (D.C. Cir. 1960) (“Thus, in viewing the term ‘labor organization’ as it is used in sections of the Act, we must apply the definition which best serves to carry out the intentions and purposes of the act.”).

³⁹⁵ Indeed, as the Supreme Court stated in *Chevron*:

[T]he fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute.

467 U.S. at 864. *See also* *Abbott Labs. v. Young*, 920 F.2d 984, 987 (D.C. Cir. 1990) (“We note that it is not impermissible under *Chevron* for an agency to interpret an imprecise term differently in two separate sections of a statute which have different purposes.”).

Before settling on the *Electromation* line of cases that have added some measure of precision to the “labor organization” question, the Board and the courts displayed disparate tendencies in its “labor organization” inquiry. Perhaps most fluid was the question of how to treat informal groups of employees who engage the employer in some way, either through a delegation, a spontaneous walk out after the presentation of some demand, or more traditional pickets and strikes, but do not seem well-formed enough to have clearly-established purposes. An examination of several of these cases demonstrates that more than black-letter law was at issue. Rather, as the cases indicate, the Board and courts answer the “labor organization” question in a way that allows concerted activity to be protected by the Act.

In several cases, courts have interpreted protesting employee groups to be “labor organizations” in order to bring them within the protections of the NLRA’s anti-discrimination provision. Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate with respect to any term of employment “to encourage or discourage membership in any labor organization.”³⁹⁶ Although this provision has been interpreted broadly to encompass protected concerted activity generally, in several early decisions courts read the provision literally to require that there be a “labor organization” for which membership is either encouraged or discouraged.³⁹⁷ In the 1950 case of *NLRB v. Kennametal, Inc.*, for example, the discharge of four employees for their role in leading a work stoppage was actionable only because the court determined that the employees constituted a “labor organization.”³⁹⁸ The action began with seven or eight employees gathered around a water fountain complaining that a nearby plant at recently won a wage increase after a strike. The group decided to present a wage grievance to the president of the company, and on the way “their numbers swelled to approximately 100.”³⁹⁹ The U.S. Court of Appeals for the Third Circuit found it “perfectly clear” that the informal group was a “labor organization,” and accordingly enforced the Board’s order that Section 8(a)(3) had been violated.⁴⁰⁰

In contrast to *Kennametal*, the Board in *Harold Fuel Co.* found that similarly ad hoc groups of roving miners who went from mine to mine did not constitute a labor organization where the consequence of finding otherwise would have been charging the group with illegal restraint of their fellow employees.⁴⁰¹ The coal miners in *Harold Fuel Co.* were concerned about the potential loss of special medical and hospital benefits available to miners whose employers paid into a United Mine Workers’ (UMW) fund, after various miners throughout the area received letters that they were losing benefits due to their employer’s failure to pay.⁴⁰² After the local unions held a meeting to discuss the issue, a separate group of employees held several meetings and formed what the ALJ termed “roving pickets” that would go from mine to mine in

³⁹⁶ NLRA Section 8(a)(3); 29 U.S.C. § 153(a)(3).

³⁹⁷ See *supra* note 103. This conclusion has been expressed in by the Supreme Court in *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954), *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), and more recently in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 703 (1983) (“Section 8(a)(3) not only proscribes discrimination that affects union membership, it also makes unlawful discrimination against employees who participate in concerted activities protected by § 7 of the Act.”). The Board has found 8(a)(3) violations on the basis of discharges unrelated to membership in a labor organization. See, e.g., *Kaiser Engineers*, 213 N.L.R.B. 752, *enforced*, 538 F.2d 1379 (9th Cir. 1976).

³⁹⁸ 182 F.2d 817 (3d. Cir. 1950).

³⁹⁹ *Id.* at 818.

⁴⁰⁰ *Id.* See also *Smith Victory Corp.*, 90 N.L.R.B. 2089 (1950) (deciding that employer’s discharge of employee who served as spokesman for group of workers and sought to discuss wage increase with employer violated Section 8(a)(3) because group of employees constituted a “labor organization”).

⁴⁰¹ Local Unions Nos. 8505, 8915, 5899, 7788, and 8161, District 30, United Mine Workers of America (*Harold Fuel Company, Inc.*), 146 N.L.R.B. 652 (1964).

⁴⁰² *Id.* at 654-55.

the area.⁴⁰³ At each mine, the group would speak to employees, ask them the wages they received and whether they were receiving welfare and other benefits, and ask them to quit work and join the group.⁴⁰⁴ For the most part, discussion with mine operators was limited to asking permission to talk to employees, but in one instance the group asked an unrepresented mine operator to work under a UMW contract, and in another asked a mine superintendant to shut down his area of the plan in order to force the operator to pay into the UMW fund.⁴⁰⁵ The roving group also met with mine operators on several occasions at the operators' request. At these meetings, the primary discussion was the operators' request that the groups cease their picketing activities, but "conditions which had brought about the picketing were discussed," albeit in general terms, and no specific demands to the operators were made.⁴⁰⁶

The Employer had charged that the roving groups, as well as the certified unions involved, had violated Section 8(b)(1) through mass picketing and threats of violence,⁴⁰⁷ by blocking ingress to and egress from their place of work.⁴⁰⁸ The ALJ concluded that the roving groups were not labor organizations under Section 2(5) because they focused on speaking to employees, and thus did not evince a purpose of "dealing with" employers.⁴⁰⁹ Accordingly, they could not be subject to unfair labor practice liability.⁴¹⁰ To reach this end, the ALJ minimized evidence that the groups had attempted to impress their position upon mine operators. Although in some instances the roving employee groups complained to employers about low wages and poor working conditions,⁴¹¹ the ALJ stated that "[o]ccasional 'dealing' is not enough (even if it existed here) unless it is so widespread as to lead reasonably, as a matter of evidence, to the conclusion that this was the purpose of its existence."⁴¹² This stands in marked contrast to the treatment of the "labor organization" issue in cases like *Kennametal*, where the spontaneously-formed group seemed to have no more an intention to "deal with" the employer than the mine operators who attempted to persuade a mine supervisor to shut down operations to serve union members.⁴¹³ One explanation for this result is that the Board did not wish to restrict the concerted activity of the mine workers so declined to characterize them as a labor organization subject to union unfair labor practice charges.

On the other hand, the Board has had no trouble finding "labor organizations" in cases where such a finding will serve the Act's policy of preventing employers or outside groups from undermining concerted activity. In *Porto Mills, Inc.*, the Board found that an anti-union group who had rallied to force the employer to fire a union supporter was a labor organization in violation of NLRA Section 8(b)(2).⁴¹⁴ Before the events in question, a union organizational campaign had begun at the company, and a prominent union supporter, Luz Maria Rios, had been discharged but was later offered reinstatement.⁴¹⁵ However, illness kept her away for some

⁴⁰³ *Id.* at 655-56. Although designated "roving pickets," the group did not in fact carry pickets.

⁴⁰⁴ *Id.* at 656.

⁴⁰⁵ *Id.* at 656-57.

⁴⁰⁶ *Id.* at 657.

⁴⁰⁷ Section 8(b)(1) makes it an unfair labor practice for a labor organization or its agents "to restrain or coerce . . . employees in the exercise of the rights guaranteed in Section 7." 29 U.S.C. § 159(b)(1).

⁴⁰⁸ 146 N.L.R.B. at 653.

⁴⁰⁹ *Id.* at 659.

⁴¹⁰ *Id.*

⁴¹¹ *Id.* The ALJ characterized these as "[i]solated instances of vague suggestions that wages should be higher or that general working conditions in the coalfields should be improved." *Id.*

⁴¹² *Id.*

⁴¹³ See *supra* notes 398-400 and surrounding text.

⁴¹⁴ 149 N.L.R.B. 1454 (1964). Section 8(b)(2) provides that it is an unfair labor practice for a labor organization or its agents "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)." 29 U.S.C. § 158(b)(2).

⁴¹⁵ 149 N.L.R.B. at 1460.

days until eventual return on the day of the events leading to the charge.⁴¹⁶ In the meantime, employees opposed to unionization had organized two organizations that distributed leaflets and attended rallies opposing the organizational effort, including the organization charged, the *Comite Pro-Defense de Los Trabajadores De Porto Mills*.⁴¹⁷ On the day of Rios's eventual return to work, the anti-union group struck the employer in order to force the employer to terminate her, apparently both for her union activity and other reasons.⁴¹⁸

In a finding upheld by the Board, the ALJ concluded that *Comite* did attempt to cause unlawful discrimination against Rios, and that it was a labor organization that could be liable for a Section 8(b)(2) charge.⁴¹⁹ In making the latter finding, the ALJ acknowledged that the *Comite*'s apparent purpose was to "fight the unionists," and never made any request to the company to negotiate on behalf of the company's employees.⁴²⁰ Instead, the ALJ stated that the *Comite*, by refusing to work with Rios, was "asserting a grievance and seeking to effect a change in their working conditions," and thus had a purpose of dealing with employers "concerning grievances, labor disputes . . . or conditions of work."⁴²¹ Going further, the ALJ admitted that while it may "appear anomalous" that a militant antiunion group could qualify as a "labor organization" that "one of the major purposes of the comprehensive statutory definition was to reach antiunion and company-dominated organizations which performed but few, if any, of the functions usually embraced under the term 'collective bargaining.'"⁴²² Reaching further into the Act's purpose, the ALJ stated that "Congress intended to cover more than the conventional type of labor organization so as to reach others that 'may be a ready and effective means of obstructing self-organization of employees and their choice of their own representatives for the purposes of collective bargaining.'"⁴²³ Anomaly aside, it is quite clear that the *Comite* did not wish to "deal" with the employer in any real sense; but only wished to remain free of the union and of Rios.⁴²⁴ However, *Porto Mills* illustrates that "labor organization" may in some cases be construed more loosely to thwart antiunion activity that would surely offend the Act's sponsors.

A similar result was reached in *S & W Motor Lines, Inc.*, where the NLRB held that an employer violated 8(a)(2) by encouraging a group of employees—which it categorized as a "labor organization"—to decertify their union.⁴²⁵ The incident occurred in the midst of contentious labor negotiations, during which the employer expressed its desire to end the collective bargaining relationship at the expiration of the contract, and its driver-employees eventually went on strike.⁴²⁶ One week prior, word got out to several drivers that an employee meeting was going to be held. When a supervising dispatcher, and son-in-law of the company's president, heard the news, he offered to pay a motel for meeting space and to bring the company

⁴¹⁶ *Id.*

⁴¹⁷ *Id.* at 1461

⁴¹⁸ *Id.* at 1471. The ALJ characterized her as *persona non grata* among the other employees.

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

⁴²¹ *Id.* (quoting NLRA Section 2(5), 29 U.S.C. § 152(5)).

⁴²² *Id.* at 1472

⁴²³ *Id.* (quoting *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 266 (1938)).

⁴²⁴ By comparison, the Board sensibly finds that ad hoc employee groups or negotiating committees who hold rallies and other activities to influence an employer after losing a representation election are "labor organizations" acting in violation of the Section 8(b)(7)(B) requirement that no labor organization picket an employer within twelve months of a valid election. *See, e.g., Employees Negotiating Comm.*, 177 N.L.R.B. 754 (1969); *Nat'l Packing Co. v. NLRB*, 377 F.2d 800 (10th Cir. 1967). In such cases, it is often clear that the dissatisfied employee group wishes to deal with the employer in a broad sense, as the group had recently expressed its desire—now thwarted—to enter into an exclusive collective bargaining relationship.

⁴²⁵ 236 N.L.R.B. 938 (1978), *enforced in relevant part*, 621 F.2d 598 (1980).

⁴²⁶ *Id.* at 940.

president.⁴²⁷ Instead, the supervisor arrived alone to the eight-employee meeting and offered to discuss their problems with him.⁴²⁸ At the meeting, the supervisor suggested that they form a company union among themselves, and encouraged the employees to attempt to decertify the union.⁴²⁹

In addition to finding that the Supervisor's actions and statements violated Section 8(a)(1), the ALJ also found a Section 8(a)(2) violation.⁴³⁰ To do so, of course, a "labor organization" was needed. The ALJ held, and the Board agreed, that the ad hoc employee group that met with the Supervisor was a labor organization because it "existed in part for discussing their grievances with [the Employer] in an effort to resolve those grievances to the exclusion of the Union."⁴³¹ The ALJ described the meeting as a first step towards establishing a more formalized organization, and stated that it had the "object of eventually negotiating a collective-bargaining agreement with Respondent following the demise of the Union."⁴³² The ALJ noted that its "broad construction [of 'labor organization'] is consistent with an effort to reach" the organizations that obstruct employee choice, citing *Porto Mills* and *Pennsylvania Greyhound Lines*. Having established that the ad hoc group was a "labor organization," the ALJ found that the Supervisor had supported it, solicited its grievances, encouraged the formation of a company union, attended a meeting and rendered financial assistance in violation of Section 8(a)(2).⁴³³ Rather than characterizing the ad hoc group as a "labor organization" dominated by a supervisor, a more plausible story is that they were a group of employees who, in their only meeting, were being illegitimately influenced by a scheming supervisor. While such activity clearly merits a Section 8(a)(1) charge, analysis under Section 8(a)(2) appears gratuitous, especially considering that the only effect on the remedy was to order the employer to cease and desist encouraging or assisting the no longer existent ad hoc employee group.⁴³⁴ However, this recharacterization served to punish behavior that was clearly at odds with the Act.

These cases show that the labor organization definition is often used in service of the Act's purposes. Informal employee groups will be considered "labor organizations" in some cases where such a finding is necessary to punish employer activity that trenches on Section 7 rights. However, where a finding of "labor organization" would subject the informal group to liability, as in the *Harold* case, the definition of labor organization loosens in order to protect concerted activity by employees.

b. Section 8(g): Strike notification in the health care industry

Section 8(g) of the NLRA requires that labor organizations must give ten days' notice before any strike or concerted refusal to work as a health care institution.⁴³⁵ Failure to do so

⁴²⁷ *Id.* at 941.

⁴²⁸ *Id.*

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ *Id.* at 942.

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ *Id.* at 959. This stands in contrast with the more typical remedy for section 8(a)(2) violations of disestablishing the dominated labor organization.

⁴³⁵ 29 U.S.C. § 158(g) ("A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention . . ."). The law defined health care institutions to include "any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person." NLRA § 2(14); 29 U.S.C. § 152(14).

renders the activity unprotected and therefore involved employees may be subject to discipline.⁴³⁶ The provision was part of a set of reforms in 1974 that brought health care institutions within the coverage of the NLRA, thus extending the right to organize to a broad array of health care employees.⁴³⁷ Because the strike notification applies only to “labor organizations,” a number of cases have arisen in which the issue is whether groups of healthcare employees who walked off the job without advance warning were “labor organizations” and thus acting in violation of Section 8(g) or simply employees acting concertedly for the purpose of mutual aid, and thus protected by the Act.

The Board confronted this issue in the 1977 case of *Walker Methodist Residence and Health Care Center, Inc.*⁴³⁸ In *Walker Methodist*, two unrepresented nurses’ aides were terminated after they left their shifts for under 30 minutes to present a grievance to their nursing home employer, along with another employee who had been given permission to leave the floor.⁴³⁹ The Board concluded that the discharge was a violation of section 8(a)(1), because it discouraged concerted protected activity.⁴⁴⁰

However, the Board first considered whether the discharged employees were required to give notice of their work stoppage under Section 8(g). The employer had argued that despite Section 8(g)’s specific reference to “labor organization,” some language in the legislative history suggests that the notice requirement was to apply to all strikes at a health care institution.⁴⁴¹ The Board ultimately rejected this contention, having found that the legislative history supports the textual “labor organization” requirement.⁴⁴² In doing so, the Board relied upon its reading of the legislative history as well as “an examination of policy considerations” to conclude that plain meaning of the statute should be followed so that the notification would only apply to a “labor organization”.⁴⁴³ First, the Board noted that in enacting the Health Care Amendments, “Congress was concerned that sudden, massive strikes could endanger the lives and health of patients in health care institutions.”⁴⁴⁴ Second, the Board noted the statements of a Senator on the Committee on Labor and Public Welfare indicating that the legislation was a product of compromise and as such should be construed strictly.⁴⁴⁵ Lastly, the Board adverted to policy considerations, noting that “the purpose of the notice provision is to allow a health care institution to make arrangements for the continuity of patient care in the event of a strike or picketing by a labor organization,” as such strikes are “likely to last longer and involve a greater

⁴³⁶ See *Shelby County Health Care Corp. v. State, County & Municipal Employees Local 1733*, 967 F.2d 1091 (6th Cir. 1992). Section 8(d) specifies that “[a]ny employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act

⁴³⁷ As originally passed in 1935, the NLRA contained no exemption for hospitals, but one was added in 1947 applying to private nonprofit hospitals. Act of 1947, Pub. L. No. 80-101, 61 Stat. 136, 137 (codified as amended at 29 U.S.C. § 152).

⁴³⁸ 227 N.L.R.B. 1630 (1977).

⁴³⁹ *Id.* at 1630.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

⁴⁴² *Id.* at 1631.

⁴⁴³ *Id.* Specifically, the Senate Report on the 1974 Amendments stated that “The bill . . . contains . . . special provisions designed . . . to provide advance notice of any strike . . . involving a health care institution.” S. Rep. No. 766, 83d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 3946, 3947. Moreover, Senator Robert Taft, Jr. stated on the Senate floor that “it would not be protected activity for employees acting without a labor organization to engage in a work stoppage . . . without giving the required notice.” 120 CONG. REC. 12945 (1974).

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.*

number of employees than a work stoppage by unorganized employees” and are more likely to involve “the presence of a picket line” which could interfere with supply lines.⁴⁴⁶ The Board thus concluded that no violation of Section 8(g) took place, implicitly ruling that the nurses’ aides did not constitute a labor organization.

The application of section 8(g) has also been analyzed with respect to greater workplace disruptions. In *East Chicago Rehabilitation Center, Inc. v. NLRB*,⁴⁴⁷ the U.S. Court of Appeals for the Seventh Circuit held that a spontaneous walk-out by employees did not trigger the Section 8(g) notice requirement because the employees were not a “labor organization.”⁴⁴⁸ The employee action in *East Chicago* was a walk-out by seventeen hospital employees following a meeting that management had called to discuss a more restrictive lunch policy that was announced earlier that day.⁴⁴⁹ After hearing of the change, the employees had gathered in small groups, and management held two meetings with them that morning to explain the new policy. After the second meeting, the employees walked out.⁴⁵⁰ Although these employees were represented by a union, the union played no role in encouraging the walk-out, and even asked the workers to return to work when it learned of the action.⁴⁵¹ When the employees were terminated for this action, their union filed unfair labor practice charges.⁴⁵²

The employer had argued that the employees’ wildcat strike was in violation of section 8(g), and that to hold otherwise would defeat the purpose of the notice requirement by allowing workers to get around the requirement by striking without their union’s authorization.⁴⁵³ Writing for the majority, Judge Richard Posner rejected this proposition, concluding that the “labor organization” requirement was plain. Judge Posner also validated the statutory requirement as rational, reasoning that union-led strikes are more costly, “apt to last longer, involve more workers, and command more support from other unions” than wildcat strikes.⁴⁵⁴ The majority also rejected the employer’s alternative argument that the 17 striking workers comprised an “informal labor organization,” because it found neither the organization nor the requisite purpose.⁴⁵⁵ Moreover, Judge Posner suggested, requiring any concerted activity by health care workers to comply with Section 8(g) would restrict much more section 7 activity than Congress intended.⁴⁵⁶

While both *Walker Methodist* and *East Chicago* focused on the question of whether in fact a “labor organization” was required in order to trigger Section 8(g), more remarkable for our purposes is the fact that no such organization was found. Indeed, Judge Posner’s opinion in *East Chicago* drew a vigorous dissent, which would have found the striking nurses to constitute a “labor organization.”⁴⁵⁷ According to Judge Coffey, the employees composed an “organization,”

⁴⁴⁶ *Id.*

⁴⁴⁷ 710 F.2d 397 (7th Cir. 1983), enforcing 259 N.L.R.B. 996 (1982). For commentary on the *East Chicago* case, see Max G. Mahaffee, Note, *The Ten-Day Notice of Strike Requirement of Section 8(g) of the 1974 Health Care Amendments as Applied by the East Chicago Rehabilitation Center, Inc. v. NLRB Court*, 35 S.C. L. REV. 651 (1984).

⁴⁴⁸ 710 F.2d 397 (7th Cir. 1983) (stating that while informality is no obstacle to finding that a “labor organization” exists, “there must be an organization, such as the employee committee,” citing *Pacemaker Corp. v. NLRB*, 260 F.2d 880, 883 (7th Cir.1958)).

⁴⁴⁹ *Id.* at 399.

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

⁴⁵² *Id.* at 400.

⁴⁵³ *Id.* at 403.

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.* at 404.

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.* at 411 (Coffey, J., dissenting).

because they had met twice prior to the walkout, and had the requisite dealing with purpose, because they wished “to coerce their employer into abandoning its new lunch period policy.”⁴⁵⁸

Of course, the Board *could have*, if it so chose, found the striking employees to be a labor organization. Such a result would clearly be justified in light of the cases discussed above, where recently formed groups with unclear intentions directed at the employer were deemed to have satisfied the “dealing with” requirement.⁴⁵⁹

However, it appears that the Board and the Seventh Circuit have been guided by the background policy goals of Section 8(g) in finding that these groups of protesting workers were not labor organizations. In neither case did the employee actions cause serious harm to patients, nor did the actions reach the scale contemplated by Congress in passing the strike notice requirement. Judge Posner also hinted at the potential for conflict between the strike notice requirements and the protections for concerted activity under Section 7 if informal groups were considered “labor organizations.”⁴⁶⁰ In a more recent decision, the Board similarly determined that a group of five employees who presented a memorandum to management complaining about a wage cut before walking off the job was not subject to the notification requirement.⁴⁶¹ Although decided under the “bilateral mechanism” reading of “dealing with,” the result is consonant with the policy considerations discussed above.

In short, these Section 8(g) cases show that while the Board and the courts will cite “labor organization” cases as a uniform body of law, they may be influenced by the specific policy context in which the case arose.

c. Representation Petitions

A last area in which the “labor organization” question may arise is under the representation procedures of NLRA Section 9. Section 9(c)(1)(A) provides that employees may be represented “by an employee or group of employees or any individual or labor organization.”⁴⁶² The Board will direct an election and issue certification unless the proposed bargaining representative fails to qualify as a “bona fide representative” of the employees.⁴⁶³ As many petitions are filed by organizations holding themselves out as “labor organization,” the Board in this context will apply the statutory definition of “labor organization,” along with other factors, to determine whether the representative is qualified.⁴⁶⁴

For the most part, the “choice of a bargaining representative rests upon the desires of the employees,”⁴⁶⁵ and Board will not refuse to process a petition if the organization qualifies as a “labor organization,” despite union corruption or other imperfections.⁴⁶⁶ However, there are some exceptions to this rule.

⁴⁵⁸ *Id.* (Coffey, J., dissenting).

⁴⁵⁹ *See infra* Section VI.B.2.a.

⁴⁶⁰ *See supra* note 456 and surrounding text.

⁴⁶¹ *Vencare Ancillary Services, Inc.*, 334 NLRB 965, 969 (2001), *enforcement denied on other grounds*, 352 F.3d 318 (6th Cir. 2003).

⁴⁶² NLRA Section 9(c)(1)(A); 29 U.S.C. § 159(c)(1)(A).

⁴⁶³ *See* NLRB, AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES 51 (2005) [hereinafter NLRB, REPRESENTATION CASES], *available at* http://www.nlr.gov/publications/manuals/r_-_case_outline.aspx.

⁴⁶⁴ *Id.* However, because the Act on its face allows representation by non-“labor organizations,” there is no textual reason why the Board has required that groups of employees qualify as a “labor organization” in order to be certified, as least if the group or individual has not held itself out as a labor organization.

⁴⁶⁵ *Auto Transps., Inc.*, 100 N.L.R.B. 272 (1952).

⁴⁶⁶ *See* *Alto Plastics Mfg. Corp.*, 136 NLRB 850, 851-52 (1962) (“If an organization fulfills [the requirements of being a “labor organization”], the fact that it is an ineffectual representative, that its contracts do not secure the same gains that other employees in the area enjoy, that certain of its officers or representatives may have criminal records, that there are betrayals of the trust and confidence of the membership, or that its funds are stolen or misused, cannot

In some cases, however, the Board will dismiss a petition for a representation because the labor organization is deemed to be “disqualified” from representing the unit employees.⁴⁶⁷ This finding, which does not negate the “labor organization” status of the organization, can arise due to conflicts of interest, such as because the union competes with the employer for business.⁴⁶⁸ A labor organization may also be disqualified if supervisors participate in the internal affairs of the organization.⁴⁶⁹ The underlying principle of such cases is that “[e]mployees have the right to be represented in collective-bargaining negotiations by individuals who have a single-minded loyalty to their interests.”⁴⁷⁰ In addition, the Board, basing its action on constitutional concerns, has withheld its election processes from unions that excluded employees from membership because of their race.⁴⁷¹

Nevertheless, despite the premium on employee choice in this area, in some cases the Board will reject an election petition because it finds that the petitioner is not a bona fide labor organization. For example, in *Harrah’s Marina Hotel and Casino*, the Board held affirmed the decision of the Regional Director that the Casino Police and Security Officers, Local 2, was not a labor organization within the meaning of the Act.⁴⁷² The petitioning union’s officers had been convicted of embezzling union funds, and the Regional Director found that they were operating the union “as their personal business and for their personal profit.”⁴⁷³ The Regional Director concluded that the petitioner and its parent federation “are not organizations dedicated to the interests of the employees as a bona fide collective bargaining representative, that they are not organizations in which employees participate to any significant extent in the governance and administration of the organization, and that they are not labor organizations within the meaning of Section 2(5) of the Act.”⁴⁷⁴ The Board agreed on the narrower ground that the union and federation failed to establish that they “exist, either in whole or in part, for the purposes set forth in the statute.”⁴⁷⁵

Notably, at no point in *Harrah’s Marina Hotel* did the Board or the ALJ discuss whether the Casino Police and Security Officers union had dealt with employers, or had a purpose of dealing. Presumably, as an established labor union, it did engage in such dealing, despite its illicit character. Clearly, it was the basic incompatibility of the organization with the principles of the Act that influenced the Board’s assessment of the petitioner’s “labor organization” status, rather than a plain textual analysis of whether the organization met the elements of Section 2(5).⁴⁷⁶

affect the conclusion which the Act then compels us to reach, namely, that the organization is a labor organization within the meaning of the Act.”).

⁴⁶⁷ HOW TO TAKE A CASE BEFORE THE NLRB, *supra* note 166, at 95.

⁴⁶⁸ *Id.* See, e.g., *Bausch & Lomb Optical Co.*, 108 N.L.R.B. 1555 (1954).

⁴⁶⁹ See *Sierra Vista Hospital, Inc.*, 241 N.L.R.B. 631, 632 (1979). The Board in *Sierra Vista* also endeavored to make clear that “[t]he question of statutory labor organization status is . . . distinct from the question of a statutory labor organization’s qualification to act as a bargaining representative in all instances and without regard to the circumstances under which bargaining takes place or will take place.” *Id.*

⁴⁷⁰ *Id.* (quoting *Nassau and Suffolk Contractors’ Ass’n, Inc.*, 118 N.L.R.B. 174, 187 (1957)).

⁴⁷¹ See *Independent Metal Workers Union, Local No. 1 (Hughes Tool Co.)*, 147 N.L.R.B. 1573 (1964). See also *E. & R. Webb, Inc. (Town & Country)*, 194 N.L.R.B. 1135 (finding that Christian Labor Organization was a bona fide labor organization because it did not restrict its membership on religious grounds).

⁴⁷² 267 N.L.R.B. 1007 (1983).

⁴⁷³ *Id.* at 1011.

⁴⁷⁴ *Id.* at 1012.

⁴⁷⁵ *Id.* at 1007 n.2. This echoed the Director’s conclusion that the petitioner was seeking certification “for purposes abhorrent to the Act.” *Id.* at 1012.

⁴⁷⁶ Notably, in other cases in which the Board has denied representation petitions on the basis of the character of the petitioning organization, it has not specifically held that the organization was not a labor organization under Section

3. The implications of the contextual approach for worker centers

The foregoing cases make clear that purposive considerations guide the question of whether an organization is a “labor organization.” More specifically, adjudicators will consider the specific legal context in which the question is raised. While for the most part striving for definitional consistency on the face of things, the NLRA’s purposes act on a subterranean level to influence decisionmaking.⁴⁷⁷

The clearest application of this revelation for worker centers may arise in the Act’s restrictions on picketing and secondary activity. These provisions, based in the Taft-Hartley and Landrum-Griffin era concerns of expanding union power and corruption, were clearly not envisioned to regulate non-profit worker centers.⁴⁷⁸ Therefore, the contextual approach calls upon the Board to exercise its policy-making power when assessing charges against worker centers that do not seek status as the exclusive representative of employees. In doing so, it should also exercise restraint, in part because worker center activity is often based on the exercise of constitutional rights to association. These rights are explored in the following section.

C. The Constitutional-purposive approach: Worker Centers as social movement organizations

A third approach to the question of whether worker centers are “labor organizations” addresses the tension between first amendment associational rights and restrictions deemed appropriate in the labor context. First, the NLRA was directed towards the establishment of a well-defined system of industrial relations and most worker centers appear to fall outside this purpose of the original Act. Second, many worker centers can also be classified as civil rights and social movement groups whose speech has been accorded the highest degree of First Amendment protection. Finally, many worker centers attempt to vindicate statutory legal rights through lawsuits and associated settlement efforts, so that the constitutional protections for access to the courts weigh against Board regulation of worker centers whose relations with employers are ancillary to their efforts to enforce legal rights.

1. The Center for United Labor Action

a. Summary of the Case

The published decision that has come closest to considering whether worker centers are “labor organizations” came over thirty years ago, in *Center for United Labor Action*.⁴⁷⁹ The

2(5). See, e.g., *Iowa Packing Co.*, 125 N.L.R.B. 1408 (1959); *National Electric Coil Division*, 199 N.L.R.B. 1017 (1972).

⁴⁷⁷ Unlike in other contexts, adjudicators have not explicitly determined that the “labor organization” definition is contextual in this manner. Cf. *Weaver* 87 F.3d at 1437 (“Identical words may have different meanings where ‘the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different.’”). See *supra* note 393.

⁴⁷⁸ But see *GORMAN & FINKIN*, *supra* note 98, at 315 (“[S]ince its adoption . . . the interpretation of section 8(b)(4)(A) as amended has been guided in only slight measure by the text and far more significantly by the legislative object of outlawing the common law secondary boycott.”).

⁴⁷⁹ 219 N.L.R.B. 873 (1975) [hereinafter, *CULA*]. The *CULA* case has been the subject of several commentators assessing the status of worker centers. See, e.g., Rosenfeld, *supra* note 344, at 486-89 (arguing that the majority’s reasoning in *CULA* was flawed and agreeing with the dissent that *CULA* existed at least in part for the purpose of dealing with employers); Yates Rivchin, *supra* note 345, at 413 (“Under this holding, most workers’ centers would not be considered a ‘labor organization . . .’”). See also Pope, *supra* note 263, at 944-52 (discussing *CULA* as “the

Center for United Labor Action, or CULA, was a labor support group with a national headquarters and branches in several major cities. CULA's publications described itself as "an association of working men and women devoted to the improvement of working conditions and the advancement of all workers of all races and nationalities in the struggle against the U.S. corporations. . . ." and stated that the organization "helps to organize the unorganized and aims to make existing labor organizations more effective."⁴⁸⁰

The case arose in the context of a national boycott called by the Amalgamated Clothing Workers of America against the products of the Farah clothing manufacturing company. While the union had picketed a Rochester, New York clothing store (Sibley) where Farah's products were sold, the Rochester branch of CULA took the further step of asking consumers not to patronize the store altogether so long as it sold Farah products⁴⁸¹—a clear violation of the secondary boycott restrictions if undertaken by a labor organization. The retail clothing store filed unfair labor practices charging that the local CULA branch had engaged in prohibited secondary activity, and the administrative law judge (ALJ) determined that the threshold issue was whether CULA was a "labor organization." The ALJ concluded that CULA was not a "labor organization," and the NLRB, in a 2-1 decision, affirmed the order while refining the ALJ's reasoning.⁴⁸²

The Board described CULA's activities in general as "join[ing] and support[ing] employees in their protest against alleged employer injustices and seek[ing] to rally public opinion in favor of the employee's cause."⁴⁸³ Specifically, the Board mentioned that CULA had been "supporting strikes by joining in the picketing and leafleting of employers," and "engaging in fund-raising on behalf of strikers."⁴⁸⁴ In the case before the Board, CULA had picketed the Rochester retail store "with signs urging customers to boycott" the store and "distributed leaflets and literature in the Rochester area requesting that customer boycott."⁴⁸⁵

The only question regarding CULA's labor organization status concerned whether the organization had the purpose of "dealing with the employer," as it was clearly an organization in which employees participated. The ALJ had found that CULA dealt with the employer in part, but was not a labor organization "even though it comes within the literal meaning of the act" because "such a result tends to warp the structure and distort the policy and purposes of the Act."⁴⁸⁶ The Board, unwilling to follow this broad purposive argument, found instead that the CULA did not deal with the employer at all.⁴⁸⁷ Instead, the Board characterized CULA's activities as "support for what is considered to be a social cause," and not "a desire to represent the individuals in the furtherance of their cause."⁴⁸⁸ The dissent would have found that CULA did have a purpose of "dealing" with the employer, based on its "declared purposes" of

leading NLRB decision on labor support groups"); Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 Cal. L. Rev. 1767 (2001)

⁴⁸⁰ 219 N.L.R.B. at 874.

⁴⁸¹ *Id.* at 876.

⁴⁸² The ALJ in this case was Sidney J. Barban.

⁴⁸³ *Id.* at 873

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.* at 876.

⁴⁸⁶ *Id.* at 879.

⁴⁸⁷ *Id.* at 874.

⁴⁸⁸ *Id.* at 873. By connecting the notion of "representation" and "dealing," the Board appears to be giving a purposive reading of the meaning of "labor organization." *See infra.*

“picketing for reinstatement of discharged employees, for a boycott of a manufacturer with whose labor policies it disagrees, or to aid and indeed finance employee organizing activities.”⁴⁸⁹

In addition to its central holding that CULA did not “deal” with the employer, the Board also described certain activities that would *not* be considered “dealing.” First, the Board determined that the goals of individual members cannot easily be ascribed to the organization at large; thus, CULA would not be “bound by the individual action of its members” who formed delegations confronting the employer.⁴⁹⁰ Second, the Board held that “representation of employees by CULA . . . before various state agencies and commissions . . . has no bearing on CULA or [the Rochester branch of CULA’s] status as a labor organization within the meaning of [the] Act.”⁴⁹¹

b. The *CULA* Principle

i. Social causes versus employee representation

Factually, the activities of modern-day worker centers differ in important respects from the group analyzed in *CULA*. Most importantly, *CULA* was explicitly a labor-*support* group, which sought in the first instance to support the activities of pre-existing labor struggles, as exemplified by the *CULA* case itself.⁴⁹² When it did engage employers directly, it was usually through concerted actions such as pickets and boycotts, as opposed to sending messages or requests to negotiate.⁴⁹³

However, the overriding principle of *CULA* is that social movement organizations that do not seek to represent employees—by being selected and designated by such employees to resolve their conflicts with employers—should not be subject to the regulations of the NLRA.⁴⁹⁴ The Board expressed this idea succinctly:

Support for a cause, no matter how active it may become, does not rise to the level of *representation* unless it can be demonstrated that the organization in question is expressly or implicitly seeking to deal with the employer over matters affecting the employees.⁴⁹⁵ In highlighting the idea of “representation,” the Board was expressing its agreement with the ALJ, who focused extensively on the Act’s purpose of regulating the representation process.⁴⁹⁶

The ALJ decided that even though *CULA* did “deal with employers” within the meaning of the Act, he rejected the conclusion that *CULA* was a “labor organization” as inconsistent with the underlying policy and purposes of the Act.⁴⁹⁷ In support of this conclusion, the ALJ gave a capsule summary of the NLRA’s purposes, focusing on the central role of organizations that act

⁴⁸⁹ *Id.* at 875 (Kennedy, Member, dissenting). Member Kennedy relied in part on a previous case, in which the Board concluded that an anti-union group, the Comité Pro-Defense de los Trabajadores de Porto Mills, had dealt with the employer by virtue of its demand that an employee leading a union organization drive be discharged. *See* *Porto Mills, inc.*, 149 N.L.R.B. 1454 (1964).

⁴⁹⁰ *Id.*

⁴⁹¹ *Id.* at 873-74.

⁴⁹² *Id.* at 877 (describing *CULA*’s strike-support activities in three different campaigns).

⁴⁹³ The chairwoman of the Rochester *CULA* branch testified that the branch often engaged in picketing activities but did not approach employers directly on behalf of discharged employees. *Id.*

⁴⁹⁴ *Id.* at 873 (“[T]o qualify as a labor organization under our Act the organization must be selected and designated by employees for the purpose of resolving their conflicts with employers and Respondent clearly does not meet such a test.”).

⁴⁹⁵ *Id.* (emphasis added).

⁴⁹⁶ Indeed, the Board made clear that it agreed with “his reason” for reaching the conclusion that *CULA* is not a labor organization. *Id.*

⁴⁹⁷ *Id.* at 879. In support of this argument, the ALJ invoked a broad purposive idea—that regulation of organizations like *CULA* was not within the “spirit” of the Act. *Id.* (quoting *NLRB v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58, 72 (1964)). *See Holy Trinity*, 143 U.S. at 463 (source of the quote in *Fruit Packers* case).

as employee *representatives*. In his words,

It is a basic tenet of the Act that by investing the employees' chosen representative with authority to deal with the employer and *to resolve labor disputes with the employer* in the interests of the employees, a degree of regularity and stability can be achieved in labor relations which would diminish burdens on and interruptions to interstate commerce. It is thus the purpose of the Act to create circumstances favorable to the *resolution* of such labor disputes.

. . . .

From the outset, Congress clearly expected, as has since normally been the case, that labor organizations would be the representatives chosen to carry out the purposes of the Act. . . . The later amendments to the Act in numerous sections confirm the understanding of the function of the labor organization as the representative, or the potential representative, of the employees who may participate in that organization in dealing with their employer concerning the employees' work-related problems.⁴⁹⁸

The ALJ therefore stated his conviction that “the authors of the original Act, as well as those who have since worked to amend it, intended that the term ‘labor organization’ as used in the Act should be applied to organizations selected and designated by employees (who are, or may be, members of or participants in such organizations) for *the purpose of resolving the employees’ conflicts with employers*.”⁴⁹⁹ Although not stated explicitly, the ALJ’s discussion clearly refers to the Act’s concern with the process of exclusive representation; i.e., the set of processes resulting in certified labor organizations, with whom the employer is thereafter required to bargain.⁵⁰⁰

Indeed, the ALJ felt so strongly that CULA did not match the underlying purposes of the Act that he concluded it was not a labor organization despite his belief that it had indirectly dealt with the employer, and thus in his view fell within the “literal definition of a labor organization.”⁵⁰¹

The Board, seeking to find textual as well as purposive consistency with the Act, instead concluded that CULA did not seek to deal with the employer, “expressly or implicitly . . . over matters affecting the employees.”⁵⁰² Nevertheless, the Board read the “labor organization” issue purposively. Part of its rationale for finding CULA not to be a “labor organization” was that it was acting as a social movement organization concerned with labor rights that extend beyond the workplace. Thus, in explaining its distinction between support for a “social cause” and “representation,” the Board said the following:

Many present day labor disputes are viewed by some as problems which extend beyond the confines of the plant involved and have an impact on the community at large or, in some instances, on the Nation itself. In such circumstances, it is not unusual for social activist groups, newspapers, and clergy to actively support the employees' cause and to seek to marshal public opinion in support of it. . . . But are we then to conclude that any organization which engages in strike-supporting activities exists, at least in part, for the purpose of dealing with employers over employee labor relations matters? We believe that such a conclusion would be ridiculous on its face.⁵⁰³

Therefore, social-cause organizations that do not seek to represent employees, and do not deal with employers over “employee labor relations matters,” should not be regulated by the NLRA.

⁴⁹⁸ *Id.* at 879-80.

⁴⁹⁹ *Id.* at 880.

⁵⁰⁰ Section 9 of the Act regulates the process by which a labor organization may become the exclusive representative of a group of employees, *see* 29 U.S.C. § 159; NLRA Section 8(a)(5) imposes upon employers the duty to bargain with the exclusive representative in good faith. 29 U.S.C. § 158(a)(5).

⁵⁰¹ *CULA*, 219 N.L.R.B. at 879.

⁵⁰² *Id.* at 873. The Board rejected the ALJ’s notion that CULA had dealt with Farah, even in the absence of any direct contact, by virtue of its “picketing, leafleting, and related activities . . . designed to cause the employer [Farah’s] to act in accordance with [its] expressed desire.” *Id.*

⁵⁰³ *Id.*

One important consequence of this “representation” principle for worker centers is that it is not considered “dealing with employers” under Section 2(5) when an organization pursues representation of employees through adjudicative forums rather than through direct negotiation with the employers themselves. Thus, the Board concluded that CULA’s activities of representing employees before state administrative agencies and commissions “has no bearing on [it’s] status as a labor organization.”⁵⁰⁴

ii. Explaining the “representation” principle

As is clear, the “representation” basis for “labor organization” status has not been followed in subsequent cases, particularly *Electromation* and its progeny, for which the “dealing with” question focuses on the quality and extent of bilateral communication.⁵⁰⁵ The language used in *CULA* to specify the representation idea—“selected and designated by employees”—derives from Section 9(a) of the NLRA, which concerns the process by which a labor organization becomes the exclusive representative of employees for the purposes of collective bargaining.⁵⁰⁶ Therefore, *CULA* conflates two legally independent sections of the Act: those concerning representation and those concerning “labor organization” status.⁵⁰⁷

However, as Professor James Gray Pope has noted, *CULA*’s representation idea is consonant with many NLRB and court decisions that have found “labor organization” status for organizations that seek recognition as bargaining agents.⁵⁰⁸ Pope highlights, as “the exception that proves the rule,” a series of cases in which intermediate labor organizations, such as state councils, are considered “labor organizations” even though they do not seek recognition, and scarcely “deal with” employers, in part because they “pool and coordinate the power of

⁵⁰⁴ *Id.* at 873-74.

⁵⁰⁵ See *supra* Section VI.A.2.c. In *Electromation*, the Board majority stated that one of the “definition elements” of Section (2)(5) is that “if an ‘employee representation committee or plan’ is involved, evidence that the committee is in some way representing the employees.” 309 N.L.R.B. at 996. Having found that the Action Committees in question did act in a representative capacity, the Board expressly declined to decide “whether an employee group could ever be found to constitute a labor organization in the absence of a finding that it acted as a representative of the other employees,” 309 N.L.R.B. at 994 n.20, although one Board Member would have so required. *Id.* at 17 (Devaney, Member, concurring); *E.I. Dupont*, 311 N.L.R.B. at 903 n.11 (Devaney, Member, concurring) (“I would require that an employee committee act in a representative capacity in order to be found a statutory labor organization.”).

Unlike *CULA*, however, the representation issue considered in *Electromation* is limited to the context of “employee representation committee[s] or plan[s]” rather than labor organizations generally. See *Electromation*, 309 N.L.R.B. at 1007 n.13 (Raudabaugh, Member, concurring) (rejecting argument “that the factor of representation is an additional defining characteristic and must be present before a finding of labor organization status can be made under Sec. 2(5),” because the term only modifies “employee committee or plan”). One commentator has suggested that while it is not clear whether “acting in a representative capacity” is a necessary condition for finding a labor organization, it clearly is a sufficient one. GORMAN & FINKIN, *supra* note 98, §9.2, at 262 (citing *NLRB v. Webcor Packaging, Inc.*, 118 F.3d 1115, 1120 (6th Cir. 1997)).

7. In determining whether an employee organization functioned as a representative of employees, I would look to the organization’s authority: have the employees, the employer, or both empowered this group to speak for other employees? Thus, contrary to the arguments of some amici, I can envision that an organization would have a representation function even where employees themselves did not view it as such; I note that part of the harm Section 8(a)(2) was intended to correct arose out of the attempt to create in employees the perception that they were enjoying the benefits of bargaining representation when in fact they were not.

⁵⁰⁶ NLRA Section 9(a), 29 U.S.C. § 159(a). Cf. *CULA*, 219 N.L.R.B. at 873 (“[T]o qualify as a labor organization under our Act the organization must be *selected and designated* by employees for the purpose of resolving their conflicts with employers and Respondent clearly does not meet such a test.” (emphasis added)).

⁵⁰⁷ See Hyde, *New Institutions*, *supra* note 99.

⁵⁰⁸ Pope, *supra* note 263, at 947-48.

organizations that do.”⁵⁰⁹ As Pope argues, these cases show that the Board will classify as labor organizations those that play familiar roles in the labor relations sphere, such as seeking recognition or representing organizations that do play such roles.

Holding aside the “representation” concept itself, what animates *CULA* is the idea that the square peg of social movement organizations cannot fit through the round hole of a statute designed specifically to regulate labor organizations that negotiate with employers in the back and forth of traditional labor relations. This mismatch is reinforced by constitutional doctrines as well. Thus, as Professor Pope hypothesizes, the Board’s conclusion that an organization like *CULA* is not a labor organization “is best understood as an attempt to avoid infringing the first-amendment rights of *CULA* members.”⁵¹⁰ Although neither the Board nor the ALJ adverted to the Constitution, Pope notes that “its reasoning resonates strongly with constitutional decisions protecting the freedoms of association and protest.”⁵¹¹ Another rationale for excluding organizations that do not seek to represent employees is that they should not be regulated in a manner that applies only to labor organizations if they cannot enjoy the prime organizational benefit of the labor law — the possibility of attaining exclusive representative status”⁵¹²

Therefore, even though worker centers may come close to “representing” employees—in the colloquial, rather than the exclusive, sense—and even to engaging the employer, *CULA* still has some bearing. It’s constitutionally-infused purposivism suggests that when an organization that fights for broad social causes attempts to vindicate rights in the workplace, the normal “labor organization” test may not apply. Indeed, if the organization seeks no role in the traditional scheme established under the NLRA, either by attempting to organize a union or bargain with an employer, the Board may prefer to keep it outside of the Act’s regulatory scope.

c. The life of *CULA*

Despite its provocative analysis, the *CULA* decision has for most part lain dormant since it was written over thirty years ago. It has been referenced in only one subsequent Board opinion, although only insofar as the Board approved, without comment, the ALJ’s opinion which cited *CULA* in clear dicta;⁵¹³ cited without comment in one federal district court decision

⁵⁰⁹ *Id.* at 948. Pope cites to two federal cases in which employers had sought orders enjoining, based on NLRA Section 10(l), 29 U.S.C. § 160(l), trade union councils from threatening, coercing, or restraining the employer from doing business with nonunion companies. In each case, the court found that the labor body had engaged in “dealing with employers,” and implicitly found that employees participated despite the fact that the membership consisted of other labor organizations. In *NLRB v. Omaha Building and Construction Trades Council*, the Eighth Circuit held that the trade council was a labor organization, and thus subject to secondary boycott restrictions, even though its dealing was limited to mediating jurisdictional disputes among various labor unions and their employers. 856 F.2d 47, 50 (8th Cir. 1988). The second case cited by Pope is *Levin v. Carpenters*. 93 L.R.R.M. (BNA) 2663, 2665 (N.D. Ohio 1976) (holding that “Mutual Assistance Committee,” for which there was “reasonable cause to believe that the organization has involved (if it does not consist solely of)” business representatives of unions involved in labor disputes at the picketed site, was a labor organization even though it purported to be a consumer protection group). See also *Bldg. & Constr. Trades Council of Reading & Berks County*, 155 N.L.R.B. 1184, 1186-87 (1965) (adopting ALJ’s finding that trades council was a “labor organization,” because craft unions operate through the council as a unit, the council organizes employees of nonunion contractors for constituent locals, and because such activity may result in the recognition of constituent locals, and “as recognition is the sine qua non to negotiation of a collective-bargaining agreement and is within the broad term ‘dealing with’ in Section 2(5) of the Act”).

⁵¹⁰ Pope, *supra* note 263, at 946-47.

⁵¹¹ *Id.* at 947.

⁵¹² *Id.*

⁵¹³ *Northeastern University*, 235 N.L.R.B. 878 (1978), *enforced in part*, *NLRB v. Northeastern University*, 601 F.2d 1208 (1st Cir. 1979). The ALJ had stated in dictum that the Northeastern University chapter of the 9-to-5 Organization for Women Office Workers was not a labor organization because it “eschew[ed] a collective bargaining role,” and comparing it to *CULA*. *Id.* at 859.

in relation to entirely dissimilar issues;⁵¹⁴ and cited in several advice memorandum of the General Counsel. The bulk of the relevant advice memoranda—those which concern non-union organizations that do not engage in collective bargaining—date from the 1970s, and are not particularly illuminative.⁵¹⁵

A more modern example is the 1994 case concerning the Asian Immigrant Women Advocates (AIWA), in which the San Francisco Regional Director declined to issue a complaint charging that AIWA engaged in illegal secondary activity.⁵¹⁶ AIWA had engaged in sporadic picketing at a San Francisco store of the Jessica McClintock clothing company as part of a national public campaign to pressure the clothing label to take responsibility for the labor conditions of its contractors.⁵¹⁷ The campaign began when twelve seamstresses, who were employed by Lucky Sewing Company to do piecework for Jessica McClintock dresses, complained to AIWA after Lucky went bankrupt, leaving months of wages—which in any case were below the minimum wage—unpaid.⁵¹⁸

Citing *CULA*, the Regional Director determined that AIWA was not a labor organization because it did not exist, either in whole or in part, for the “for the purpose of dealing with employers concerning employee labor relations matters.”⁵¹⁹ Rather than such “traditional” concerns, the Regional Director explained that AIWA “seeks to improve the living and working conditions generally of all low income Asian immigrant women.”⁵²⁰ The Director noted that AIWA has no collective bargaining relationships, has never filed for a representation election, and is not officially a membership organization.⁵²¹ The letter also observed that’s AIWA’s

⁵¹⁴ Sacramento Valley Chapter, Nat. Elec. Contractors Ass’n, Inc. v. Wallace, 1983 WL 2093, 114 L.R.R.M. (BNA) 3037 (E.D. Cal. Jun 22, 1983) (rejecting claim by one employer in contractor’s association that his contribution to the union’s and contractor association’s joint apprenticeship training committee trust fund would constitute a violation of NLRA Section 8(a)(2), because trust fund was not a labor organization). *Sacramento Valley* cited *CULA* as the second in a string citation for the dubious proposition that “[t]he purpose of a labor organization is to bargain collectively with an employer.” *Id.* at *2., 114 L.R.R.M. at 3037.

⁵¹⁵ Three advice memorandum citing *CULA* are available on the commercial electronic database Westlaw. See Int’l Brotherhood of Teamsters Local 600, Cases 14-CE-89, 14-CE-90, and 14-CE-91, 2006 WL 2040091, at *10 n.43 (NLRB General Counsel Memo, May 3., 2006) (citing *CULA* as contrast to union affiliates that were labor organizations); Ass’n of Prof’l Flight Attendants, Case Nos. 16-CC-694 & 16-CC-695, 1987 WL 103406 (NLRB General Counsel Advice Memo, June 9, 1987) (finding that no Section 2(5) organization existed when statutory employees did not participate in the entity, Corporate Campaign, Inc., and labor organizations, which retained entity’s services, were not its constituent parts); Blue Bird Workers’ Committee, Case 4-CC-1458, 1982 WL 30224 (NLRB General Counsel Advice Memo, July 15, 1982) (labor organization found). The *Blue Bird* referred to “a number of previous Advice Memorandua [sic] which found that particular groups were not 2(5) labor organizations because their activities were in support of general social causes.” *Id.*

These memoranda, which are available from the Division of Advice, include: *Central Arizona Minority Employment Plan*, Case 28-CC-623 (1977); *Michael E. Drobney, an Agent of Laborers Local 498*, Cases 8-CC-835; 8-CB-3229 (1976); *Casa Aztlan Ass’n. Proderechos Obreros*, Case 13-CG-5 (1976); *Metro Atlantic/DeKalb SCLC*, Cases 10-CP-123, 10-CC-866; *United Black Workers Association*, Case 14-CB-2206; *Acme/Alltrans Strike Committee*, Case 21-CB-6318 (1978); “*Protesting Citizens*” and *Its Agent Elvin Winn*, Case 15-CC-681 (1977); and *Eastern Farmworkers Association*, Case 29-CP-287 (1975).

⁵¹⁶ Letter from Robert H. Miller, Reg’l Dir., Region 20, NLRB, to Wesley J. Fastiff & Ronald J. Holland, Esqs., Littler, Mendelson, Fastiff, Tichy & Mathiason, regarding AIWA, San Francisco Labor Council, Health Care Workers Union Local 250, Teamsters Local 856, Hotel and Restaurant Employees Local 2, Amalgamated Transit Union Local 1555, Cases 20-CB-9727, 20-CC-3271, and 20-CP-1030 (Dec. 6, 1994) (on file with author; no longer available from NLRB under FOIA) [hereinafter Miller, *AIWA Letter*].

⁵¹⁷ See Marion Crain & Ken Matheny, *Labor’s Identity Crisis*, 89 CAL. L. REV. 1767, 1791 (2001). For an extensive discussion of the AIWA campaign against Jessica McClintock, and the ultimate settlement reached, see RANDY SHAW, RECLAIMING AMERICA: NIKE, CLEAN AIR, AND THE NEW NATIONAL ACTIVISM 97-109 (1999).

⁵¹⁸ Crain & Matheny, *supra* note 517, at 1791.

⁵¹⁹ Miller, *AIWA Letter*, *supra* note 516, at 2.

⁵²⁰ *Id.* at 1.

⁵²¹ *Id.*

primary purpose was providing social services to Asian immigrant women at no cost, and that the non-profit organization was funded through charitable donations.⁵²² Therefore, even though AIWA had engaged in a two-year campaign against McClintock, in which it sent formal demands, attempted to meet, and targeted the company in national media and in demonstrations across the country, the Director could not get over the basic mismatch between the goals and structure of AIWA and those of traditional labor unions regulated by the NLRA.

Notably, in the ROC-NY Advice memo, the only direct consideration of a worker center's status under the Act, the General Counsel did not cite *CULA*.⁵²³ This lack of reliance may indicate either that the General Counsel no longer believes the Board would consider *CULA* good law, or that it was distinguishable in that rather than acting in a supporting role for other labor organizations, ROC-NY had directly organized the workers' campaign against Restaurant Daniel. Instead, the ROC-NY Advice memo followed the traditional approach and concluded that settlement negotiations arising out of a single issue or lawsuit did not evince a "pattern or practice" of dealing.

After an unsuccessful appeal of this decision, the employer sought a motion for reconsideration. Although the motion was denied, the General Counsel appeared to back away from its earlier conclusion that ROC-NY was not a labor organization, but nevertheless concluded that no charge was warranted in the absence of evidence that ROC-NY had a recognitional object.⁵²⁴

In making this conclusion, however, the General Counsel suggested that prosecution of a charge could interfere with ROC-NY's First Amendment right to petition, and cited to a recent D.C. Circuit case emphasizing that the "'canon of constitutional avoidance' requires that the NLRA's prohibitions be construed, if possible, to avoid creating First Amendment problems."⁵²⁵ It is to these constitutional considerations we now turn.

2. The Constitutional Backdrop

According to the familiar canon of constitutional avoidance, courts should avoid interpreting a statute in a way that creates serious constitutional questions.⁵²⁶ In applying the constitutional avoidance canon to matters regulated by the NLRA, courts generally seek to determine whether a statutory proscription that appears to prohibit a constitutionally-protected activity can permissibly be interpreted not to encompass the activity in question.⁵²⁷ In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, the Supreme Court applied this doctrine to the NLRA's restrictions on secondary activity under Section 8(b)(4)(ii).⁵²⁸ At issue in *DeBartolo* was whether peaceful consumer handbilling was prohibited by Section 8(b)(4)(ii)'s limitation on labor organization activity that "threaten[s], coerce[s], or

⁵²² *Id.*

⁵²³ Kearney, *ROC-NY Advice Memo*, *supra* note 3. See *supra* discussion Section VI.A.3. The lack of reference to *CULA* cannot be said to have been inadvertent, as the case had been raised to the NLRB Region handling the unfair labor practice charge. Letter from Daniel E. Clifton, Partner, Lewis, Clifton & Nicolaidis, to Celeste Mattina, Reg'l Dir., Region 2, NLRB, regarding Rest. Opportunities Ctr. of N.Y., Cases 2-CP-1067 and 2-CP-20643 (Mar. 27, 2006).

⁵²⁴ Meisburg, *ROC-NY Reconsideration Letter*, *supra* note 360.

⁵²⁵ *Id.* at 2. The case referred to was *Sheet Metal Workers' Int'l Ass'n, Local 15 v. NLRB*, 491 F.3d 429 (D.C. Cir. 2007).

⁵²⁶ See *NLRB v. Catholic Bishops of Chicago*, 440 U.S. 490 (1979); ESKRIDGE, ET AL., *supra* note 268, at 348-53.

⁵²⁷ See, e.g., *DeBartolo*, 485 U.S. 568 (whether peaceful consumer handbilling is proscribed by Section 8(b)(4)(ii)); *BE&K* (whether filing of unsuccessful lawsuit is proscribed by Section 8(a)(1)).

⁵²⁸ *DeBartolo*. 485 U.S. at 575 ("[W]here an otherwise acceptable construction of [the Act] would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.") See also *Sheet Metal Workers'*, 491 F.3d at 437 ("[T]he canon of constitutional avoidance is not suspended merely because a secondary boycott is at issue.").

restrain[s] any person engaged in commerce or in an industry affecting commerce” with respect to certain prohibited objectives.⁵²⁹ Although the Court acknowledged that an interpretation of 8(b)(4)(ii) restricting such activity would be reasonable, the Court relying, on the text and legislative history of the statute, found no clear intent to reach peaceful consumer handbilling.⁵³⁰ In this fashion, the Court avoided what it considered the “serious constitutional questions” that would arise if such activity, which it suggested merited First Amendment protection,⁵³¹ were prohibited.⁵³²

As *DeBartolo* shows, the canon is a means of narrowly interpreting prohibitory NLRA language that may threaten constitutionally-protected activity. However, there is no reason why an adjudicator may not employ an extra measure of constitutional caution, by construing an organization’s status as a “labor organization”—a threshold issue for many of the Act’s proscriptions—in a way that removes the organization from the reach of the prohibitory NLRA provision. Indeed, even if adjudicators do not explicitly invoke the constitutional avoidance canon, narrowly interpreting the term “labor organization” so as not to apply to constitutionally-protected worker center activity may be a more tacit means of alleviating the same concerns.⁵³³

There are two constitutional norms derived from the First Amendment that suggest that adjudicators should be cautious in applying NLRA restrictions to worker center activity: the right to political expression through assembly, and the right to petition.

a. *Claiborne*: First Amendment Protections for Political Assembly

In *NAACP v. Claiborne Hardware Co.*, the Supreme Court found that the First Amendment protected nonviolent picketing by civil rights protesters in their effort to publicize a boycott of white merchants who refused to embrace racial integration.⁵³⁴ The local branch of the NAACP had initiated the boycott after government officials, which included some of the merchants, refused demands by the protesting citizens to end discrimination against African-Americans.⁵³⁵ To enforce the boycott, black citizens picketed white-owned stores and ostracized, and in some cases used violence against, other black citizens who did not observe the boycott.⁵³⁶ White business-owners sued the protestors and the NAACP on a number of theories, and the Mississippi Supreme Court upheld a tort judgment against the picketers.⁵³⁷

In overturning the damages award, the Supreme Court held that all peaceful aspects of the citizens’ protest was protected by the First Amendment, even if it had the effect of coercing some citizens to participate.⁵³⁸ The court noted that each element of the boycott was a “form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth

⁵²⁹ NLRA Section 8(b)(4)(ii); 29 U.S.C. § 158(b)(4)(ii).

⁵³⁰ *DeBartolo*. 485 U.S. at 578-88.

⁵³¹ *Id.* at 575-76 (“On its face, this was expressive activity arguing that substandard wages should be opposed by abstaining from shopping in a mall where such wages were paid. Had the union simply been leafletting the public generally, including those entering every shopping mall in town, pursuant to an annual educational effort against substandard pay, there is little doubt that legislative proscription of such leaflets would pose a substantial issue of validity under the First Amendment. The same may well be true in this case, although here the handbills called attention to a specific situation in the mall allegedly involving the payment of unacceptably low wages by a construction contractor.”)

⁵³² *Id.* at 588.

⁵³³ Indeed, Professor Pope suggests that the *CULA* case may have been decided in this manner. See *supra* discussion at notes 510–511.

⁵³⁴ 458 U.S. 886, 918-19 (1982). The First Amendment guarantees from government infringement “the right of the people peaceably to assemble and to petition the government for a redress of grievances.”

⁵³⁵ *Id.* at 900.

⁵³⁶ *Id.* at 902-04.

⁵³⁷ *Id.* at 894.

⁵³⁸ *Id.* at 910.

Amendment,”⁵³⁹ and that “speech does not lose its protected character simply because it may embarrass others or coerce them into action.”⁵⁴⁰ In the words of the Court, “[t]he right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself.”⁵⁴¹

The *Claiborne* case suggests that peaceful worker center protest activities cannot be proscribed without offending the Constitution. However, the First Amendment rights enshrined in *Claiborne* have not been applied in the field of labor disputes, where the NAACP-organized picketing would have been considered an illegal secondary boycott. The Court implied two reasons for affording special status to the *Claiborne Hardware* picketing: that the protest was political in nature rather than economic; and that Congress has developed a special, balanced system to regulate labor picketing based on its governmental interest to prevent industrial strife.⁵⁴²

This economic-political divide was subsequently reinforced in *F.T.C. v. Superior Court Trial Lawyers Association*, in which the Court rejected the claim, by a large group of court-appointed criminal defense attorneys in the District of Columbia, that their group boycott designed to pressure the District to increase their hourly pay was protected by the First Amendment.⁵⁴³ The Court emphasized that unlike the civil rights protestors, who would gain no particular economic advantage from their boycott and sought the loftier goals of equal treatment under the law, the Superior Court Trial lawyers’ “immediate objective was to increase the price that they would be paid for their services.”⁵⁴⁴ The Court also noted that while the lawyers’ publicity and lobbying efforts were protected by the First Amendment, their concerted refusal to work until they receive a pay increase was a *per se* unlawful horizontal restraint of trade, and therefore not immune from antitrust liability.⁵⁴⁵ Rather, the Court recalled that “[s]uch an economic boycott is well within the category that was expressly distinguished in the *Claiborne Hardware* opinion itself,” and referenced its statements in *Claiborne Hardware* that unfair trade practices and secondary activity by labor unions may be restricted pursuant to Congress’ balanced efforts to regulate the economy.⁵⁴⁶

However, unlike labor unions engaged in secondary activity, worker center activity is more likely to receive first amendment protection under *Claiborne Hardware*, which could immunize worker centers from potential antitrust or tort liability and suggests that NLRA restrictions on “labor organizations” should not apply to worker centers’ constitutionally-

⁵³⁹ *Id.* at 907.

⁵⁴⁰ *Id.* at 910.

⁵⁴¹ *Id.* at 914

⁵⁴² As the Court stated:

This Court has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association Secondary boycotts and picketing by labor unions may be prohibited, as part of “Congress’ striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.”

Id. at 912. But the Court found no “comparable right to prohibit peaceful political activity such as that found in the boycott in this case.” *Id.* at 913. See also Jack Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?*, 45 B.C. L. REV. 125, 143 (2003).

⁵⁴³ 493 U.S. 411 (1990). See Pope, *supra* note 263, at 921-24.

⁵⁴⁴ *Id.* at 427. In describing the different goals of the boycotters in *Claiborne Hardware*, the Court described the NAACP picketers in lofty terms, stating that “they sought only the equal respect and equal treatment to which they were constitutionally entitled,” and struggled “to change a social order that had consistently treated them as second class citizens.” *Id.* at 426 (quoting *Claiborne Hardware*, 58 U.S. at 912).

⁵⁴⁵ *Id.* at 426-28 & 436 n.19.

⁵⁴⁶ *Id.* at 427-28 & n.12.

protected activity. This is so for three reasons. First, while worker center actions often are based in some type of economic demands, the actions often have broader political goals.⁵⁴⁷ This is clearly the case when protest activities are based on discrimination claims or discrete political issues such as immigration reform, which are quite akin to the boycott in *Claiborne Hardware*. Actions by ethnicity-based worker centers also share similarities to the NAACP-approved boycott in *Claiborne Hardware*, insofar as their commands for better treatment in the workplace may be related to racial stigma that may be present in other domains. Even worker centers that do not organize along racial lines can appeal to other bases of identity that call out for “equal treatment,” such as status as immigrants, as women, or as young people. Like the *Claiborne Hardware* boycotters, worker centers also often seek support from community leaders and other community groups. Lastly, some worker center activity is explicitly linked to advocacy for changes in the law to elevate the status of worker center members, which increases the “political” nature of the activity.

Second, it does not appear that Congress factored in organizations like worker centers in the careful regulatory balance between labor unions and management that the Court approved of in *Claiborne Hardware*.⁵⁴⁸ Most worker center-led employer campaigns target employer practices that violate statutory employment laws rather than federal labor law. To the extent that worker centers seek to ensure employer compliance with these legal dictates, protests to vindicate employment rights would in many cases be consonant with the will of Congress,⁵⁴⁹ and in any event do not form part of the balance Congress struck in the NLRA to minimize “industrial strife.”⁵⁵⁰

Last, to the extent that regulation of communicative conduct by labor unions engaging in secondary activity is justified based on the “speech plus” or “signal” theory—that picketing is may be regulated because it “calls for an automatic response to a signal, rather than a reasoned response to an idea”⁵⁵¹—the worker center protests may be distinguished as not profiting from the same automatic garnering of support attributed to labor union activity.⁵⁵² However, restrictions on secondary boycotts also derive their support from other theories, including the protection against coercion described in *Claiborne Hardware*.⁵⁵³

b. *BE&K*: The right to petition

In addition to First Amendment protections for protests that implicate neutral employers, the right to file a lawsuit, especially as part of a campaign for social change, has repeatedly been

⁵⁴⁷ Professor Pope has made similar arguments with respect to community groups supporting labor boycotts. See Pope, *supra* note 263, at 924-27.

⁵⁴⁸ See *supra* note 542.

⁵⁴⁹ This is so particularly where the worker center alleges violations of federal employment laws. However, even with respect to state law protections, unless preempted such laws form a minimum standard from which

⁵⁵⁰ See *Claiborne Hardware*, 58 U.S. at 912; *supra* note 542.

⁵⁵¹ *NLRB v. Retail Store Employees Union Local 1001 (Safeco)*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring).

⁵⁵² See *Overstreet v. United Bhd. of Carpenters*, 409 F.3d 1199, 1215 (9th Cir. 2005) (holding that speech directed at the public, rather than other union members, does not inducement or encouragement prohibited by NLRA section 8(b)(4)(i)(B)). Cf. Pope, *supra* note 263, at 932 (arguing that traditional union boycott appeals based on class or union sympathy do not apply in the context of labor-community boycotts, because such appeals no longer automatically generate support, and that social groups must be convinced that union demands are worthy of support). See also Lee Goldman, *The First Amendment and Nonpicketing Labor Publicity Under Section 8(b)(4)(ii)(B) of the National Labor Relations Act*, 36 VAND. L. REV. 1469, 1482—86 (1983) (discussing “speech plus” theory).

⁵⁵³ 458 U.S. at 912 (“Secondary boycotts and picketing by labor unions may be prohibited, as part of ‘Congress’ striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from *coerced participation* in industrial strife.” (emphasis added)).

protected under the First Amendment.⁵⁵⁴ To the extent that worker center activity grows out of the initiation of lawsuits, therefore, adjudicators should be wary of subjecting that activity to NLRA regulation by categorizing the centers as "labor organizations."

The right to petition the government for redress of grievances was recognized in modern form in another NAACP case, *NAACP v. Button*.⁵⁵⁵ In *Button*, the NAACP challenged a Virginia law that would have prevented the civil rights organization from soliciting plaintiffs for civil rights lawsuits. The Court concluded that the right of association encompassed the bringing of lawsuits as "a form of political expression."⁵⁵⁶ Especially as used by the NAACP, the Court found that litigation is "not a technique of resolving private differences" but a "means for achieving the lawful objectives of equality of treatment by . . . government."⁵⁵⁷

The litigation right acknowledged in *Button* has been extended to non-political groups and has also been specifically recognized within the context of NLRA regulation.⁵⁵⁸ Even when the rights sought by litigation are statutory rather than constitutional in nature, the right to bring litigation has itself received First Amendment protection.⁵⁵⁹ Thus, in *Bill Johnson's Restaurant v. NLRB*, when the Supreme Court considered whether the NLRB could enjoin an employer's ongoing tort action filed during an organizing campaign, the Court made clear that "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances," and that due regard to such First Amendment values must be made in construing the NLRA.⁵⁶⁰

In *BE&K Construction Co. v. NLRB*, the Supreme Court expanded the protections afforded by the Petition Clause in the NLRA context, holding that the First Amendment afforded some level of protection to employer lawsuits that are unsuccessful but reasonably based.⁵⁶¹ The Court thus held that the Board's prior test for determining whether an unsuccessful lawsuit violated Section 8(a)(1)—whether the lawsuit was filed with a retaliatory motive—was overbroad and therefore invalid.⁵⁶² Concerned that the prior standard "broadly covers a substantial amount of genuine petitioning," the Court construed Section 8(a)(1) not to require such a reading, and remanded the case to the NLRB for further consideration.⁵⁶³ On remand, the Board found that all reasonably based lawsuits are immune from unfair labor practice liability, regardless of motive.⁵⁶⁴

⁵⁵⁴ See Catherine L. Fisk, *Union Lawyers and Employment Law*, 23 BERKELEY J. EMP. & LAB. L. 57, 80–85 (2002).

⁵⁵⁵ 371 U.S. 415 (1962).

⁵⁵⁶ *Id.* at 429

⁵⁵⁷ *Id.*

⁵⁵⁸ See Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 67-71 (1998) (reviewing evolution of First Amendment Right to Petition as a right to file lawsuits). See also *Peddie Buildings*, 203 N.L.R.B. 265, 272 (1973), *enforcement denied on other grounds*, 498 F.2d 43 (3d Cir. 1974) ("[G]oing to a judicial body for redress of alleged wrongs . . . stands apart from other forms of action directed at the alleged wrongdoer. The right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in the court is to enjoin employees from exercising a protected right.").

⁵⁵⁹ *Id.* Thus, in *United Mine Workers v. Illinois Bar Association*, the Supreme Court held that a state could not enjoin a union from employing a lawyer to represent members' workers' compensation claims. 389 U.S. 217, 233 (1967). The Court made clear that the first amendment right was not limited to litigation for political purposes, but rather encompasses "[g]reat secular causes, with small ones," and extends "to any field of human interest." *Id.* (quoting *Thomas v. Collins*, 323 U.S. 516, 531 (1945)).

⁵⁶⁰ 461 U.S. 731, 741 (1983).

⁵⁶¹ 536 U.S. 516 (2002). The Court identified a series of values that could be served by unsuccessful lawsuits that are reasonably based, namely allowing the public airing of disputed facts, raising matters of public concern, promoting the evolution of the law, and adding legitimacy to the court system as an alternative to force. *Id.* at 531-32.

⁵⁶² *Id.* at 537.

⁵⁶³ *Id.* at 533.

⁵⁶⁴ 351 N.L.R.B. No. 29, 2007 NLRB LEXIS 421 (Sep. 27, 2007).

Although *BE & K* focused on employer lawsuits, the constitutional dimension of the petition rights identified by the Court clearly apply to worker-center lawsuits as well.⁵⁶⁵ Moreover, the Court found that NLRB adjudication burdens the First Amendment right to petition in various ways, by imposing liability and associated penalties for such petitioning activity, as well as reputational harm that may result.⁵⁶⁶ Adding to this list, the Board further noted that “the very prospect of liability may deter prospective plaintiffs from filing legitimate claims.”⁵⁶⁷

Based on these considerations, worker center should not be subject to the Board’s processes that would burden their constitutionally-protected pursuit of litigation to vindicate statutory rights, nor for activities that fairly can be said to support litigation objectives.⁵⁶⁸ Such activities include settlement negotiations, and may also extend to picketing and handbilling undertaken to support settlement or publicize a grievance.⁵⁶⁹ Even settlement negotiations that go beyond the form of the lawsuit, or even achieve outcomes not obtainable as judicial remedies should be considered part and parcel of worker center petitioning rights, and therefore not a basis for NLRA regulation, so long as they bear a reasonable relationship to exercise of petition rights.⁵⁷⁰ In respect of these rights, the Board should be wary to subject petition-related activities to the restrictions on picketing or secondary boycotting. This caution also suggests that the Board should interpret NLRA Section 2(5) in a manner that avoids the serious constitutional questions posed by classifying worker centers who pursue litigation as “labor organizations” that are potentially subject to unfair labor practice liability. For these reasons, the Board should not interpret as “dealing with” the litigation-related activities pursued by worker centers against employers.

VII. The sliding scale of worker center activity

As discussed above, the NLRB has considerable flexibility when interpreting ambiguous portions of the NLRB. Indeed, it is proper for the Board to be guided by policy concerns when doing so.⁵⁷¹ As for the question of whether worker centers should be considered “labor organizations,” the history and purposes of the Act would provide sufficient justification for the Board to decline regulating such organizations. In this section, I discuss how the Board might incorporate the approaches discussed in this paper when assessing worker center activity.

A. The Three Approaches in Summary

⁵⁶⁵ Several courts have assumed that labor unions enjoy a right to petition, although have restricted exercise of that right within the “critical period” before a representation election. *See, e.g., Freund Baking Co. v. NLRB*, 165 F.3d 928 (D.C. Cir. 1999).

⁵⁶⁶ 536 U.S. at 529-30.

⁵⁶⁷ 351 NLRB No. 29, 2007 NLRB LEXIS 421, at *32.

⁵⁶⁸ The General Counsel even cited *BE & K* as partial justification for its refusal to prosecute a complaint that ROC-NY engaged in recognitional picketing, in violation of NLRA Section 8(b)(7), based on a lawsuit and related picketing activity against the Fireman Group. Meisburg, *ROC-NY Reconsideration Letter*, *supra* note 360.

⁵⁶⁹ *See id.*

⁵⁷⁰ Indeed, the fact that many courts encourage settlement suggest that negotiations toward settlement should be considered an exercise of First Amendment petitioning rights. *See, e.g., Thompson v. Cleland*, 783 F.2d 719, 722 (7th Cir. 1986) (holding that lower court lacked authority to dismiss lawsuit merely because a “settlement proposal had requested relief beyond that which the court thought appropriate,” and observing that “it is quite proper for a court to encourage settlement negotiation . . .”). Moreover, negotiators are encouraged to reach for unconventional options in settlement. *See CHARLES B. CRAVER, EFFECTIVE NEGOTIATION AND SETTLEMENT* 159 (5th ed. 2005) (“Negotiators should not hesitate to explore unconventional options that may go beyond what courts might have the power to impose or that may transcend established business practices.”).

⁵⁷¹ *See supra* Section V.B.

The wide variety of goals and activities worker centers pursue raises the question of whether worker centers could be considered “labor organizations” for some purposes but not for others. Theoretically, an organization could be immune from labor law regulation when acting as a service organization or legal clinic, but not in its dealings with the employer. The NLRB has expressed some disapproval of this possibility.⁵⁷² The real issue returns us to the difference between an organization’s purpose and its actual activities. So long as an organization “exists for the purpose, in whole or in part, of dealing with employers” concerning statutory subjects, it is a labor organization.⁵⁷³ Therefore, the Board’s suggestion that labor organization status is permanent is unfounded. As we have seen, a worker center may attempt a unionization drive but reorient itself after the drive is unsuccessful.⁵⁷⁴ Therefore, while an organization of employees is a labor organization as long as one of its several purposes is to deal with employers, that status may change if the organization changes its mission.

However, the preliminary question is whether an organization is a labor organization at all. As the three approaches discussed above illustrate, the question is ultimately highly factual, and depends on the statutory context in which the question is raised.

The dominant “traditional” approach to defining a labor organization has itself limited the circumstances in which worker centers will be considered subject to the Act. Because the “dealing with” question will be assessed through the “bilateral mechanism” inquiry, only worker centers that intend to engage the employer in back-and-forth communication over time will be considered labor organizations. Raising singular protests to the employer and engaging employees in action over workplace issues that do not address employer fall outside the “bilateral mechanism” requirement. Moreover, as the ROC-NY Advice Memo, suggests, even repeated negotiations, when restricted to a single issue or growing out of a single lawsuit, will not amount to a “pattern or practice” of dealing.

Although the second approach I discuss, the “contextual-purposive approach,” has never been explicitly adopted by the Board or the courts, contextual considerations likely inform the “labor organization” inquiry. Thus, the purposes of the NLRA provision at issue often shape the manner in which the “labor organization” question is determined. The broad definition of labor organization was meant to combat a particular evil: company unions that deprived workers of free choice. This statutory history suggests that the broad definition may not be appropriate in all cases; in other words, workers centers’ status under the Act may depend on the context in which the labor organization issue is raised. For example, a worker center would clearly be a labor organization if it were to petition the NLRB to become the certified representative of a company’s employees, as the Section 9 certification procedures are designed to allow all but the most illegitimate organizations to serve that role so long as they achieve a majority employee approval. As for the restrictions on picketing and secondary activity, however, which are closer

⁵⁷² See *Air Line Pilots Ass’n (ABX Air, Inc.)*, 345 N.L.R.B. No. 51, 2005 WL 2137479, at *2 n.4 (Aug. 27, 2005) (“We are not aware of any case which holds that an entity can be a labor organization for some purposes under the Act and not for other purposes under that same Act. The language of the Act is plain. Once an entity is found to be a labor organization, it is subject to all of the prohibitions of Sec. 8(b) of the Act.”).

At issue in *ABX Air* was whether the Air Line Pilots union had engaged in secondary activity, for which a threshold question was whether the union was a “labor organization.” *Id.* at *2. The issue was nontrivial because the vast majority—99.973%—of ALPA pilot were employed by employers that were not covered by the NLRA, and thus were not “employees.” *Id.* at *9 (Liebman, Member, dissenting). However, the union conceded that it was a “labor organization,” although qualified the admission by stating “at least for some purposes we’re a labor organization.” *Id.* at *19 n.7 (ALJ decision). The rebuke of this notion by the two-member Board majority came in response to the dissent’s reiteration of the union’s qualified admission. *Id.* at *2 n.4.

⁵⁷³ See *supra* Section V.A.2.a.

⁵⁷⁴ See *supra* Section I.C.2.b (discussing KIWA’s efforts after failed unionization campaign).

to the heart of worker center concerns about the NLRA, a strong argument can be made that these restrictive provisions were intended to apply to ascendant labor unions with the capacity to control whole industries, and should therefore not apply to fledgling nonprofit worker organizations. The contextual approach also gives further support to the textual argument that the LMRDA should not be enforced against worker centers. However, the contextual approach may be subtler, and simply call upon adjudicators to consider the worker center activity not merely within the labor relations frame, but as expressive political activity.

Last, the “constitutional-purposive” approach adds a normative dimension to the debate of worker center status under the Act, providing an additional rationale for adjudicators to be cautious in extending traditional labor laws to potentially constitutionally-protected activity. The Board has also demonstrated that it takes these concerns seriously, declining to find that organizations that do not fulfill traditional purposes within the NLRA are labor organizations, as illustrated in *CULA*. These concerns are well-founded. Worker centers who engage in secondary boycotts and other collective activity may be engaging in political expressive activity protected by the First Amendment. The political nature of many worker center protests suggests that its activities will fall within the *Claiborne Hardware* First Amendment immunity.

Worker centers serve and support workers in broader capacities than do traditional labor unions, combining education, leadership development, and direct services to their advocacy. Furthermore, worker center campaigns often have broader political goals, such as guaranteeing minimum legal compliance by those who employ low-wage workers, improving treatment of all workers of a certain class, and passing legislation directed at their condition. Unlike labor unions, for which Congress developed a comprehensive regulatory scheme to manage their rights vis-à-vis employers, worker centers and the workers they represent stand outside this industrial relations system. Rather, they normally fight for mere compliance with statutory employment mandates. Adjudicators should also be wary of regulating worker centers within the NLRA scheme because this litigation activity is protected by the First Amendment right to petition. Because much of worker center activity is based on pursuit of statutory claims through administrative and judicial forums, entanglement in NLRB processes may serve to deter the exercise of worker centers’ right to pursue legal claims. Therefore, litigation and even extensive settlement activity with employers arising out of such litigation should not give rise to labor organization status.

B. Applying the Approaches to Worker Center Activity

Let us see then how these approaches and concerns guide our analysis of the worker centers profiled above.

1. La Raza Centro Legal

La Raza Centro Legal, like many Immigrant Day Laborer organizations, focuses on individual job placement and employment claims rather than collective approaches to engaging employers.⁵⁷⁵ Even where La Raza engages in collective activity or makes demands of employers, these are in support of legal claims for wage enforcement. Therefore, to the extent it does present demands to employers, such demands are in the constitutionally-protected litigation context. They should therefore not be the basis of labor organization status, both on the traditional ground that such dealings do not establish a “pattern or practice” of dealing, and that to find otherwise would entrench upon La Raza’s First Amendment right to petition on behalf of its members.

⁵⁷⁵ See *supra* Section I.C.1 for background on La Raza’s activities.

However, the hiring hall —known as the Day Labor Program (DLP)—presents a different concern. Clearly, through the hiring hall DLP deals in some sense with employers over statutory subjects when negotiating conditions of employment and dispatching employees. Statutory employees also participate in the program, even setting working standards through a democratic process. However, it is not clear that the “dealing” in this case is sufficient to establish a “pattern or practice” as required under the traditional approach. Because the hiring hall mostly serves a wide variety of clients on generally small labor projects, it does not generally deal with repeat clients. Even when it does, a new negotiation takes place that is not related to prior employment. Moreover, it is not clear whether the dispatching really involves a back-and-forth of proposals, or simply concerns information sharing necessary for the employee to be dispatched. Most terms are not subject to negotiation by the program, as the center sets a minimum wage level by which the hiring employer must abide. Any further negotiations are between the individual and the employer and do not involve the DLP. Thus, in the final analysis, the question of whether a hiring hall “deals” with employers under the traditional approach requires close attention to the facts of the relationships established between client employers and the worker center agency.

Attention to context is also instructive. Because the DLP is restricted to hiring hall functions, it is in some ways insulated from the collective activities taken by other parts of La Raza. If all of these activities may be considered part of one entity, i.e., La Raza Centro Legal, then that entity might be considered a labor organization as a whole by virtue of potential dealing that takes place in the hiring hall; and would thus be responsible as a labor organization for the activity of all its branches. However, if the legal clinic is considered separately, it clearly does not engage in dealing.

2. KIWA

Similar issues confront KIWA, which has helped to spawn several organizations that are tied to KIWA but nominally independent, such as the RWAK and the IWU.⁵⁷⁶ Clearly, the IWU was a labor organization —it had a clear purpose to represent employees in dealings with the employer as the employees’ certified exclusive representative. However, may KIWA be considered a labor organization on the basis of IWU’s efforts, in which KIWA members were actively involved? This question may ultimately be resolved under the law of agency.⁵⁷⁷ If so, has the fact that the effort failed, and KIWA no longer has the purpose of dealing with employers in this matter, remove the “labor organization” taint? I suggest that it would.⁵⁷⁸

KIWA’s “fair share” campaign also raises the specter of “labor organization” status. Under a traditional approach, it is likely that KIWA engages in dealing with employers by asking them to raise wages and sign on to the campaign. There are two potential traditional defenses to this claim, however. On the one hand, it may be questioned whether employees “participate” in this campaign. Although grocery workers clearly participate in some of KIWA’s programs, such as the legal clinic and other areas, the “fair share” campaign may be run by the organization’s staff without involvement from KIWA’s employee participants. This is similar to other non-

⁵⁷⁶ See *supra* Section I.C.2.b, profiling KIWA.

⁵⁷⁷ See NLR Act Section 2(13); 29 U.S.C. 152(13) (“In determining whether any person is acting as an “agent” of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.”). Although the statute does not direct how the agency analysis should proceed, courts have noted that the statute is consistent with application of common law agency principles, a result supported by the legislative history of the Act. See *NLRB v. Sheet Metal Workers’ Int’l Ass’n, Local Union No. 19*, 154 F.3d 137, 142 & n.7 (3d Cir. 1998).

⁵⁷⁸ See *supra* note 572 and surrounding text.

profit organizations that make demands that corporations abide by certain “codes of conduct,”⁵⁷⁹ which are a familiar part of the consumer advocacy terrain. These organizations likely do not include employees of the targeted corporations as member-participants. To the extent that KIWA acts as a community representative rather than an employee representative in making these demands, it is incongruous to attribute the campaign to an employee-membership organization. However, it is hard to escape the conclusion that employees “participate” in KIWA and its fair share campaign.

A stronger argument may be that the “fair share” campaign does not involve “dealing” because it does not depend on a “bilateral mechanism” in order to achieve employer sponsorship. The campaign simply sets a universal standard and asks employers to sign on. No negotiation is necessary, and the employer can even join the campaign without being directly addressed. Therefore, it is questionable whether through the campaign KIWA has contemplated, much less demonstrated an organizational purpose, an ongoing relationship with the signatories.⁵⁸⁰

Reaching beyond the traditional approach, KIWA’s fair share approach shares striking similarities to the civil rights protesters in *Claiborne Hardware*, and regulation of KIWA’s activities connected to the campaign may raise similar constitutional concerns. Like the NAACP-inspired boycott, KIWA’s campaign is undertaken on behalf of workers in a specific geographical community, and makes appeals enunciated in terms of ethnic equality and fair treatment. Although the Court in *Claiborne Hardware* used some language suggesting that the NAACP’s civil rights protest merited First Amendment protection because its goal was to achieve equal protection of the laws, as the Constitution requires, the First Amendment is not limited merely to advocacy for constitutional compliance. KIWA’s campaign, although advocating better treatment than that required by employment laws, grew out earlier campaigns to target standard employer behavior. Unlike the advocacy in *Superior Court Trial Lawyers Association*,⁵⁸¹ KIWA’s campaign was not merely self-interested and does involve practices prohibited by the antitrust laws. Rather, the campaign falls on the “political” side of the economic-political divide, and resembles the efforts of the *Claiborne Hardware* protestors “to change a social order that had consistently treated them as second class citizens.”⁵⁸² For these reasons, KIWA’s campaign should be immune from charges of illegal picketing or secondary boycotts.

On the other hand, to the extent that KIWA is trying to set a level of working conditions beyond that mandated by law, its actions in the marketplace might be considered economic weapons that Congress meant to regulate through the national scheme of labor laws. In this context, KIWA’s activities are not protected as well by constitutionally-infused petitioning rights, because the campaign does not depend on legal advocacy nor is based on employment statutes. Rather, it is a direct intervention into the employer’s right to set wages as it pleases. Therefore, the fair share campaign raises several indices of “dealing with” that may confer “labor organization” status upon KIWA, although the issue is far from clear cut and involves potentially difficult constitutional questions. In light of this risk, however, organizations like KIWA should

⁵⁷⁹ “Codes of Conduct” are increasingly used by workers’ rights organizations to ensure compliance with minimum labor standards or in some case “fair” standards that are above legal requirements. Whether efforts to enlist employers as “signatories” to such codes constitutes “dealing with employers” has not been considered by the Board. See Cynthia Estlund, *Something Old, Something New: Governing the Workplace by Contract Again*, 28 COMP. LAB. L. & POL’Y J. 351, 373 (2007).

⁵⁸⁰ However, efforts to enforce the “code” could involve KIWA in direct back-and-forth communications with the employer sufficient to demonstrate “dealing with.” Because of this risk, KIWA might consider alternative approaches to enforcement, such as by raising compliance issues to the community and the public generally, rather than to the employer.

⁵⁸¹ 493 U.S. 411. See *supra* note 543 and surrounding text.

⁵⁸² *Claiborne Hardware*, 58 U.S. at 912.

consider separating the directorship of “code of conduct” campaign from its employee-member programs, and ensure that it does not engage in back-in-forth communications with targeted employers as part of their campaign efforts.

3. YWU

YWU’s activities raise many similar questions.⁵⁸³ In particular, YWU’s effort to convince the Cheesecake Factory to sign on to a Code of Conduct may evince a purpose of “dealing with” the employer in a manner similar to KIWA’s fair share campaign.⁵⁸⁴ Unlike KIWA, however, YWU cannot defend by claiming that employees did not participate in this campaign; as the code was developed by an employee committee of YWU and presented by employees to the employer. On the other hand, because YWU’s proposed code was never consummated and apparently abandoned, it is not clear that YWU retained its purpose of engaging the employer in this manner.

The fact that YWU’s initial demands and subsequently proposed Code of Conduct grew out of administrative wage claims suggests other avenues of defense. First of all, because YWU had a First Amendment right to bring these claims, associated demands, such as the demand that payment for rest time abuse be immediate, should arguably be protected from government interference as part of the overall petitioning activity. Relatedly, according to the logic of the ROC-NY Advice memo, settlement negotiations pertaining to a single issue or lawsuit do not evince the type of “pattern or practice” required to show a purpose of dealing.

Unanswered in the ROC-NY Advice Memo is the extent to which proposals that encompass many areas not related to the initial legal claim may still fall within the “single context” or “single issue” safe harbor.⁵⁸⁵ YWU’s Code of Conduct would have covered a variety of issues not directly relevant to the underlying administrative claim, and contemplated a several enforcement mechanisms that could create an ongoing relationship. As the number and variety of issues that a worker center seeks to address in settlement-related talks increases, the ROC-NY “safe harbor” may be stretched to a breaking point. Therefore, worker centers are advised to ensure that their informal demand-making bear an arguable relationship to litigation activity, lest such demands are equated to union-like collective bargaining proposals.

A remaining issue of interest is whether the law would distinguish codes of conduct directed at one employer from those that seek to impose an industry-wide or geographically-based standard. On the one hand, YWU could argue that its proposed code was more of a “one-shot” tactic than a broader campaign extending towards multiple employers and continuing over time. On the other hand, it is easier to craft codes of conduct that are addressed to multiple targets without engaging each employer individually. Such campaigns can set a community standard and debate about its adoption can take place in the public forum, thus avoiding extensive negotiations with each employer. In short, whether codes of conduct involve “dealing with employers” depends on the manner in which the code of conduct campaign is pursued.

4. ROC-NY

Although ROC-NY has gone furthest in the direction of negotiated agreements with employers, its activity has already passed NLRB scrutiny and has been deemed insufficient to designate ROC a “labor organization.”⁵⁸⁶ In addition to its employer-targeted campaigns, ROC is also pursuing “code-of-conduct”-like efforts, namely through its Restaurant Roundtable. This

⁵⁸³ YWU’s campaign activities are profiled *supra*, Section I.C.3.a.ii.

⁵⁸⁴ See *supra* note 65.

⁵⁸⁵ See *supra* text at notes 350-358 and note 357.

⁵⁸⁶ ROC-NY’s campaign activities are profiled *supra*, Prelude and Section I.C.3.b.iii. See also Kearney, *ROC-NY Advice Memo*, *supra* note 3, discussed *supra* text at notes 350-358.

strategy, of honoring good employers rather than punishing bad ones, may allow ROC to avoid the types of confrontational tactics most likely to lead to adjudication of its labor organization status.

In other ways, ROC-NY appears to have built certain parameters into its campaigns so as to avoid entanglement with the NLRB. For example, instead of picketing, ROC-NY distributes handbills in its restaurant protests. Moreover, these handbills contain express disclaimers clarifying that ROC-NY's actions are based in legal claims for violation of employment rights, and that the organization does not seek to represent employees as a collective bargaining agent.⁵⁸⁷ This language is clearly used to avoid charges that ROC-NY is engaged in recognitional picketing. Moreover, by using consumer handbills rather than pickets, ROC-NY ensures that its activity falls within the zone of protected First Amendment activity that the Supreme Court has explicitly ruled the NLRA restrictions on secondary activity not to reach.⁵⁸⁸ In this way, ROC-NY is already acting like an organization regulated by the NLRA, prudently trying to avoid its strictures. This is smart. By not pressing the issue, ROC-NY may avoid the administrative and legal difficulties that may attend should it be ruled a "labor organization."

The real nightmare for an organization like ROC-NY would be a determination by the Secretary of Labor that it is a labor organization subject to LMRDA reporting and organizational requirements. The ensuing administrative cost, and deep changes to ROC's organizational culture, would be devastating. Although there are strong textual and purposive arguments that LMRDA regulation would not follow even if an organization passed the NLRA Section 2(5) threshold,⁵⁸⁹ ROC-NY wisely seeks to avoid entanglement with the NLRB should Department of Labor scrutiny follow. This caution is also sound in the face of uncertain legal development in this area that has yet to be settled determinatively.⁵⁹⁰

VIII. Conclusion: The Future of Worker Center and Labor Laws

As worker centers continue to expand in markets underserved by traditional unions, and further innovate in their campaign tactics, questions of the applicability of labor law to their conduct will surely arise in new contexts. The trend of partnerships between worker centers and traditional unions may accelerate this reckoning.⁵⁹¹

Worker centers will also likely increase their resort to the NLRB to vindicate workers' right to act in concert. Reaping the benefits of labor law protections without suffering the negative consequences may strike some as an unfair, or "strategic" use of the law.⁵⁹² But the law was designed to protect pre-union organizational activity—based on rights afforded to "employees"—independently of the later-added prohibitions on union unfair labor practices that apply to "labor organizations." It is possible, of course, that the Board will see things differently, and desire to regulate organizations that in other disputes petition the agency to protect employee rights.

⁵⁸⁷ See *supra* note 87.

⁵⁸⁸ *DeBartolo*, 485 U.S. 568. See *supra* Section IV.A.2, discussing NLRA restrictions on secondary activity.

⁵⁸⁹ See *supra* Section IV.C.3.

⁵⁹⁰ This is especially true in light of the General Counsel's suggestion that the issue of ROC-NY's "labor organization" status was not as clear as suggested by the earlier Advice Memo. See Meisburg, *ROC-NY Reconsideration Letter*, *supra* note 360. The Board has yet to determine this issue.

⁵⁹¹ See Jayesh M. Rathod, *The AFL-NDLON Agreement: Five Proposals for Advancing the Partnership*, 14 No. 3 HUM. RTS. BRIEF 8 (2007). While such collaborations are still in their infancy, worker centers must be sure to avoid acting as mere proxies in labor union disputes. In such scenarios, the union may still be responsible for the worker center conduct on a theory of agency, and the risk of raising the "labor organization" status of worker centers to the NLRB or other forums is greatly increased.

⁵⁹² See Hyde, *What is Labour Law*, *supra* note 88.

However, the law, as it stands, is unfit to regulate worker center activity that does not seek collective bargaining. The relevant laws were developed in a different time and for different types of employer-employee relationships. As a policymaking body, the Board should therefore decline any invitation to regulate worker centers. Until worker centers explicitly seek to take on collective bargaining roles, or until a new law is developed, worker center protest activity should be accorded the First Amendment protection it deserves.