OLIVE BRANCH OR BRIBE: A CONTENTIOUS FUTURE LOOMS FOR NEUTRALITY AGREEMENTS UNDER THE LABOR MANAGEMENT RELATIONS ACT

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I. INTRODUCTION

Since the 1980s, certification elections in the private sector have dropped precipitously[1] while union membership has correspondingly plummeted.[2] Under the National Labor Relations Act (NLRA),[3] a union requires the signatures of 30% of the employees in a workplace in order to justify filing an election petition with the National Labor Relations Board (NLRB).[4] As a practical matter, unions often secure the signatures of 60% or more of the workforce in order to provide a buffer for legal wrangling with the employer over the constitution and size of the bargaining unit.[5] Notwithstanding such strong opening salvos, the success of organizing campaigns is fleeting. Intense management resistance is often the reason.[6] According to one empirical study, in 22,382 organizing drives occurring between 1994 and 2004 that yielded an election petition, secret-ballot

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[1] Gerald E. Calvasina & Wayne Roberts, *Growing Union Membership: How Important Is the Representation Election Process?* 21 AM. SOC. BUS. & BEHAV. SCI. PROC. 148, 152-54 (2014), *available at* http://asbbs.org/files/ASBBS2014/PDF/C/Calvasina_Roberts%28P148-158%29.pdf (noting representation elections dropped from 4,405 in 1983 to 1,215 in 2012).

[2] Barry Hirsch & David Macpherson, *Union Membership And Coverage Database From The CPS,* Private Sector(2014), *available at* http://www.unionstats.com (private sector union membership declined from 16.5% in 1983 to 6.6% in 2012).

[3] 29 U.S.C. §§ 151-69 (2012).

[4] 29 U.S.C. § 159(e)(1) (2012).

[5] Andrew W. Martin, *The Institutional Logic of Union Organizing and the Effectiveness of Social Movement Repertoires,* 113 AM. J. SOC. 1067, 1072 (2008).

[6] Morris M. Kleiner, *Intensity of Management Resistance: Understanding the Decline of Unionization in the Private Sector*, 22 J. LAB. RES. 513, 535 (2001) (finding management resistance can account for as much as 40% of the decline in private sector unionization); Laura J. Cooper, *Latinos and Latinas at the Epicenter of Contemporary Legal Discourses: Privatizing Labor Law: Neutrality/Card Check Agreements and the Role of the Arbitrator*, 83 IND. L. J. 1589, 1591 (2008) (concluding employer opposition to unions, expressed in legal and illegal means, is a significant contributing factor to the decline in union representation).

elections were held in only 65% of cases and, within that group, unions won 56%.[7]

Unions have responded by side-stepping the time-consuming, intimidation-laden NLRB election process[8] with neutrality agreements they enter into with the employers of the workers they intend to organize.[9] These agreements usually include the employer's promise to remain neutral regarding the union's organizing campaign (i.e., expressing no hostile comments toward unions) and often go further by giving unions access to employee home contact information, permission to come onto company property during working hours to talk to employees and, perhaps most importantly, inserting a card check provision requiring the employer to recognize the union if a majority of the workers sign authorization cards (i.e., foregoing an election).[10] Employers agree because they are obligated to under local labor-peace ordinances or, in the private sector, in order to avoid higher costs attributable to work stoppages, to obtain an edge in marketing for new business or attracting employees as well as to extract concessions during subsequent collective bargaining.[11] The impact of neutrality agreements is profound. They tend to defeat disadvantages unions confront when organizing such as employer intimidation, harmful delay, inadequate access to employees and inability to secure a first contract.[12] According to a 2001 empirical study, unions won 78% of elections when a neutrality agreement was in place compared with 46% in contested elections.[13] By the 1990s, neutrality agreements became a central component of union organizing campaigns.[14] To be more precise, they have "become a major

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[7] Zev J. Eigen & David Sherwyn, *A Moral/Contractual Approach to Labor Law Reform,* 63 HASTINGS L. J. 695, 710 (2012) (*citing* John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999-2004*, 62 INDUS. & LAB. REL. REV. 3, 6 (2009)).

[8] *See* DAVID P. TWOMEY, LABOR & EMPLOYMENT LAW 103 (15th ed. 2013).

[9] James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 824-31 (2005); *see also* Cooper, *supra* note 6, at 1590-91 (tracing the growth of neutrality agreements).

[10] *See* Arch Stokes et al., *How Unions Organize New Hotels without an Employee Ballot,* 42 CORNELL HOSPITALITY Q. 86, 88 (October 2001); Brent Garron, *The High Road to Section 7 Rights: The Law of Voluntary Recognition Agreements,* 54 LAB. L. J. 263, 264-65 (2003).

[11] Eigen & Sherwyn, *supra* note 7, at 723-25; Brudney, *supra* note 9, at 835-40.

[12] Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement,* 22 BERKELEY J. EMP. & LAB. L. 369, 372 (2001).

[13] Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42, 51-52 (2001).

[14] Brudney, *supra* note 9, at 825; Richard W. Hurd, *Neutrality Agreements: Innovative, Controversial, and Labor's Hope for the Future*, 17 NEW LABOR FORUM 35, 39 (2008), *available at* http://digitalcommons.ilr.cornell.edu/articles/302 (opining expanded use of neutrality agreements are the new organizing paradigm for the labor movement).

weapon in the arsenal of organized labor"[15] especially for unions dealing with the auto industry and those employers who interact directly with the public (e.g., hotels and restaurants).[16]

Most legal commentators condemn neutrality agreements on the grounds that they are nothing more than illegal bribes[17] though a few have risen to their defense.[18] But academics are not the only ones with an interest in the topic as politicians and conservative public interest groups have joined the fray. For example, the United Auto Workers (UAW) hoped to become the first union to represent auto workers employed by a foreign manufacturer when it attempted to organize a Volkswagen plant in Tennessee in 2013.[19] Volkswagen signed a neutrality agreement providing that it would remain neutral, share employee home contact information and agreed to an expedited election schedule because it wanted the same type of works council in the plant that it has in all other plants (but required union representation to allow such cooperation as a mandatory bargaining item).[20] But local politicians, including the governor and a United States senator, vehemently opposed the UAW and publically attacked the neutrality agreement.[21] Their efforts were successful as the UAW lost a close election in February 2014, and ultimately withdrew its challenge with the NLRB to have a new election based on outside interference—ostensibly due to its desire to avoid litigation

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[15] Brudney, *supra* note 9, at 829.

[16] *See* Twomey, *supra* note 8; *see, e.g.,* Brent Snavely, *Neutrality Agreements Aid UAW in Organizing*, The Daily Journal.com, at ¶ 20 (June 22, 2014), *available at* http://archive.thedailyjournal.com/usatoday/article/11219825 (since 2009, nine out of every ten new workers organized by the UAW have come from elections in which neutrality agreements had been reached); Hurd, *supra* note 14, at 36-37 (since 2006, UNITE HERE has extensively used neutrality agreement to organize hotel workers nationwide).

[17] *See* Mark A. Carter & Shawn P. Burton, *Practitioners' Note: The Criminal Element of Neutrality Agreements,* 25 HOFSTRA LAB. & EMP. L. J. 173, 195-98 (2007); Eigen & Sherwyn, *supra* note 7, at 730-31; David J. Doorey, *Neutrality Agreements: Bargaining for Representation Rights in the Shadow of the State,* 13 CAN. LAB. & EMPLOY. L. J. 1, 7 (2006); Matthew Bowness, Comment, *Protecting Employees From Quid Pro Quo Neutrality Agreements*, 63 Emory L. J. 1499, 1505 (2014).

[18] *See* Hurd, *supra* note 14, at 44; Jonah J. Lalas, Recent Cases, *Taking the Neutrality Out of Organizing: Dana II and Union Neutrality Agreements*, 32 BERKELEY J. EMP. & LAB. L. 541, 544-46 (2012) (based on his work as a union organizer the author cites neutrality agreements for the success of his union in organizing nine thousand workers in less than two years).

[19] *Volkswagen's Union Gamble: The German car maker invites the UAW Into its Tennessee plant, Wall St. J. (Online), Feb. 12, 2014, at ¶ 1, available at http://search.proquest.com/docview/1497286028.*

[20] *Id.* at ¶¶ 5-7.

[21] *Workers blocked from exercising democratic right, PR Newswire [New York], Feb. 14, 2014, at ¶ 2, available at http://search.proquest.com/docview/1498148425.*

challenging the neutrality agreement.[22] In addition, conservative public interest firms such as the Right to Work Foundation have signaled their intention to wage war against neutrality agreements. "Union bosses and employers who use workers' rights as a bargaining chip," Foundation president Mark Mix threatened, "will now enter into [neutrality] agreements at their own risk."[23]

II. PRIOR TO 2012 FEDERAL PRECEDENT CONSISTENTLY REJECTED A NEUTRALITY AGREEMENT AS A "THING OF VALUE" UNDER SECTION 302 OF THE LMRA

The Labor Management Relations Act (LMRA), more commonly referred to as the Taft-Hartley Act, was passed by Congress in 1947 to curb abuses that were deemed "inimical to the integrity of the collective bargaining process" through bribery and extortion of union officials.[24] Section 302 of the LMRA makes it unlawful for an employer, an association of employers or any person who acts as a labor relations expert to an employer to pay, lend or deliver or agree to pay, lend or deliver any "money or other thing of value" to any labor organization or representative of such organization.[25] Correspondingly, it is unlawful for any person to receive or accept any money or other "thing of value."[26] Those convicted under this statute can be fined up to $15,000 and/or imprisoned for up to five years if

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[22] *The UAW Retreats in Tennessee: Why the union backed off its appeal to the NLRB for a revote, Wall St. J. (Online), Apr. 21, 2014, at ¶ 5, available at http://search.proquest.com/docview/1517943817.*

[23] *Right to Work Foundation-won Eleventh Circuit ruling stands, putting at risk backroom deals between companies and aggressive union organizers,* National Right to Work Legal Defense Foundation, Inc (Dec. 10, 2013), at ¶ 8, *available at* http://www.nrtw.org/en/press/2013/12/supreme-court-dismisses-union-organizing-case-12102013; *see also* Jack Goldsmith, *Further Thoughts on the Implications of the Mulhall Dismissal*, OnLabor.org (Dec. 11, 2013), at ¶ 4, *available at* http://onlabor.org/2013/12/11 (§ 302 litigation is expected from the National Right to Work Foundation and, therefore, neutrality agreements "will run a litigation risk and to the extent of the perceived risk be unattractive").

[24] Arroyo v. United States, 359 U.S. 419, 425 (1959); *see also* Turner v. Local Union No. 302, Int'l Bd. of Teamsters, 604 F.2d 1219, 1227 (9th Cir. 1979) (stating "[t]he dominant purpose of § 302 is to prevent employers from tampering with the loyalty of union officials and to prevent union officials from extorting tribute from employers").

[25] 29 U.S.C. § 186(a) (2012).

[26] 29 U.S.C. § 186(b)(1) (2012). Several exceptions are recognized for, inter alia, payments by employers to labor relations employees openly acting in that capacity, payments made in satisfaction of an arbitration award or judgment, payments made for the transfer of goods in the ordinary course of business, monies deducted for union membership dues and payments made to myriad trust funds established under collective bargaining agreements. 29 U.S.C. § 186(c) (2012).

the value of the amount of money or thing of value involved is over $1,000; if the value of the amount of money or thing of value is under $1,000 then the perpetrator faces up to a $10,000 fine and/or one year in prison.[27]

A "thing of value" is distinct from "money" under § 302.[28] However, no bright line test has yet been recognized by the federal courts to determine what falls within the definition of "thing of value." Among the items that have been classified as a "thing of value" are an employer's lease payments on a union official's car, chauffeuring services provided to a business agent without payment of fair market value, construction services on a business agent's residence that were provided below fair market value, payments made as salaries as well as benefits for officials for work never performed, interest-free loans and a union official's demand that an employer award a contract to a company in which the official had a secret interest.[29] A theme running through these cases is that Congress intended § 302 to focus on things of value that are paid or delivered to a union official for purposes of turning the official's allegiance away from the union members.[30] Items that have been held not to constitute a "thing of value" have been an employer's provision of a list of employees to a union, employer concessions to a union that allowed employees to attend union presentations on paid time and an employer's standing right to defeat corrupt union practices.[31] Prior to 2012, federal appellate courts,[32] reflected in decisions handed down in the Third and Fourth Circuits, as well as in a decision of the NLRB, have squarely excluded neutrality agreements from the ambit of § 302.

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[27] 29 U.S.C. § 186 (d)(2) (2012).

[28] United States v. Lippi, 193 F. Supp. 441, 442 (D. Del. 1961) (life insurance premiums are a "thing of value" but not "money").

[29] James Achermann, *Small Gifts and Big Trouble: Clarifying the Taft-Hartley Act*, 44 U.S.F. L. Rev. 63, 89-90 (2009).

[30] *See* United States v. Roth, 333 F.2d 450, 453 (2d Cir. 1964).

[31] Achermann, *supra* note 29, at 88.

[32] Cases handed down before 2012 from the circuit courts of appeal have consistently recognized and enforced neutrality agreements (also referred to as election agreements) but had not directly addressed the issue of whether they run afoul of § 302. *See* Int'l Union, United Auto, Aerospace, and Agric. Implement Workers of America v. Dana Corp., 278 F.3d 548, 558-59 (6th Cir. 2002) (neutrality agreements do not limit employees' rights under § 7 of the NLRA); Hotel and Restaurant Emp., Local 217 v. J.P. Morgan Hotel, 996 F.2d 561, 566-67 (2d Cir. 1993) (holding the court had jurisdiction to enforce a neutrality agreement based on § 301 of the LMRA); Hotel Emp., Restaurant Emp. Union, Local 2 v. Marriott Corp., 961 F.2d 1464, 1469-70 (9th Cir. 1992) (holding that nothing in the NLRA suggests that employers may not enter into a neutrality agreement under which they remain silent during a union's organizational campaign as the statute grants employers that right in the absence of such an agreement); Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Facetglas, Inc., 845 F.2d 1250, 1253 (4th Cir. 1988) (holding a neutrality agreement is significant to the maintenance of labor peace and is enforceable under the LMRA).

A. *Third Circuit*

The cases applying § 302 to neutrality agreements, though limited in number, had been clear in precedent—such intangible promises do not constitute things of value. In *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC* the employer signed a neutrality agreement with a union pursuant to its obligations under a municipal bond program.[33] The employer promised to recognize the union if a majority of employees signed authorization cards (a process commonly referred to as "card check recognition"). In return, the union promised not to picket the employer. Both sides agreed to arbitrate any disputes arising under the agreement. After a majority of employees refused to select the union, it sought to arbitrate the outcome and seek a second card count. In its opposition to a motion to compel arbitration the employer contended that the agreement violated § 302. In affirming the district court's judgment in favor of the union, a unanimous Third Circuit panel made short shrift of the employer's argument. The panel wrote:

> Not surprisingly, Sage is unable to provide any legal support for the remarkable assertion that entering into a valid labor agreement governing recognition of a labor union amounts to illegal labor bribery. There are many reasons why this argument makes no sense, including the language of section 302 itself, which prescribes agreements to 'pay, lend, or deliver . . . any money or other thing of value.' The agreement here involves no payment, loan or delivery of anything. The fact that a Neutrality Agreement—like any other labor arbitration agreement—benefits both parties with efficiency and cost saving does not transform it into a payment or delivery of some benefit. Furthermore, any benefit to the union inherent in a more efficient resolution of recognition disputes does not constitute a 'thing of value' within the meaning of the statute.[34]

The court bolstered its holding by warning that the employer's attempt to undermine the neutrality agreement would "wreak havoc on the carefully balanced structure" of the NLRA's dominion over recognition and bargaining with unions.[35]

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[33] 390 F.3d 206 (3d Cir. 2004).
[34] *Id*. at 219. *Accord* Patterson v. Heartland Indus. Partners, LLP, 428 F. Supp. 2d 714, 723-25 (N.D. Ohio 2006) (the district court agreed with the Third Circuit's holding in rejecting neutrality agreements as things of value under § 302) (citation omitted).
[35] *Sage*, 390 F.3d at 219.

B. *Fourth Circuit*

Four years later, the Fourth Circuit reached a similar conclusion. In *Adcock v. Freightliner LLC* several of the employer's manufacturing plants became the target of unionization campaigns by the United Automobile and Agricultural Implement Workers of America.[36] Freightliner reached an agreement with the union pursuant to which it allowed for card check recognition, required some of its employees to attend (on company time) union presentations concerning card check recognition, provided the union with access to employees in non-work areas and promised to refrain from making negative comments about the union. In exchange, the union promised to make concessions in any resulting collective bargaining agreement that included, inter alia, establishing wage differences among business units as well as refraining from demands for guaranteed employment and severance pay in the event of layoffs. The district court dismissed a complaint filed by an employee who resisted unionization and a unanimous Fourth Circuit affirmed based on its conclusion that the employer did not provide a thing of value to the union.[37] Key to the court's holding was that the concessions exchanged by the parties merely established mutually accepted ground rules for a peaceful organizing campaign.[38]

> In this case, the concessions made by Freightliner do not involve bribery or other corrupt practices. By no stretch of the imagination are the concessions a means of bribing representatives of the Union; indeed, no representative of the Union personally benefitted from these concessions. Rather, the concessions serve the interests of both Freightliner and the Union, as they eliminate the potential for hostile organizing campaigns in the workplace. In this sense, the concessions certainly are not inimical to the collective bargaining process.[39]

The court provided two additional grounds in support of its conclusion. First, it noted that the penalty provisions of § 302 (i.e., charging a felony as opposed to a misdemeanor) required that the thing of value at issue have ascertainable value. "In this case, unquestionably, the concessions made by Freightliner, which simply involved allowing the Union access to Freightliner's employees, have no such whatsoever."[40] Second, the

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[36] 550 F. 3d 369 (4th Cir. 2008).
[37] *Id.* at 374.
[38] *Id*.
[39] *Id*. at 375.
[40] *Id*.

employees had the ability to challenge the neutrality agreement by filing unfair labor practice charges against the union as well as the employer.[41] "The availability of such adequate remedies severely undermines the Employees' attempt to stretch § 302 beyond its limits."[42]

C. *NLRB*

The general policy of the NLRB is to uphold voluntary agreements between employers and unions. "'[N]ational labor policy favors the honoring of voluntary agreements reached between employers and labor organizations.' The Board will enforce such agreements—including agreements that explicitly address matters involving union representation."[43]

More specifically, the board has categorically upheld neutrality agreements. In *Dana Corp., Inc* the employer entered into a letter of agreement with a union seeking to organize its workers that laid the ground rules for the campaign.[44] Dana agreed to remain "totally neutral" on whether the workers should vote for the union, stated that it had a "positive and constructive" relationship with the union, promised to provide access to employee home contact information as well as organizer access to employees in non-work areas and expressed a willingness to accept union certification by card check recognition.[45] The agreement further set forth principles for future collective bargaining on topics such as healthcare, job classifications, and compensation.[46] It contained a no-strike/no-lockout clause and mutual promise to submit to interest arbitration if a first contract could not be negotiated.[47] After three employees filed an unfair labor practice charge, Dana renounced the letter of agreement claiming that it violated § 302 of the LMRA. The administrative law judge dismissed the complaint.[48] In affirming that ruling, the NLRB placed great weight on *Sage* and *Adcock* in refusing to invalidate neutrality agreements under § 302.[49] Neutrality agreements, the Board reasoned, are consistent with the NLRA's goal of promoting industrial peace.[50]

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[41] *Id*. at 377.
[42] *Id*.
[43] Verizon Info. Sys., 335 N.L.R.B. 558, 559 (2001) (citations omitted) (*quoting* Pall Biomedical Products Corp., 331 N.L.R.B. 1674, 1677 (2000)).
[44] 356 N.L.R.B. No. 49 (2010).
[45] *Id*. at 2.
[46] *Id*.
[47] *Id*.
[48] *Id*. at 3.
[49] *Id*. at 5 & n. 13*; see also* Cooper, *supra* note 6, at 1601 (the NLRB and federal courts have enforced neutrality agreements because they are consistent with the NLRA).
[50] *Dana Corp*., 356 N.L.R.B. No. 49, at 7.

III. A CRITICAL ANALYSIS OF A 2012 ELEVENTH CIRCUIT DECISION EXTENDING SECTION 302 TO NEUTRALITY AGREEMENTS

A. *Eleventh Circuit*

The most recent case to weigh in on the legality of neutrality agreements breaks ranks with the Third and Fourth Circuits as well as the NLRB. In *Mulhall v. Unite Here Local 355* a casino entered into a neutrality agreement with the union pursuant to which union organizers were granted access to non-public work areas of the premises during non-work hours, the employer agreed to provide a list of employees with their job classifications and home contact information and the employer promised to remain neutral in the organizing campaign.[51] In exchange, the union agreed to provide financial support (which ultimately totaled $100,000 according to the complaint) for a ballot initiative to legalize gambling and, if the union was recognized, to refrain from picketing, boycotting or striking. An employee with anti-union sympathies filed suit to enjoin enforcement of the agreement claiming that it violated § 302. After the district court dismissed the complaint (and did so a second time after the case was reversed in an interlocutory appeal), a divided panel of the Eleventh Circuit reversed and sent the case back to a jury to decide whether the neutrality agreement at issue was a thing of value under § 302.[52]

> It seems apparent that organizing assistance can be a thing of value, but an employer does not risk criminal sanctions simply because benefits extended to a labor union can be considered valuable. Violations of § 302 only involve payments, loans, or deliveries [citation omitted], and every benefit is not necessarily a payment, loan, or delivery. For example, intangible organizing assistance cannot be loaned or delivered because the actions 'lend' and 'deliver' contemplate the transfer of tangible items.
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> Yet a violation of § 302 cannot be ruled out merely because intangible assistance cannot be loaned or delivered. Section 302 also prohibits payment of a thing of value, and intangible services, privileges, or concessions can be paid or operate as a payment. Whether something qualifies as a payment depends not on whether it is tangible or has monetary value, but on whether its performance fulfills an obligation. If employers offer organizing assistance with the intention of improperly influencing a union, then the policy

[51] 667 F.3d 1211 (11th Cir. 2012).
[52] *Id*. at 1215-16.

> concerns in § 302—curbing bribery and extortion—are implicated.[53]

To be clear, the majority does not classify neutrality agreements as per se illegal or hold that they always constitute a "thing of value."[54] Instead, according to their reasoning such agreements can be found to violate § 302 if evidence is adduced that the payer intended the neutrality agreement to be an "improper payment" as part of a scheme to corrupt a union or extort a benefit from an employer.[55]

Judge Restani of the Court of International Trade (sitting by designation) dissented on the strength of *Sage* and *Adcock*.[56] She rejected consideration of the employer's intent in agreeing to a neutrality agreement and focused instead on the content of the agreement itself. In her view, the intent of the employer in offering, or the union in accepting, is irrelevant under the LMRA to answering the question of whether the agreement serves the innocuous, indeed beneficial, purpose of establishing peace in an organizing campaign. "The LMRA is designed to promote both labor peace and collective bargaining. The LMRA cannot promote collective bargaining and, at the same time, penalize unions that are attempting to achieve greater collective bargaining rights."[57] Furthermore, Judge Restani reasoned that even if a union extracts a neutrality agreement to enhance its peculiar interests (e.g., winning certification and the consequential right to collect union and agency dues from the employees in the bargaining unit), such conduct implicates the union's obligations to the employees rather than the collective bargaining process between employer and union.[58] The appropriate courses of action for the employees would be to refuse to sign authorization cards, file an unfair labor practice charge or vote to decertify the union.[59]

The Supreme Court granted certiorari in June 2013 to resolve the split among the circuits.[60] High court review was welcomed by labor law experts

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[53] *Id.* at 1215.
[54] Goldsmith, *supra* note 23, at ¶2.
[55] *Id*. *See also* Robert J. Mollohan, Jr., Article: *Employer-Union Organizing Assistance and Neutrality Agreements: Have We Overshot Congress's and Upset a Fragile Balance?* 30 GA. ST. U. L. REV. 885, 914-15 (2014) (the Eleventh Circuit favored a case-by-case approach over a categorical rejection of neutrality agreements as being violative of § 302); Patrick L. Coyle, Alexandra Garrison Barnett & Brooks A. Suttle, *Labor and Employment*, 64 MERCER L. REV. 965, 976 (2012-2013) (by focusing on the intent of the parties the Eleventh Circuit eschewed a bright-line test in favor of one dependent on the circumstances of each case).
[56] *Mulhall*, 667 F.3d at 1216 (Restani, J., dissenting).
[57] *Id*. (citations omitted).
[58] *Id*.
[59] *Id*.
[60] Unite Here Local 355 v. Mulhall, 133 S. Ct. 2849 (2013).

given the importance of the case.[61] Oral argument was presented in November 2013.[62] Mysteriously, in a per curiam ruling issued the following month, the court dismissed the writ as having been improvidently granted.[63] Writing in dissent for himself and Justices Sotomayor and Kagan, Justice Breyer objected to the summary dismissal of the case. He would have preferred additional briefing on the issue of whether the case was moot and whether plaintiff had standing. If the case was not moot and plaintiff had standing, Justice Breyer believed that not only should the Eleventh Circuit's opinion be vacated "thereby removing its precedential effect" but that a clear ruling be rendered on the availability of private rights of action under § 302.[64] Despite the yearning of legal commentators and practitioners in the collective bargaining field for such clarity,[65] the future remains contentious. Given that the *Mulhall* holding stands, practitioners anticipate that unions are not only likely to encounter opposition from friendly employers who would otherwise have entered into neutrality agreements but that employees hostile to unionization will be emboldened to defeat neutrality agreements through litigation.[66] Academics concur. In the wake of *Mulhall*, an increase in litigation attacking neutrality agreements under § 302 is likely.[67] At a

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[61] *See, e.g.,* Zach Warren, *Supreme Court to Hear Key Labor Case Involving 'Neutrality Agreements',* Inside Counsel Breaking News (Nov. 11, 2013), at ¶ 4, *available at* http://search.proquest.com/docview/1449985793 (Benjamin Sachs, a professor of labor law at Harvard Law School, described *Mulhall* as the "the most significant labor case in a generation".)

[62] Jess Bravin & Melanie Trottman, *Union-Employer Deals Challenged: Conservatives on High Court Express Skepticism About Arrangement*, Wall St. J. (Online), Nov. 14, 2013, *available at* http://search.proquest.com/docview/1458168084.

[63] *Mulhall*, 134 S. Ct. 594.

[64] *Id*. at 595 (Breyer, J, dissenting). Justice Breyer signaled the danger in allowing the Eleventh Circuit's opinion to stand. "Unless resolved, the differences among the Courts of Appeals could negatively affect the collective-bargaining process. This is because the Eleventh Circuit's decision raises the specter that an employer or union official could be found guilty of a crime that carries a 5-year maximum sentence, [citation omitted], the employer or union official is found to have made certain commonplace organizing assistance agreements with the intent to 'corrupt' or 'extort'. In my view, given the importance of the question presented to the collective-bargaining process, further briefing, rather than dismissal, is the better course of action." *Id*.

[65] *See, e.g.*, Howard S. Lavin & Elizabeth E. DiMichele, *Can Something Intangible Be a 'Thing of Value'? The Permissibility of Neutrality Agreements under The Labor Management Relations Act*, 39 EMP. REL. L. J. 88, 92-93 (2013).

[66] Richard B. Hankins & Seth H. Borden, *Labor Law 2013: A Year in Review*, 65 LAB. L. J. 31, 38 (2014); *see The UAW Retreats in Tennessee, supra* note 22, at ¶¶ 4-5 (the UAW declined to appeal lost a unionization campaign at Volkswagen due, in part, to the vulnerability of the neutrality agreement created by the Eleventh Circuit's opinion in Mulhall).

[67] Goldsmith, *supra* note 23, at ¶ 4; Hankins & Borden, *supra* note 66, at 38.

minimum, *Mulhall* is expected to have a chilling effect on employers if entering into such an agreement could expose them to criminal liability.[68]

B. *Critical Analysis*

The majority opinion in *Mulhall* is flawed for at least four reasons: neutrality agreements are neither paid, lent or delivered nor do they embody an ascertainable value that § 302 criminalizes, they are bereft of any hint of illegality but do manifest laudable labor relations goals, condemning neutrality agreements denies employers the unfettered right to free speech guaranteed by the LMRA and the absence of any attempt by Congress to amend the LMRA to outlaw or circumscribe neutrality agreements, despite several opportunities it had to do so, indicates a legislative unwillingness criminalize them.

1. Neutrality Agreement Is Not a Deliverable, Ascertainable "Thing of Value" Under a Strict Construction of § 302

The language of § 302 excludes neutrality agreements. Subsection (a) provides, in pertinent part, that it is illegal for an employer to "pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value." A neutrality agreement cannot be paid or lent or delivered. Allowing unions access to employees on a company's premises are no more a payment or loan than allowing a vacuum salesman to make a sales pitch to employees on company time.[69] As the Third Circuit emphasized in *Sage*, the fact that a neutrality agreement benefits employers as well as unions with efficiency, cost savings and peaceful organizing campaigns does not transform it into the payment or delivery of a benefit.[70] Thus, the verbs used in § 302 (a) are found wanting.[71]

Moreover, to constitute a "thing of value" the transaction would have to have an ascertainable value. Section 302 is a criminal statute the violation of which results in differing levels of punishment depending on the amount in issue. Rejecting the plain language of the statute in favor of a "common sense" approach to classifying things of value based on the recipient's desire

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[68] Kimberly Atkins, *Union Pact Case Goes Bust at U.S. Supreme Court*, South Carolina Lawyers Weekly (Dec. 25, 2013), at ¶¶ 17-24, http://search.proquest.com/docview/1490666396.

[69] Adcock v. Freightliner, LLC, 550 F.3d 369, 374 (4th Cir. 2008).

[70] Hotel Emp. & Restaurant Emp. Union, Local 57 v. Sage Hospitality Resources, LLC, 390 F. 3d 206, 219 (3d Cir. 2004).

[71] Even the majority in *Mulhall* concedes that organizing assistance, a key feature of neutrality agreements, cannot be loaned or delivered because those actions contemplate the transfer of tangible items. Mulhall v. Unite Here Local 355, 667 F.3d 1211, 1215 (11th Cir. 2012).

to have the thing, the lone case relied on by the majority in *Mulhall* involved a loan from a union to an employer.[72] Obviously, a loan has ascertainable value that is fixed by the principal amount of the loan plus interest. In remanding the case for trial the majority in *Mulhall* was impressed by plaintiff's allegation that the union spent $100,000 supporting a ballot initiative the employer sought.[73] However, that sum could not constitute a bribe under § 302 since the complaint clearly alleged that the money was contributed by a union in the exercise of its legal right to support a ballot initiative. It was not paid to the employer. Thus, no representative of the employer could have directly benefitted from the union's contribution. Indeed, if the initiative passed, the employer, the union and the workers would all have benefitted from the profits, wages, and dues that would flow from a new, job-creating enterprise. The fact that the campaign contribution served the interests of all parties negates any assertion that it could have been a bribe to any one of them.[74] Simply put, the dollar signs abound. It strains common sense to contend that merely by agreeing to remain silent, or granting union's access to employees, or agreeing to union representation based on card check recognition, no matter how coveted by a union, a neutrality agreement has a deliverable quality or an ascertainable value. Accordingly, the nouns used in § 302 are also missing when neutrality agreements are involved.

The *Mulhall* majority's expansive reading of § 302 must be rejected due to two canons of statutory construction. First, the tenet of *esjudem generis* holds that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[75] Returning to the language of § 302 it bears emphasis that the object paid, lent or delivered must be money *or other* thing of value. Plainly, the general term "thing of value" must be read as one would read the specific term "money." They must both have an ascertainable value.

Second, black letter criminal law holds that § 302, like all other criminal statutes, must be strictly construed. The canon of strict construction of criminal statutes, also known as the rule of lenity, ensures fair warning by resolving ambiguity in a criminal statute as to apply it only to conduct that is clearly covered.[76] "Although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, due process bars courts from

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[72] *Id.* (*citing* United States v. Roth, 333 F.2d 450, 453 (2d Cir. 1964)).
[73] *Id.* at 1216.
[74] *See Adcock*, 550 F.3d at 375.
[75] Wash. State Dep't of Soc. and Health Serv. v. Guardianship Estate of Keffeler, 537 U.S. 371, 384-85 (2003) (*quoting* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114-15 (2001)).
[76] United States v. Lanier, 520 U.S. 259, 265-66 (1997).

applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope."[77] When there are two rational readings of a criminal statute, one harsher than the other, courts are to apply the harsher rule only when Congressional intent to do so is clear and definite.[78] Lenity is not limited to purely criminal statutes[79] so to the extent § 302 grants federal courts jurisdiction over injunctive actions the rule is still applicable. The *Mulhall* majority dismissed the lenity principal by asserting that there was nothing ambiguous about the "plain language" of § 302.[80] However, in concluding that not all neutrality agreements are exempt from § 302, the Eleventh Circuit acknowledged the holdings in *Sage* and *Adcock* and deliberately rejected their "broad" construction of that statute.[81] How could unions or employers be on notice of the possibility of imprisonment or fines for entering into neutrality agreements prior to January 2012 (when the Eleventh Circuit ruled) when the only relevant precedent (from the Third and Fourth Circuits) categorically rejected such agreements as a "thing of value?" How could a union or employer be fairly warned of criminal sanctions in agreeing to neutrality after puzzling over the Supreme Court's withdrawal of certiorari review of *Mulhall* and the schism created in its wake by the Third and Fourth Circuits, on the one hand, and the Eleventh Circuit, on the other? If unions and employers must choose between the narrow *Sage* and *Adcock* construction of § 302 or the broad *Mulhall* construction of that statute, the Eleventh Circuit must reap what is sowed when it created ambiguity in the interpretation of § 302. Accordingly, lenity demands that the narrow construction of that statute controls unless and until the Supreme Court revisits the issue and affirms the *Mulhall* majority's rationale.

2. Neutrality Agreements Are Bereft of Any Hint of Illegality But Further Laudable Statutory Goals

Nothing contained in a common neutrality agreement is remotely illegal. Employers have long been able to engage in card check recognition rather than insist on an election.[82] They are certainly free to share employees' home

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[77] *Id.* (citations omitted).
[78] Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 409 (2003) (*quoting* McNally v. United States, 483 U.S. 350, 359-60 (1987)).
[79] Warren Thomas, Note & Comment, *Lenity On Me:* LVRC Holdings LLC v. Brekka *Points The Way Toward Defining Authorization And Solving The Split Over The Computer Fraud And Abuse Act*, 27 GA. ST. U. L. REV. 379, 402-03 (2011).
[80] Mulhall v. Unite Here Local 355, 667 F.3d 1211, 1216 (11th Cir. 2012).
[81] *Id*. at 1214-15.
[82] *See* Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 309-10 (1974) (noting that card check recognition enables willing employers to inaugurate industrial peace); NLRB

contact information or open their doors to union organizers to grant them access to non-work areas for purposes of addressing employees on company time.[83] They have the unfettered right to agree on future restrictions on picketing, strikes or other work stoppages or touch on wages, hours, or other terms or conditions of employment in future collective bargaining agreements in the event a union received the majority vote of the workforce.[84] Moreover, by agreeing to refrain from making disparaging remarks about a union and leaving the decision to rest with the discretion of voting workers, an employer is furthering a laudable goal of labor relations—peaceful elections and mutually beneficial collective bargaining. The NLRA "has not only tolerated but promoted arrangements between management and unions as conducive to labor peace."[85] Figuratively speaking, the open and obvious transactional nature of a neutrality agreement is far removed from the envelope stuffed with cash passed surreptitiously under a table. As such, it is not the type of conduct § 302 aimed to criminalize.[86]

3. Condemning Neutrality Agreements Adversely Impacts Employer's Free Speech

An injunction to thwart the implementation of a neutrality agreement would stifle an employer's free speech rights under the LMRA.[87] That statute was intended to be interpreted broadly to endorse an employer's right to express views concerning unions and organizing campaigns without regard to the content of the employer's speech. Staking out a position that is neutral, even favorable, is beyond condemnation. "Nothing in the [NLRA] requires an employer to oppose or speak against unions. That an employer is protected in doing so under § 8(c) is a response to congressional pressure to allow employers to speak, not employee demands to be informed."[88] After all, it is for the employees to gauge employer and union positions, to speak out and then make their own choices in signing authorization cards or voting

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v. Gissel Packing Co., 395 U.S. 575, 598-600 (1959) (when it enacted the LMRA Congress deliberately rejected a proposal to eliminate the use of authorization cards).

[83] *Cf.* NLRB v. Babcock & Wilcox, 351 U.S. 105, 112-13 (1956) (holding an employer must allow access if union lacks other reasonable channels of communication with employees).

[84] The NLRB held in *Dana Corp.*, *supra* note 44, at 4, that the doctrine barring unions from negotiating substantive terms and conditions of work before a union receives a majority vote, known as the *Majestic Weaving* doctrine, is not violated by neutrality agreements. *See also*, Lalas, *supra* note 18, at 547-50.

[85] Brudney, *supra* note 9, at 847.

[86] *See* Arroyo v. United States, 359 U.S. 419, 425 (1959).

[87] 29 U.S.C. § 158(c) (2012) (providing that the expressing of any views, argument, or opinion shall not constitute an unfair labor practice unless such expression contains a threat of reprisal or force or promise of benefit).

[88] Brudney, *supra* note 9, at 855.

in a certification election.[89] They are not parties to neutrality agreements and, therefore, cannot be bound by its terms.[90]

4. Congress Declined to Criminalize Neutrality Agreements Despite Ample Opportunity To Do So

Notwithstanding the fact that neutrality agreements have been utilized for decades, Congress has never attempted to criminalize, much less restrict, them. Such inaction would be immaterial but for the fact that over the same period it has revisited the LMRA several times (i.e. weighing bills that would eliminate card check recognition), examined the relationship of neutrality agreements to the LMRA and declined to pass bills that would circumscribe them.[91] If Congress found the need to criminalize neutrality agreements wanting, federal appellate courts should be reluctant to trample on its legislative domain.

IV. LMRA AFFORDS NO PRIVATE RIGHT OF ACTION FOR VIOLATIONS OF § 302

Federal precedent leaves little doubt that there is no private right of action under § 302 of the LMRA where plaintiffs seek damages. Every federal court that has addressed that issue has so concluded.[92] Simply put, "§ 302 (e) jurisdiction . . . does not comprehend claims for damages."[93]

Whether private litigants have standing to seek injunctive relief under § 302 is not so obvious. Section 302 (e) provides that the district courts have jurisdiction to restrain violations of the LMRA without regard to the provisions of the Clayton Act and the Norris-LaGuardia Act. In *Sinclair Refining Co. v. Atkinson*[94] the United States Supreme Court held that the LMRA did not repeal or in any way contradict the anti-injunction provisions

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[89] *Id*. at 846 (an employer's decision to refrain from objecting to a union does not unlawfully impact employees' freedom to choose a bargaining representative).
[90] *Id*. at 848.
[91] *Id*. at 841-44; Mollohan, *supra* note 55, at 907-08.
[92] *See* Bakerstown Container Corp. v. Int'l Bd. of Teamsters, 884 F.2d 105, 108 (3rd Cir. 1989); Am. Commercial Barge Lines Co. v. Seafarers Int'l Union of N. Am., 730 F.2d 327, 332 (5th Cir. 1984); Sellers v. O'Connell, 701 F.2d 575, 578 (6th Cir. 1983); Souza v. Tr. of W. Conference of Teamsters Pension Trust, 663 F.2d 942, 945 (9th Cir. 1981); Iron Workers Local 272 v. Bowen, 624 F.2d 1255, 1259 (5th Cir. 1980); Chun Hua Mui v. Union of Needletrades, Industrial and Textile Emp., 1998 U.S. Dist. LEXIS 12783 at *16-17 (S.D.N.Y. 1998).
[93] Iron Workers Local # 272 v. Bowen, 624 F.2d 1255, 1259 (5th Cir. 1980).
[94] 370 U.S. 195 (1962), *overruled in part on other grounds*, Boys Markets, Inc. v. Retail Clerks, 398 U.S. 235 (1970).

of the Norris-LaGuardia Act.[95] After noting that § 301 of the LMRA (§ 302 was not at issue in the case) limited suits by and against labor organizations for violations of collective bargaining agreements to the NLRB and Attorney General but not private litigants, the court stated, in dicta, that § 302 (e) permitted private litigants to obtain injunctions in order to protect the integrity of the union bargaining agents in carrying out their responsibility.[96] Without citation to any supporting legislative history or compelling public policy, the court briefly, yet broadly, supported the right of private litigants to seek injunctive relief because the restriction on payments to employee representatives manifested in § 302 "deals with an unusually sensitive and important problem"[97] (as is demonstrated by the fact that violations are criminal offenses punishable by fine and imprisonment). Many of the cases that precluded private litigants from claiming damages under § 302 have been guided—without discussion—by the dicta from *Sinclair* to permit them to seek injunctive relief.[98]

Has the dicta of *Sinclair* stood the test of time? I respectfully submit that it has not because of subsequent Supreme Court jurisprudence (alluded to by Justice Breyer in his dissent from certiorari withdrawal in *Mulhall*) that substantially limits the ability of private litigants to file civil suits for violations of federal statutes and regulations. In *Alexander v. Sandoval* the Supreme Court held that private litigants lacked standing to sue to enforce regulations promulgated under Title VI of the Civil Rights Act of 1964.[99] Noting that an expansive interpretation of private rights of action was jettisoned with the decision in *Cort v. Ash*[100] the court made clear that private rights of action under federal statutes must meet the "standard test for discerning private causes of action"[101] set forth in *Cort*. The standard test posits four questions: Whether the plaintiff is one of a class for whose special benefit the statute was enacted? Is there any legislative intent that explicitly or implicitly creates a remedy? Is a private right consistent with the underlying purpose of the legislative scheme? And is the cause of action

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[95] *See* Twomey, *supra* note 8, at 264 (the Supreme Court reasoned in *Boys Markets, Inc*. that the availability of injunctive relief under § 301 was required as a necessary accommodation to the absolute ban on injunctions under the Norris-LaGuardia Act).
[96] *Sinclair*, 370 U.S. at 205.
[97] *Id.* at 205 n. 19.
[98] *See, e.g.*, Sellers v. O'Connell, 701 F.2d 575, 578 (6th Cir. 1983) (§ 302 (e) authorizes injunctive relief only); Souza v. Tr. of W. Conference of Teamsters Pension Trust, 663 F.2d 942, 945 (9th Cir. 1981) (nothing more than injunctive relief was intended in § 302 (e)).
[99] 532 U.S. 275 (2001).
[100] 422 U.S. 66 (1975).
[101] *Sandoval*, 532 U.S. at 287.

traditionally relegated to state law?[102] In the matter of § 302 (e), the answers to all relevant questions are negative.[103]

A. *Only Unions and Employers Are Regulated by § 302*

Private litigation can only be instigated under federal statutes where Congress expressly states an intention for private litigants to sue in the language of the statute or regulation itself.[104] "Statutes that focus on the person regulated rather than the individuals protected create 'no implication of intent to confer rights on a particular class of persons.'"[105] Section 302 plainly regulates employers and labor organizations by criminalizing the exchange of money or other things of value that corrupt the collective bargaining process (hence protecting employees). It has two arrows in its quiver. Section 302 (d) empowers government prosecutors to seek criminal fines and imprisonment against employers and union officials who violate subsections (a) or (b).[106] Section 302 (e) provides district courts with jurisdiction to restrain violations of subsections (a) and (b).[107] Viewed in tandem, the thrust of these statutes is to provide enforcement tools to the government to punish or prevent violations by the only parties who are identified in § 302 (a) and (b): employers and labor organizations (as well as their officers or representatives). Nowhere on the face of the statute is there a reference to anyone to be regulated other than employers and labor organizations and the absence of such an explicit conferral is fatal to private litigation.[108]

In the lone cases that have considered whether § 302 supports a private right of action in light of *Sandoval*, two district courts have concluded that § 302 impliedly benefits employees and, as such, they have standing to sue for injunctive relief.[109] Although these courts recognized that the Supreme Court adopted a stricter approach to recognizing private actions in *Sandoval*, they

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[102] *Cort*, 422 U.S. at 78.
[103] Because the NLRA generally preempts state law in the field of labor relations, S.D. Building Trades Council v. Garmon, 359 U.S. 236, 245-46 (1959), the fourth question is irrelevant.
[104] *Sandoval*, 532 U.S. at 288.
[105] *Id*. at 289 (*quoting* California v. Sierra Club, 451 U.S. 287, 294 (1981)).
[106] 29 U.S.C. § 186(d)(2) (2012).
[107] 29 U.S.C. § 186(e) (2012).
[108] *See* Cannon v. Univ. of Chicago, 441 U.S. 677, 692 n.13 (1979).
[109] *See* Nat'l Union of Healthcare Workers v. Kaiser Found. Health Plan, 2013 U.S. Dist. LEXIS 54007 at *5-9 (N.D. Cal. April 15, 2013) ("It has long been accepted that the text of § 302 itself, rather than any regulation interpreting the statute as in *Sandoval*, contains rights-creating language."); Patterson v. Heartland Indus. Partners, 428 F. Supp. 2d 714, 721-23 (N.D. Ohio 2006) (§ 302 "is mindful of the rights of employees by regulating those who harm employees by self-dealing and other wrongful conduct.").

place great weight on the string of appellate decisions that granted private litigants standing when seeking injunctive relief.[110] The reasoning of both courts is circumspect. All of the appellate decisions those lower courts cite predate *Sandoval*. Furthermore, neither court engaged in a detailed application of the new standard to § 302 (e). In fact, one court simply invoked the *dicta* from *Sinclair* notwithstanding its concession that *Sandoval* affirmed the rigorous test established in *Cort*.[111]

B. *Legislative History of § 302 Provides No Support For Private Litigation*

Section 302 (e) merely grants federal courts the power to enjoin actions that would constitute payments to employee representatives. In *Sandoval*, the court emphasized that a statute must provide a private remedy and as well as a private right.[112] All that § 302 (e) does is grant federal court jurisdiction over injunctions. It is silent on who can file a complaint seeking such relief. Thus, while a remedy is provided, that subsection does not clearly invest that remedy in the hands of private litigants.

Nothing in § 302 (e), or in its supporting legislative history, states that employees have been granted rights or remedies. By way of contrast, the sections of the LMRA preceding and subsequent to § 302 expressly provide private rights of action.[113] "Congress's explicit provision of a private right of action to enforce one section of a statute suggests that omission of an explicit private right to enforce other sections was intentional."[114] The provisions of the LMRA that sandwich § 302 expressly create private rights of action and, by implication, negate private litigation under § 302.

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[110] *See, e.g.*, Nat'l Union of Healthcare Workers, 2013 U.S. Dist. LEXIS 54007 at *8 ("Kaiser directs us to some language in *Sandoval* that signals the Supreme Court's withdrawal from freely implying private rights of action in order to effectuate presumed Congressional intent: 'Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondent's invitation to have one last drink.' [Citation omitted]. The problem is, as far as § 302 is concerned, our appellate courts have already had that drink. It has long been accepted that the text of § 302 itself, rather than any regulation interpreting the statute as in *Sandoval*, contains rights creating language.").

[111] *Patterson*, 428 F. Supp. 2d at 722-23.

[112] Alexander v. Sandoval*,* 532 U.S. 275, 286 (2001).

[113] 29 U.S.C. §§ 185 (suits for violation of contracts between an employer and a labor organization may be brought in any district court having jurisdiction of the parties) and 187 (any party injured in his business or property by an unfair labor practice committed by a labor organization may sue for damages in any district court).

[114] Olmsted v. Pruco Life Ins. Co. of N.J., 283 F.3d 429, 433 (2d Cir. 2002).

C. *Private Right of Action is Inconsistent With The Legislative Scheme of the NLRA*

So who could sue for injunctive relief under § 302 (e) if not employees? The answer is the NLRB acting in response to an unfair labor practice charge.[115] The LMRA added a roster of unfair labor practice charges that could be alleged against labor organizations[116] to augment those the Wagner Act imposed on employers[117] and expressly empowered the NLRB "to prevent any person from engaging in any unfair labor practice."[118] Thus, the statutory scheme contemplates that the board, the administrative agency charged with overseeing collective bargaining activities in the private sector, is the only party with standing to seek injunctions to prevent actions that would constitute illegal payments to employers. "When an activity is arguably subject to § 7 or § 8 of the [NLRA] the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board."[119] Such deference was deemed to be essential by Congress in order to allow the agency with expertise in the area of collective bargaining to maintain consistency and uniformity. Congress "confide[d] primary interpretation and application of its rules to a specific and specially constituted tribunal [NLRB] and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order.[120]

Federal courts ought not to be meddling in the mechanics of collective bargaining. The comprehensive, detailed scheme established by the NLRA, as amended by the LMRA, was intended to replace the delay and increased costs inherent in litigation with the efficiency and consistency inherent in the board's enforcement of our nation's labor laws. If employees believe they are being victimized by their employers or are prey for a self-serving union the proper remedy is not with a complaint seeking injunctive relief but with an unfair labor practice charge. If an unfair labor practice charge raised the specter of irreparable damage, the NLRB is the appropriate party to seek injunctive relief in federal court.

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[115] *Cf.* Jack Goldsmith, *Three Problems in Mulhall*, On Labor.org (Aug. 21, 2013), at ¶ 2, http://onlabor.org/2013/8/21 (in the context of § 302, a criminal statute, the conferral of jurisdiction in subsection (e) grants the government the authority to seek injunctions along with penalties).
[116] 29 U.S.C. § 158(b) (2012).
[117] 29 U.S.C. § 158(a) (2012).
[118] 29 U.S.C. § 160(a) (2012).
[119] S.D. Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959).
[120] *Id.* at 242.

V. CONCLUSION

Neutrality agreements are not nefarious bribes or dastardly attempts to coerce employees. Far from being the type of conduct the LMRA punishes with imprisonment or fines, these agreements—agreements that have been successfully used for decades—represent an open and obvious attempt by some employers and unions to establish peace in collective bargaining. As such, they should be lauded. Until such time as the Supreme Court revisits the issue, however, the well-reasoned opinions of the seven federal appellate judges who voted to uphold their legality in *Sage* and *Adcock* and in dissent in *Mulhall* should hold sway over an opinion supported by two others in the *Mulhall* majority that dictates a radical departure from stare decisis. Neutrality agreements are not a "thing of value" because they cannot be paid, lent or delivered and they lack ascertainable value. Compelling as these arguments may be, however, the uncertainty created by *Mulhall* is likely to instill trepidation on the part of unions and employers who would otherwise embrace neutrality agreements for the mutual benefits they augur. For those parties with the courage to agree to neutrality, the prospect of litigation filed by agitators outside the collective bargaining process on the strength of *Mulhall* is a foregone conclusion.

The likelihood that the dockets of our overburdened federal judiciary will swell is all the more lamentable because private litigants who file lawsuits based on § 302 have no right to do so. Applying the extant standard imposed by the Supreme Court governing private actions based on federal law generally—a strict standard that supplants a more lenient approach toward to § 302 articulated by the court half a century ago—private litigants cannot file actions based on the LMRA to defeat neutrality agreements. In sum, the fact that § 302 exclusively addresses the rights and remedies of employers and labor organizations, the absence of any legislative support indicating a desire to regulate any party other than employers and labor organizations and the comprehensive scheme of the NLRA that entrusts enforcement of our country's labor laws to the NLRB negate any attempt to pry open the doors of our federal courts for private litigation.

Sadly, if the recent past is long-term prologue then neutrality agreements will neither invite neutrality nor incite agreement.