UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the matter of: United Nurses & Allied Professionals, (Kent Hospital), Respondent, and Jeanette Geary, an Individual, Charging Party.	Case No. 1-CB-11135

CHARGING PARTY JEANETTE GEARY'S RESPONSE TO THE BOARD'S REQUEST FOR BRIEFING ON ITS PROPOSED GERMANENESS STANDARD IN THE CONTEXT OF LOBBYING

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I. INTRODUCTION

On December 14, 2012, the National Labor Relations Board decided *Geary v. United Nurses & Associated Professionals*, 359 NLRB No. 42.[1] In *Geary*, the Board held for the first time that a union can force non-member employees who have objected – as is their right under *Communications Workers v. Beck*, 487 U.S. 735 (1988) – to pay for union political activities, *i.e.* "lobbying" on matters of public policy and legislation. The *Geary* decision violates Charging Party's right to be free from forced political speech, which is, at the least, a "First Amendment-type interest[]" if not one that is "constitutionally required." *Miller v. ALPA*, 108 F.3d 1415, 1422 (D.C. Cir. 1997), *aff'd on other grounds*, 523 U.S. 866 (1998); *see Abrams v. Comm'cns Workers*, 59 F.3d 1373, 1379-80 & n.7 (D.C. Cir. 1995).

By categorizing such political spending as "germane," *Geary* effectively overturns *Beck* and a raft of prior and controlling Supreme Court decisions. Taken together, these Supreme Court decisions give employees – who are already forced into compulsory representation – the right to refrain from paying for union political expenses and many other expenses unrelated or not germane to the union's role as their monopoly bargaining representative with their employer.

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[1]In *Noel Canning v. NLRB*, Case No. 12-1115 (D.C. Cir., Jan. 25, 2013), the Court ruled that the current Board is illegitimate because two of its three sitting members were appointed in violation of the Constitution's limitations on recess appointments. As a result, the Board is incapable of acting in this case, and Charging Party rejects its authority to do so. The *Geary* decision, as well as any subsequent rulings by this Board in the case, are *per se* invalid under *Noel Canning*. This brief in response to the Board's solicitation of briefs is filed out of an abundance of caution, and to fully insulate Charging Party from some future allegation that under NLRA Section 10(e), 29 U.S.C. §160(e),she has failed to raise all of her issues or otherwise failed to exhaust her rights or remedies. By filing this brief, *Geary* is not submitting to this Board's authority or waiving any due process rights or other constitutional arguments. Indeed, Geary has pending before the D.C. Circuit a Petition for a Writ of Mandamus or Prohibition to prevent this Board from taking any further action in this case. *In re Jeanette Geary*, Case No. 13-1029 (D.C. Cir., Feb. 11, 2013). She here renews her request that the Board cease and desist.

The *Geary* decision turns *Beck* upside down, completely eviscerating employees' right to refrain from forced political speech. Under *Geary*, unions can now assume that all political lobbying expenditures are related to representation, and force non-member objectors to pay for them or litigate over them.

The *Geary* "standard" is no standard at all. As the D.C. Circuit warned in *Miller*, this Board's desertion of the *Lehnert* standard has become the proverbial "exception which would swallow the [] rule." *Miller*, 108 F.3d at 1423, citing *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). Union political expenses go from being *per se* non-chargeable to objectors in *Lehnert* to presumptively chargeable in *Geary.*

Seeking feedback on the new "standard," the *Geary* Board has solicited briefs from "all interested parties . . . regarding the question of how the Board should define and apply the germaneness standard in the context of lobbying activities." Slip op. at 9. The Board most likely will *not* be receiving responses from the parties who *most* will be affected by its ruling – the innumerable *Beck* objectors throughout the country who now, under *Geary*, will be forced to subsidize union politics with no financial accountability or hope for relief. Responses will surely come from parties with a lesser stake – *i.e.*, unions arguing to expand their power to forcibly extract contributions from all employees for the unions' political spending agenda.

Because Charging Party rejects the deeply flawed *Geary* decision's grant of power to unions to charge objecting non-members for the union's political activity, she will not provide the Board advice as to how it should apply that grant.[2] Rather, Charging Party here sets out her

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[2]*See* Board Member Hayes' dissenting opinion: "Obviously, I disagree with [the majority's] analysis and the resultant standard for chargeability. Consequently, I disagree that (continued...)

objections to the Board's ruling on the chargeability of political activity.[3]

II. ARGUMENT

A. The Railway Labor Act and the National Labor Relations Act Are "Statutory Equivalents."

When it comes to a union's power to compel represented employees to pay dues by virtue of a so-called "union security" provision in a collective bargaining agreement, the RLA and NLRA are statutory equivalents. *Beck* reaffirmed this:

> [W]e have previously described the two provisions as "statutory equivalent[s]," *Ellis v. Railway Clerks,* 466 U.S. 435, 452, n.13 (1984), and with good reason, because their nearly identical language reflects the fact that in both Congress authorized compulsory unionism only to the extent necessary to ensure that those who enjoy union-negotiated benefits contribute to their cost. Thus, in amending the RLA in 1951, Congress expressly modeled § 2, Eleventh on § 8(a)(3), which it had added to the NLRA only four years earlier, and repeatedly emphasized that it was extending "to railroad labor the same rights and privileges of the union shop that are contained in the Taft-Hartley Act." 96 Cong.Rec. 17055 (1951) (remarks of Rep. Brown). In these circumstances, we think it clear that Congress intended the same language to have the same meaning in both statutes.

487 U.S. at 745-47 (citation omitted)

The RLA and NLRA must be identically construed, and authority interpreting the one must be applied identically to the other, especially on the core holding in the case discussed here, that charging non-members for union political activity is forbidden. *Geary* casually rejected this

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[2](...continued)
there is need for further briefing and analysis of any of the lobbying activities at issue in this case." *Geary*, slip op. at 14.

[3]*Geary* also erroneously held that unit members could be charged for "extra-unit" legislative expenses through the so-called "pooling" arrangement approved in *Locke v. Karass*, 555 U.S. 207 (2009) for litigation expenses. Charging Party objects to *Geary*'s application of *Locke* ,which explicitly recognized that the union in that case "cannot charge the non-member for certain activities, *such as political or ideological activities*." 555 U.S. at 213 (emphasis added). Clearly, *Locke* cannot be applied to political spending. This Board reads *Locke* and other Supreme Court cases selectively, ignoring holdings and important *dicta*.

parallelism, conceding only that "RLA cases and public sector cases may provide limited guidance on what types of lobbying may be chargeable to objectors." Slip op. at 6. The *Geary* Board apparently believed that the union's ability to charge objectors for its politics should be unrestricted, either by constitutional or statutory limits. *Geary* rejected the "statutory equivalence" doctrine firmly established by *Beck* and a long line of cases, discussed below.

Despite the current NLRB's blinders, *Beck* unequivocally supports the principle of identity between the NLRA and RLA. *Beck* held that the Supreme Court's statutory holdings in *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), where lobbying was ruled *per se* non-chargeable, are "controlling" under the NLRA: "Our decision in *Street* . . . is far more than merely instructive here; we believe it is *controlling*, for § 8(a)(3) and § 2, Eleventh are in all material respects identical." *Beck*, 487 U.S. at 745 (emphasis added). And, the *Beck* Court, finding *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), another RLA case, controlling, concluded "that § 8(a)(3), *like its statutory equivalent*, § 2, Eleventh of the RLA, authorizes the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." 487 U.S. at 762-63 (quoting *Ellis*, 466 U.S. at 448) (emphasis added).

Unlike the Board in *Geary*, the federal courts have been quite faithful to the Supreme Court's holdings. For example, in *Beck* itself, the United States Court of Appeals for the Fourth Circuit explicitly followed *Ellis* in ruling that union organizing is non-chargeable under the NLRA. *Beck v. Commc'ns Workers*, 776 F.2d 1187, 1211 (1985), *aff'd en banc*, 800 F.2d 1280 (4th Cir. 1986), *aff'd sub nom. Commc'ns Workers v. Beck*, 487 U.S. 735 (1988); *see also Kidwell v. TCIU*, 946 F.2d 283, 293-94 (4th Cir. 1991) (finding *Beck* "highly persuasive" in a

RLA case).

In *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1002-04 (9th Cir. 1970), *further proceedings*, 533 F.2d 1126, 1128 n.3 & 1131-32 (9th Cir. 1976), the court similarly held that RLA cases protecting the rights of non-members were "equally applicable" to the NLRA, and that "it is immaterial that the NLRA rather than the Railway Labor Act is involved in the present litigation." *Seay* twice reversed a district court that had refused to apply RLA precedents in *Street* and *Railway Clerks v. Allen*, 373 U.S. 113 (1963), to unions and objectors covered by the NLRA.

Other circuits have ruled likewise. The District of Columbia Circuit has repeatedly held that unions collecting agency fees under the NLRA must meet the standards of the Supreme Court's RLA and constitutional cases in order to satisfy the NLRA's "duty of fair representation." *Abrams*, 59 F.3d at 1379 & n.7 (citing '"[b]asic considerations of fairness'" under *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 306 (1986)); *Miller*, 108 F.3d at 1418-20, *aff'd*, 523 U.S. 866 (1998); *Ferriso v. NLRB*, 125 F.3d 865, 867-70 (D.C. Cir. 1997); *Penrod v. NLRB*, 203 F.3d 41, 47 (D.C. Cir. 2000). Similarly, in determining whether to apply the RLA and constitutional standards to an agency shop arrangement under the NLRA, the Seventh Circuit recognized that the "germaneness guidance offered by the [Supreme] Court in *Ellis* has also been applied in private sector NLRA cases." *Nielsen v. Machinists Local 2569*, 94 F.3d 1107, 1113 (7th Cir. 1996).

Consequently, the Board should reconsider the chargeability standard announced in *Geary*, not apply it. *Beck* held that the forced fee authorizations of the RLA and NLRA are "identical" and that RLA precedents interpreting the RLA provision, such as *Street* and *Ellis*, are

"controlling" under the NLRA. The NLRA does not license the Board to repudiate or ignore that Supreme Court mandate. The Board majority cannot refuse to follow RLA precedents by "manufacturing distinctions" between the NLRA and RLA that do not exist insofar as forced fees are concerned. *Teamsters Local 443 (Connecticut Limousine Serv.*), 324 NLRB 633, 638 (1997) (Chairman Gould, dissenting); *see also Lechmere v. NLRB*, 502 U.S. 527, 536-39 (1992).

B. The RLA and NLRA Prohibit Charging Objectors for Lobbying.

It cannot be disputed that the RLA prohibits unions from forcing objecting employees to fund a union's political or ideological activity through compulsory dues. *See Ellis v. Railway Clerks*, 466 U.S. at 439-40, 446-47; *Street*, 367 U.S. at 768-70. As shown above, the Board's assertion that RLA cases do not apply under the NLRA is a wilful misreading of the law.

Moreover, the RLA cases make it clear that as to private-sector employees, lobbying is never lawfully chargeable. In *Street*, employees objected to the union's use of their dues for contributions to political campaigns "and to promote the propagation of political and economic doctrines, concepts and ideologies." 367 U.S. at 744. *Street* unequivocally held such forced subsidies of political and ideological activities are illegal under the RLA: "[Section] 2, Eleventh is to be construed to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." *Id*. at 768-69. The Court at that very point explained exactly what it meant by "political causes," quoting from a Treasury regulation defining as nondeductible "the use of union funds for political purposes," including "expenditures for lobbying purposes, for the promotion or defeat of legislation, . . . for carrying on propaganda (including advertising) related to any of the foregoing purposes." *Id.* at 769 n.17.

Miller powerfully enforced the principle that *Geary* completely ignores: employees are

protected from compulsory "support" for a union's political activity, including lobbying. In *Miller*, the union argued, like the Board majority here, that lobbying government agencies concerning "airline safety issues that animate much of its collective bargaining . . . should be regarded as germane to that bargaining." The D.C. Circuit emphatically rejected that argument:

> That the subject of safety is taken up in collective bargaining hardly renders the union's government relations expenditures germane. Under that reasoning, union lobbying for increased minimum wage laws or heightened government regulation of pensions would also be germane. Indeed if the union's argument were played out, virtually all of its political activities could be connected to collective bargaining; but the federal courts, including the Supreme Court, have been particularly chary of treating as germane union expenditures that touch the political world.

108 F.3d at 1422; *see Knox v. SEIU Local 1000*, 132 S. Ct. 2277, 2294-95 (2012) (expenditures to defeat ballot proposition that would affect bargaining agreements held non-chargeable).

Thus, under *Beck*'s mandate that RLA cases are controlling, *Street* and *Miller* require the Board to hold that a union's lobbying expenses are *per se* non-chargeable, in order to protect employees' right to be free from political coercion.

The Board majority's decision in this case also ignores judicial precedent under the NLRA. *Abrams* held that, under the NLRA, a union's *Beck* notice to non-member objectors was inadequate because it failed to inform them clearly that they could not be charged for the union's political expenses. 59 F.3d at 1380. In doing so, the D.C. Circuit reiterated, without qualification, that unions may not charge non-members for lobbying.

> The fact that the CWA notice lists "legislative activity" and "support of political candidates" as non-chargeable expenses does not cure the imprecision, and therefore overbreadth, of the notice. The *Beck* and *Ellis* holdings foreclose the exaction of mandatory agency fees for such activities, and, in our view, additionally require that the Union notice not use language which might lead workers to conclude that such activities are chargeable. (footnotes omitted).

Id.

Thus, both NLRA and controlling RLA precedent require this Board to reconsider its new, unprecedented incursion on "nonmembers' First Amendment-type interests that are protected" by the NLRA under *Beck*.

C. *Geary* Gives Unions Unprecedented Power to Compel Political Speech.

1. Under *Geary*, Only NLRA-Covered Employees Are Denied Protection from Forced Political Speech.

Public-sector and RLA unions cannot compel political contributions without automatically triggering constitutional scrutiny. Such forced payments are considered a significant burden to employees' First Amendment rights. Except for the narrowest of exceptions in the public sector, where interaction between unions and the government employer is sometimes necessary to ratify or implement the collective bargaining agreement, political activity– including lobbying– may not be charged to *non-member* objectors. *Lehnert*, 500 U.S. at 519-522, 527, 558-59 (1991).

In *Geary*, the Board brushed aside these constitutional concerns:

> [P]ublic sector and RLA cases both implicate State action and are therefore subject to constitutional scrutiny. In contrast, private sector union-security clauses pursuant to the Act do not involve State action implicating constitutional considerations.

Slip op. at 6 (notes omitted).

Not only did the Board ignore constitutional considerations, it also turned *Beck* upside down. *Geary* undermines and reverses *Beck's* original purpose — to protect the right of objecting *non-member* employees to be free from compulsory subsidization of a union's non-representational expenses, including its political expenses. In *Geary*, unions are given the

broadest possible latitude to categorize all of their political spending as representational, thereby placing the burden of challenge on the employee, something that has long been condemned.[4]

This drastic evisceration of *Beck* rights was reached by the Board's faulty statutory analysis, supposedly following *Beck*, as if Beck had foreclosed on the constitutional question. This is not what *Beck* held. To the contrary, while *Beck*'s holding that non-member employees could not be forced to pay for a union's political expenses relied on interpretation of the NLRA and RLA, the *Beck* Court left wide open the constitutional question of whether the constitution applies to the NLRA's authorization of forced union fee agreements: "We need not decide whether the exercise of rights permitted, though not compelled, by § 8(a)(3) involves state action." 487 U.S. at 761.

Beck's mandate that RLA precedents are controlling, and the holdings of *Street* and its progeny, are sufficient to require reversal of the majority's ruling that non-members can be forced to subsidize union lobbying. However, to preserve the issue, Charging Party here argues

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[4] It seems to me, however, that while the Court's remedy may prove very lucrative to special masters, accountants and lawyers, this formula, with its attendant trial burdens, promises little hope for financial recompense to the individual workers whose First Amendment freedoms have been flagrantly violated. Undoubtedly, at the conclusion of this long exploration of accounting intricacies, many courts could with plausibility dismiss the workers' claims as de minimis when measured only in dollars and cents.

I cannot agree to treat so lightly the value of a man's constitutional right to be wholly free from any sort of governmental compulsion in the expression of opinions. It should not be forgotten that many men have left their native lands, languished in prison, and even lost their lives, rather than give support to ideas they were conscientiously against. The three workers who paid under protest here were forced under authority of a federal statute to pay all current dues or lose their jobs. They should get back all they paid with interest.

Street, 367 U.S. at 796 (Black, J., dissenting).

that constitutional standards apply and also are violated by the Board's ruling.

2. *Geary*'s Grant of Power to Unions to Compel Political Speech Involves State Action and Violates Employees' First Amendment Rights.

a. State Action under the RLA's Compulsory Union Provisions

Under *Geary*, the NLRB has bestowed on unions, as monopoly bargaining representatives for millions of NLRA-covered employees, the extraordinary power to compel objecting non-members to support the union's political speech. Under *Geary*, these employees can no longer "opt out" of paying for union politics any more than they can opt out of being represented by and paying fees to a union under Sections 8(a)(3) and 9(a) of the Act, which grants unions exclusive bargaining power under threat of termination.

Geary grants to unions power to do what would be unconstitutional *in any other labor context*. *Geary* goes beyond merely allowing unions to charge non-member objectors for the expenses necessary for contract ratification and implementation, expenses that are political in nature only in the public sector because the employer is government. *See Lehnert*, 500 U.S. at 519-22.

Contrary to the *Geary* Board's facile analysis, however, such a grant of power under the NLRA is, in fact, state action that burdens employees' First Amendment rights.

Beginning with *Railway Employees v. Hanson*, 351 U.S. 225 (1956), and continuing under *Street* and *Ellis*, the Supreme Court has ruled that union-security provisions under the RLA implicate state action. In *Hanson*, the Court reasoned that "the federal statute is the source of the power and authority by which any private rights are lost or sacrificed." 351 U.S. at 232. Although *Hanson* found the constitutional burdening of non-member employees' rights to be

justified by Congress' overriding goal of securing "labor peace," that conclusion was reached only on the facts presented in that case. The Court expressly left open the possibility that it could revisit the question under a different set of facts: "If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case." *Id.*

The Court was faced with precisely such issues in *Street*. As in *Hanson*, the Court found state action by recognizing that the case "squarely . . . present[s] the constitutional questions reserved in *Hanson*." 367 U.S. at 749. However, "to avoid serious doubt of [the RLA's] constitutionality, the Court construed the statute to prohibit the use of non-members forced fees "for political causes." *Id.* at 749-50.

Lastly, *Ellis* found it necessary to address whether the First Amendment was violated "with regard to the three activities for which, we have held, the RLA allows the union to use [non-members'] contributions," because the "First Amendment does limit the uses to which the union can put funds obtained from dissenting employees." 466 U.S. at 455. In *Ellis*, the Court thus again implicitly recognized that the RLA's sanction of compulsory union provisions amounts to state action.

3. State Action under the NLRA Is Identical to RLA-Derived State Action.

There is no relevant difference between NLRA and RLA compulsory union fee requirements. Both are possible only because of compulsory monopoly union representation, sanctioned by the respective statute. Both are federal statutory schemes. The obligations of compulsory unionism arrangements sanctioned and encouraged by both statutory regimes are

equally burdensome and inescapable for employees subject to them.

Geary rejected this obvious parallel. Without explanation, and relying on the Board's statements in *California Saw & Knife Works*, 320 NLRB 224 (1995), *Geary* repeated the notion that public sector and RLA cases implicate state action while NLRA cases do not. *Geary,* slip op. at 6. Contrary to *Geary*'s "analysis," the issue is far from settled and the federal courts are split.

The supposed difference giving rise to constitutional treatment for RLA compulsory unionism provisions, but not for identical NLRA-sanctioned, is based on the notion that whereas the RLA preempts all state laws governing compulsory union arrangements, the NLRA does not. This idea was first iterated in *Hanson*: "If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded." 351 U.S. at 232.

However, the RLA's preemption of state Right to Work laws cannot possibly be the only reason that there is governmental action under the RLA. If that were the case, RLA forced union fees would be subject to constitutional scrutiny only in Right to Work states, which is not the case. *Hanson* itself suggests that there is another source of governmental action, *i.e.*, RLA § 2, Eleventh, which authorizes the forced fee agreements: "The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction." 351 U.S. at 232.

That is just as true under the NLRA as under the RLA. NLRA § 8(a)(3), and indeed, the authorization of exclusive representation in § 9(a), are the governmental actions that sanction the private forced fee arrangements. Consequently, some federal courts have ruled that state action *is* present under the NLRA. *See Linscott v. Miller Falls Co.*, 440 F.2d 14, 16-17 (1st Cir. 1971);

Seay, 427 F. 2d at 1002-04; *Havas v. Comm'cns Workers*, 509 F. Supp. 144, 147-49 (N.D.N.Y. 1981); *Lykins v. Aluminum Workers*, 510 F. Supp. 21, 24-26 (E.D. Pa. 1980).

In *Schreier v. Beverly California Corp.*, 892 F. Supp. 225 (D. Minn., 1995), the court, in sharp contrast to the *Geary* majority, applied the *Lehnert* standard of chargeability to an NLRA case. It ruled unlawful a union's overly broad explanation of its chargeable expenses because they included lobbying:

> Moreover, the "curative" letter does not comport with the *Beck* opinion, because it asserts that the Union may charge the plaintiff for "lobbying for collective bargaining legislation or to effect changes affecting working conditions before Congress, state legislatures, state and federal agencies, and local boards, commissions and councils." This is broader than permitted under either the test used by Justices Blackmun, White and Stevens and Chief Justice Rehnquist or by Justices Scalia and Kennedy in *Lehnert*. . . .

Id. at 227.

The *Geary* "standard" as to the chargeability of lobbying removes from employees all protections of both their statutory and First Amendment rights. The *Geary* decision should be reconsidered and that standard overturned on both statutory and constitutional grounds, and the constitutional scrutiny enjoyed by all other employees should be applied to non-members' *Beck* rights under the NLRA.

III. CONCLUSION

The Board should not decide how it "should define and apply the germaneness standard in the context of lobbying activities," *Geary*, slip op. at 9. Rather, the Board should reconsider and overrule its adoption of a germaneness standard that fails to follow binding Supreme Court precedent under the NLRA and RLA and violates non-members' First Amendment rights.

Dated this 19th day of February, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of February, a copy of this Response was electronically filed to the Lester Heltzer, National Labor Relations Board, Executive Secretary. In addition, a copy was sent via U.S. mail, first-class postage pre-paid, as well as email, to the following:

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