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"MEMBERSHIP" OBLIGATIONS UNDER NLRA SECTION 8(a)(3): A PROPOSAL FOR STATUTORY CHANGE

Ronald Turner*

I. INTRODUCTION

Section 7 of the National Labor Relations Act ("NLRA" or "Act") provides that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Employees "shall also have the right to refrain from any or all of 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 158(a)(3) of this title."

Section 158(a)(3) ("section 8(a)(3)"), in turn, makes it an unfair labor practice for an employer to discriminate in hiring, tenure, or terms of employment for the purpose of encouraging or discouraging the union membership of employees. That section, in its first proviso, also

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3. Id.
4. See 29 U.S.C. § 158(a)(3), which provides in pertinent part: It shall be an unfair labor practice for an employer—(3) 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: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement,
provides that an employer and a union which is selected or designated as the employees' exclusive collective bargaining representative, may enter into a collective bargaining agreement containing a union-security clause that requires all employees who receive the benefits of union representation to pay for that representation. The proviso states that nothing in this subchapter, or in any statute of the United States, shall preclude an employer from making an agreement with a labor organization... to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later.

Under a second proviso, and so long as membership is not denied to an employee "for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership..."


6. See Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 37 (1998) (finding that union-security clauses "require employees to become 'member[s]' of a union as a condition of employment"); see also Wegscheid v. Local Union 2911, 117 F.3d 986, 987 (7th Cir. 1997) (stating that an employer may agree "to make it a condition of continued employment that all the employees in the bargaining unit join the union (that is, may include in the agreement a 'union shop' clause)"). Note that union-security clauses cannot be enforced in the twenty-one states that have right-to-work laws. As provided in section 14(b) of the National Labor Relations Act, 29 U.S.C. § 164(b): "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

7. See Oil, Chem. & Atomic Workers Int'l Union v. Mobil Oil Corp., 426 U.S. 407, 416 (1976); see also Communications Workers v. Beck, 487 U.S. 735, 748 (1988) (holding that without union-security agreements, "many employees would reap the benefits that unions negotiated on their behalf without in any way contributing financial support to those efforts").

an employee can be terminated for failure to comply with a union-security clause. Thus, the text of section 8(a)(3) forbids employer encouragement of union membership, yet permits labor agreements requiring employees to obtain and maintain "membership" as a condition of keeping their jobs.

Under a literal reading and colloquial understanding of section 8(a)(3), an employee subject to a collectively-bargained union-security clause can be contractually required to obtain membership in a union. The statute, however, as interpreted and applied by the courts and the National Labor Relations Board ("NLRB" or "Board"), does not require that employees become full union members subject to union rules and discipline. Rather, as discussed below, actual union membership cannot be compelled and employees can only be required to pay dues and initiation fees as a condition of employment. Of course, many employees may not be knowledgeable about the differences between the literal and the judicially-constructed meanings of the term "membership." Accordingly, employees who are unfamiliar with the provisions of section 8(a)(3) as interpreted by the courts and the NLRB may be confused, if not misled, by what appears to be a clear statutory mandate to workers—join the union or lose your jobs.

9. Id.
10. See 29 U.S.C. § 158(b)(2), which provides in pertinent part:
   It shall be 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) of this section 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 the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Id.

A union violates this provision when it asks or causes an employer to terminate an employee for the nonpayment of dues without first informing the employee of actions necessary to meet her union-security obligations. See Production Workers Union, Local 707 v. NLRB, 161 F.3d 1047, 1052 (7th Cir. 1998); see also NLRB v. Hotel, Motel & Club Employees' Union, Local 568, 320 F.2d 254, 258 (3d Cir. 1963) (holding that, at minimum, a union must "inform the employee of his obligations in order that the employee may take whatever action is necessary to protect his job tenure"); NLRB v. Local 1445, 647 F.2d 214, 217 (1st Cir. 1981) (finding that, before asking an employer to fire an employee, a union must notify the employee of the amount of dues owed, the methodology of the calculation of the dues, and the payment deadline).

13. See infra Part II.
14. See id.
This article focuses on and provides a proposed statutory response to the real-world problem of section 8(a)(3)'s membership requirement and misleading, yet lawful union-security clauses. Part II surveys seminal cases establishing the meaning and limitations of section 8(a)(3) and discusses the legal fiction relative to, and the term of art that is, this section's "membership" obligation. Part III examines the United States Supreme Court's recent decision in Marquez v. Screen Actors Guild, Inc. In light of Marquez's holding that a union may lawfully negotiate a union-security clause tracking the language of section 8(a)(3), the statute should be amended to reflect the settled state of the law regarding an employee's right to abstain from full union membership. This proposed amendment is drafted and presented in Part IV with the goal and purpose of fully advising workers of their actual section 8(a)(3) rights.

II. UNION "MEMBERSHIP" AND THE NLRA

A. The Meaning of the Term "Membership"

What is the meaning of the term "membership" in section 8(a)(3)? Can the more than ninety percent of employees subject to some form of a union-security clause be compelled by law to become union members and be required to financially support a union's activities, including its political endeavors? These questions, and the answers provided by the courts and the NLRB, are discussed herein.


NLRA Section 8(a)(3) does not apply to public sector employers. See 29 U.S.C. § 152(2) (1994). Whether the First Amendment applies to and governs the enforcement of a union-security clause under section 8(a)(3) was not decided by the Supreme Court in its decision in Communications Workers v. Beck, 487 U.S. 735 (1988), and remains an open question. See International Ass'n of Machinists v. NLRB, 133 F.3d 1012, 1015 (7th Cir.) ("The issue of whether an employer's enforcement of a union-shop clause is nevertheless a governmental act (because of the government's role in encouraging collective bargaining), and is therefore within the purview of the First Amendment, is difficult and remains unresolved."). cert. denied sub nom., Strang v. NLRB, 119 S. Ct. 47 (1998).
In *In re Union Starch & Refining Co.*, the NLRB held that employees could only be required to pay dues and initiation fees in order to obtain or keep their jobs.

If the union imposes any other qualifications and conditions for membership with which [a worker] is unwilling to comply, such an employee may not be entitled to membership, but he is entitled to keep his job . . . Congress evinced a strong concern for protecting the individual employee in a right to refrain from union activity and to keep his job even in a union shop.

That an employee can keep her job while refraining from union activity does not mean that the worker does not have to pay for certain services rendered by the union. In a 1954 decision, the United States Supreme Court noted that

legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. Thus Congress recognized the validity of unions' concern about "free riders," *i.e.*, employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason.

In *NLRB v. General Motors Corp.*, the Court, holding that an agency shop arrangement is not an unfair labor practice prohibited by the NLRA, construed the second proviso of section 8(a)(3) as follows:

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19. 87 N.L.R.B. 779 (1949), enforced, 186 F.2d 1008 (7th Cir. 1951).
20. See id. at 784.
21. Id.; see also International Bhd. of Boilermakers, Local Union No. 749 (Cal. & Blowpipe & Steel Co.), 192 N.L.R.B. 502 (1971), enforced, 466 F.2d 343 (D.C. Cir. 1972), Local 386, Int'l Bhd. of Teamsters (Hershey Foods Corp.), 207 N.L.R.B. 897 (1973), enforced, 513 F.2d 1083 (9th Cir. 1975).
22. Radio Officers' Union of the Commercial Tels. Union v. NLRB, 347 U.S. 17, 41 (1954); see also Wegscheid v. Local Union 2911, 117 F.3d 986, 987 (7th Cir. 1997) (stating that employees not required to pay for a union's representational services "could take a free ride" and "no workers would join the union, which would therefore have no income out of which to defray the expense of performing its duties as bargaining representative").
Under the second proviso to § 8 (a)(3), the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues. It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. "Membership" as a condition of employment is whittled down to its financial core.

In another decision, Pattern Makers' League v. NLRB, the Court held that the NLRA prohibited a union from fining members who resigned from the union during a strike or when a strike was imminent. The Court upheld the Board's finding that union restrictions on an employee's right to resign were "inconsistent with the policy of voluntary unionism implicit in section 8(a)(3)." Under that section and policy, an employee can be required to pay dues but "cannot be discharged for failing to abide by union rules or policies with which he disagrees." As stated by the Court:

Full union membership thus no longer can be a requirement of employment. If a new employee refuses formally to join a union and subject himself to its discipline, he cannot be fired. Moreover, no employee can be discharged if he initially joins a union, and subsequently resigns. We think it noteworthy that § 8(a)(3) protects the employment rights of the dissatisfied member, as well as those of the worker who never assumed full union membership. By allowing employees to resign from a union at any time, § 8(a)(3) protects the employee whose views come to diverge from those of his union.

LABOR LAW]; see Raymond Hogler & Steven Shulman, The Law, Economics, and Politics of Right to Work: Colorado’s Labor Peace Act and its Implications for Public Policy, 70 U. COLO. L. REV. 871, 871 n.1 (1999) (stating that the agency shop form of union security “requires employees to pay an agency fee to the union for representational services”).

25. See supra note 4 and accompanying text.
26. General Motors Corp., 373 U.S. at 742 (emphasis added).
29. Pattern Makers’, 473 U.S. at 104 (footnote omitted); see also International Ass’n of Machinists, Local Lodge 1414 (Neufeld Porsche-Audi, Inc.), 270 N.L.R.B. 1330 (1984).
31. Id.
Communications Workers v. Beck\(^32\) similarly recognized that the "membership" required by section 8(a)(3) has been reduced to the employee's financial obligations to pay dues and fees and nothing more.\(^33\)

In that case, the Court held that section 8(a)(3) "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.'"\(^34\)

Accordingly, that section prohibits union expenditure of funds, collected from objecting nonmember employees, for activities unrelated to collective bargaining, contract administration, or grievance adjustment.\(^35\)

Any effort by a union to require objecting employees to support union activities beyond these core representational matters violates the union's duty of fair representation\(^36\) owed to all bargaining unit members, both union and non-union.\(^37\)

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33. See id. at 745.
34. Id. at 762-63.
35. See id. at 759.

37. See Communications Workers v. Beck, 487 U.S. at 745; see also United Paperworkers Int'l Union (Weyerhaeuser Paper Co.), 320 N.L.R.B. 349 (1995), rev'd on other grounds sub nom., Buzenius v. NLRB, 124 F.3d 788 (6th Cir. 1997) (discussing a union's legal obligations to adequately inform employees of their rights under General Motors and Beck), vacated and remanded, 119 S. Ct. 442 (1998); California Saw & Knife Works, 320 N.L.R.B. 224 (1995), enforced sub nom., International Ass'n of Machinists v. NLRB, 133 F.3d 1012 (7th Cir.), cert. denied, 119 S. Ct. 47 (1998). In California Saw & Knife Works, the NLRB ruled that a union "has an obligation under the duty of fair representation to notify [unit employees] of their Beck rights before they become subject to obligations" under a union-security clause. See California Saw & Knife Works, 320 N.L.R.B. at 231.

When or before a union seeks to obligate an employee to pay fees and dues under a union-security clause, the union should inform the employee that he has the right to be
Thus, under section 8(a)(3)'s policy of voluntary unionism, and unlike the compulsory unionism of the era of the closed shop, the only aspect of union membership that can be required pursuant to a union shop agreement is the payment of dues. The "financial core" member must pay dues and fees pursuant to section 8(a)(3), but is free to decline formal membership in the union.

B. "Membership" As a Legal Fiction and a Misleading Term of Art

Employees subject to union-security clauses may not know of the legal interpretation and construction of section 8(a)(3)'s membership requirement discussed in the preceding part. "The average worker, unversed in the tortuous complexities of statutory interpretation, would

or remain a nonmember and that nonmembers have the right (1) to object to paying for union activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities; (2) to be given sufficient information to enable the employee to intelligently decide whether to object; and (3) to be apprised of any internal union procedures for filing objections.

Id. at 233.


39. See Thomas R. Haggard, Compulsory Unionism, the NLRB, and the Courts (1977); Jerome L. Toner, The Closed Shop (1942); Kenneth G. Dau-Schmidt, Union Security Agreements Under the National Labor Relations Act: The Statute, the Constitution, and the Court's Opinion in Beck, 27 HARV. J. ON LEGIS. 51 (1990). The Wagner Act of 1935, 49 Stat. 452 (1935), legalized the closed shop. Section 8(3) of the 1935 law, while prohibiting discrimination on the basis of union membership, provided that "nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . ." Under closed shop agreements, initial employment was conditioned upon union membership, and employers could only employ full union members in good standing with their organizations and had to fire workers expelled from the union. See Robert A. Gorman, Basic Text On Labor Law: Unionization and Collective Bargaining 639 (1976); The Developing Labor Law, supra note 24, at 1492; Reuel E. Schiller, From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength, 20 BERKELEY J. EMP. & LAB. L. 1, 41-42 (1999). Full union members are required to maintain their membership, to pay full union dues, attend union meetings, comply with a union's constitution, bylaws, and rules, and can be disciplined by a union for breaching the obligations of membership.

See Pattern Makers', 473 U.S. at 106, 106 n.16; Malin, supra note 36, at 16.

The closed shop and its requirement of full union membership were outlawed by Congress in the Taft-Hartley Act of 1947.

40. Pattern Makers', 473 U.S. at 106 n.16.

41. See General Motors Corp., 373 U.S. at 743.
normally construe [the term "membership"] to mean membership in the colloquial sense—i.e., formal membership.”42 The following examples of NLRB and federal courts of appeals decisions interpreting the “membership” requirement reveal the ways in which the uninitiated may not understand, and may even be misled by, the statute as it is currently written.

Keystone Coat, Apron & Towel Supply Co.43 is an important early decision addressing the legality of union-security clauses. A clause in the parties’ collective bargaining agreement stated that: “[t]he Company shall employ only members of the Union in good standing for production work.”44 A provision in the agreement provided that “[o]n the first day of each month, initiation, membership and apprentice fees, dues, fines, and assessments shall be deducted from the pay of each employee by the Employer and turned over to the Secretary-Treasurer of the Union or other duly authorized representative of the Union.”45

The question before the Board was whether union-security clauses set forth in collective bargaining agreements barred petitions seeking NLRB-conducted representation elections.46 The Board held that a contract containing a union-security clause which did not facially conform to the requirements of the statute, or which had been determined to be unlawful in an unfair labor practice proceeding, would not bar an election.47 In so holding, the Board considered and rejected the argument that its rule would disadvantage not only the sophisticated parties who deliberately employed ambiguity to infringe on employees’ rights, but would also be detrimental to “those who, because of carelessness, ineptitude, or oversight, fail to make their union-security provisions comply with the law.”48 Recognizing the possibility of the latter scenario, the Board opined that “the answer is plain that the Board, as the agency of Government charged with the interpretation and administration of this section of the Act, cannot close its eyes to such failures, irrespective of the reasons.”49

Seeking to assist parties in the drafting of lawful union-security clauses, the NLRB provided the following model clause “deemed by the

42. HAGGARD, supra note 39, at 70.
43. 121 N.L.R.B. 880 (1958).
44. Id. at 882.
45. Id. at 883.
47. See Keystone Coat, Apron & Towel Supply Co., 121 N.L.R.B. at 883.
48. Id. at 884.
49. Id.
Board to be the maximum permissible in conformity with the require-
ments of the Act.\textsuperscript{50}

It shall be a condition of employment that all employees of the Em-
ployer covered by this agreement who are members of the Union in
good standing on the effective date of this agreement shall remain
members in good standing and those who are not members on the ef-
fective date of this agreement shall, on the thirtieth day [or such longer
period as the parties may specify] following the effective date of this
agreement, become and remain members in good standing in the Un-
ion. It shall also be a condition of employment that all employees cov-
ered by this agreement and hired on or after its effective date shall, on
the thirtieth day following the beginning of such employment [or such
longer period as the parties may specify] become and remain members
in good standing in the Union.\textsuperscript{51}

Keystone's model clause was subsequently questioned and rejected
by the Board in International Union of Electronic Workers (Paramax
Systems Corp.).\textsuperscript{52} That case involved employee Lawrence Ferriso's un-
fair labor practice charge alleging that a union-security clause\textsuperscript{53}
violated employees' rights under NLRA sections 7,\textsuperscript{54} 8(b)(1)(A),\textsuperscript{55}
and 8(b)(2).\textsuperscript{56} The NLRB, after reviewing its and the courts' prior interpretations of
section 8(a)(3)'s "membership" obligation, concluded that those prior
interpretations "did little to clarify any statutory imprecision or apprise
employees of their actual obligations. On the contrary, some decisions

\textsuperscript{50} Id. at 885.
\textsuperscript{51} Id. (emphasis added and footnote omitted). In a subsequent decision, the Board held that
it would no longer presume that union-security clauses were illegal for purposes of barring elec-
tions where the clauses did not explicitly reflect the NLRA's limitations. See Paragon Prods.
\textsuperscript{52} 311 N.L.R.B. 1031, 1031 (1993).
\textsuperscript{53} The clause provided:
All present employees of the Employer, and those who in the future enter the bargain-
ing unit, shall join the Union by the thirtieth day following the beginning of their em-
ployment, or by the thirtieth day following the effective date of this agreement, which-
ever is later, and continue to remain members of the Union in good standing as a term
and condition of employment.
\textsuperscript{54} Id. at 1031 (emphasis added).
\textsuperscript{56} See 29 U.S.C. § 158(b)(1)(A), which provides that:
It shall be an unfair labor practice for a labor organization or its agents—
(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in sec-
tion 157 of this title: Provided, That this paragraph shall not impair the right of a labor
organization to prescribe its own rules with respect to the acquisition or retention of
membership therein . . . .
\textsuperscript{56} 29 U.S.C. § 158(b)(2); supra note 10 (quoting § 8(b)(2)).
further obfuscated the statutory requirements.” 57 For example, the Board noted Keystone’s model union-security clause 58 “increased confusion about employees’ obligations under section 8(a)(3).” 59 This is especially true where “the Board replaced the statutory term ‘membership’ with the ambiguous, and equally undefined phrase, ‘members in good standing.’” 60 Additionally, the Board stated that

unions and employers frequently do not inform employees of their actual union-security obligations. Whether this omission results from misunderstanding by the contracting parties, inattention, or conscious attempts to mislead employees, the effect is that the average represented employee may well not understand the obligations incurred under a union-security agreement. 61

Turning to the union-security clause in Paramax, the Board held that the clause was not facially unlawful, for

illegal objects will not be presumed, and contracts will not be found unlawful merely because they fail to disclaim all illegal objects. Here, the phrase ‘members of the Union in good standing’ does not explicitly require that employees bear obligations other than those lawfully imposed under section 8(a)(3). On the contrary, ‘members of the Union in good standing’ can be interpreted as requiring that Paramax employees merely tender initiation fees and dues. 62

Although the clause was not facially unlawful, the Board found that the phrase “members of the Union in good standing” was ambiguous in that it could be interpreted to require more from employees than was imposed by section 8(a)(3). 63 “Indeed, it is likely that employees unversed in the intricacies of section 8(a)(3) and interpretative decisions will literally interpret the clause as requiring full membership and all attendant financial obligations, e.g., assessments. At a minimum, they will be confused about their obligations.” 64

58. See supra note 44-45 and accompanying text.
60. Id. at 1036-37.
61. Id. at 1037 (citations omitted).
64. Id. at 1037.
Because employees could reasonably believe that the union-security clause required full membership in good standing, the Board determined that, as part of a union’s duty to fairly represent employees in good faith and honesty, a union has to apprise all employees as to their specific rights and obligations (including the section 7 right to refrain from full union membership). As the union had maintained the clause requiring that employees become and remain “members of the Union in good standing” without informing them that their sole obligation was to pay dues and fees, the Board concluded that the union had breached its fiduciary duty to employees when it failed to inform them of the limits of their obligation, and rejected the model clause in Keystone because that clause contained the same ambiguous phrase at issue in Paramax.

Reviewing the Board’s decision, the United States Court of Appeals for the District of Columbia Circuit found no evidentiary basis for the Board’s finding that the union had engaged in conduct violative of the duty of fair representation.

There [was] not one iota of evidence indicating ‘egregious,’ ‘invidious,’ or ‘improperly motivated’ conduct on the part of IUE in this case. Since its Keystone Coat decision in 1958, the Board [had] accepted as permissible union-security agreements identical to the one at issue in this case. The Board has always has held that, so long as a union does not attempt to enforce the agreement beyond its lawful requirement that employees pay only uniform initiation fees and dues, such agreements are perfectly lawful under section 8(a)(3).

Furthermore, the court indicated that there was no evidence that the union gave unlawful advice to employees regarding the agreement, or that the union had ever tried to enforce the agreement in an unlawful fashion by seeking the discharge or discipline of an employee for failing to pay more than the provision lawfully required.

The court also considered and rejected the employee’s argument

65. See id. at 1037.
66. See id. at 1040.
67. See id. at 1041. Because the clause was not facially unlawful, the Board did not require that the clause be struck from the collective bargaining agreement. The union was ordered to notify each employee in the bargaining unit that they were only obligated to pay the union uniform initiation fees, if any, and dues.
69. Id. at 1538.
70. See id. at 1539.
that, in light of *Pattern Makers'* and *Beck*, "any union-security agreement requiring 'membership in the union in good standing' or even simply 'membership in the union,' is facially invalid."71 The court reasoned that the Supreme Court's decisions did not compel the conclusion that such union-security agreements are illegal on their face.72 *Beck* dealt with "the level of dues an employee may lawfully be required to pay under a union-security agreement,"73 while *Pattern Makers'* held that a union "may not require full union membership as a condition of employment and may not restrict an employee's right to resign from full membership in the union. Neither case has anything to do with what language is permissible in a union-security agreement and, as such, neither case supports Ferriso's claim."74

In *Bloom v. NLRB* ("*Bloom I*"),75 the employer-union collective bargaining agreement contained the following union-security clause: "[a]ll Employees of the Employer subject to the terms of this Agreement shall, as a condition of continued employment, become and remain members in good standing in the Union, and all such Employees subsequently hired shall make application and become members of the Union within thirty-one (31) days."76

Implementing this clause, the employer withheld union dues and initiation fees from an employee's paycheck without the employee's authorization.77 Thereafter, the union sent a letter to the employee requesting that he sign a union authorization card and a voluntary dues checkoff card.78 The employee asked the union for information on how union dues were spent.79 In response, the union provided him with data on union expenditures, but did not indicate the percentage of dues and

71. Id. at 1539.
72. See id.
73. *International Union of Elec. Workers*, 41 F.3d at 1539.
74. Id.
76. Id. at 1002.
77. See id.
78. A dues checkoff card or authorization allows an employer to deduct union dues directly from the paycheck of an employee and to remit those funds to the union. The union is relieved of the administrative burden of collecting dues on a periodic basis from employees. See THE DEVELOPING LABOR LAW, supra note 24, at 1547; see also JULIUS G. GETMAN ET AL., LABOR MANAGEMENT RELATIONS AND THE LAW 361 (2d ed. 1999) ("Most employers are willing to grant a checkoff provision. It is an easy way to demonstrate willingness to deal fairly with the union, and its institution prevents the disruption that might result from union efforts to collect dues during working time.").
79. See *Bloom I*, 30 F.3d at 1002.
fees spent on nonrepresentational activities. Nor did they advise the employee that he could object to nonrepresentational expenditures and could be charged only for a percentage of dues spent on representational functions. The union did tell the employee, however, that the labor agreement required that he become a member of the union and that the union would request his discharge if he did not apply for membership and complete a dues checkoff card. The employee filed unfair labor practice charges against the employer and the union with the NLRB alleging, inter alia, that the enforcement of a provision requiring employees to become and remain union members in good standing as a condition of employment violated the NLRA. While those charges were pending, the employer, the union, and the NLRB’s General Counsel entered into settlement agreements approved by the NLRB over the employee’s objection.

The United States Court of Appeals for the Eighth Circuit concluded that the NLRB should not have approved the settlement agreements. Citing the Supreme Court’s decisions in Pattern Makers’ and Beck, the Eighth Circuit reasoned that an employee unfamiliar with those Court decisions is likely to conclude that the clause requires exactly what it says—'[membership] in good standing in the Union.' We fail to see how an employee can discern from such language that he cannot be terminated if he does not wish to become a formal, full-fledged union member burdened with all the obligations of union membership and subject to the full reach of the union’s disciplinary measures.

The union literally interpreted the union-security clause and threatened the employee’s job if he did not become a member of the union. The court concluded that such a threat is not permitted by section 8(a)(3) and “the settlement agreements are inadequate, for they do not delete the misleading union security clause that the charged parties unlawfully interpreted and applied.” Accordingly, the court called for ex-

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80. See id.
81. See id.
82. See id.
83. See id.
84. See Bloom I, 30 F.3d at 1005.
85. See id.
86. Id. at 1004.
87. See id.
88. Id. The court also rejected the NLRB’s argument that the settlement agreements remedied the alleged violations because the employer and the union agreed to post notices, for sixty
punction of the union-security clause and remanded the case to the NLRB.99

On remand, the Board approved the parties’ second revised settlement agreements that provided for the expunction from the union-security clause of the phrase “members in good standing” and the substitution of a new clause requiring employees to “become and remain members in the Union” with an accompanying explanation of the requirements of union membership.90 The decision on remand was reviewed by the Eighth Circuit,91 which noted that the first sentence in the substitute union-security clause provided that employees “shall, as a condition of continued employment, become and remain members in the Union, and all such employees subsequently hired shall become members of the Union within thirty-one (31) calendar days.”92 The court concluded that “[t]his language is not simply misleading and coercive, it is repugnant to the Supreme Court’s pronouncements in Beck and Pat-

90. See id. at 1005. The flaw in the notice, according to the court, was the implication that employees could be required as a condition of their employment to pay all union dues and fees. This implication is contrary to Beck’s holding that employees can insulate themselves from discharge by paying that portion of dues and fees attributable to a labor organization’s representational activities. See id. (citing Beck, 487 U.S. at 762-63). Furthermore, the court was concerned that the settlement agreements did not address the ways in which employees would be informed about the lawful extent of their obligations to the union after the sixty-day posting period had expired. “Thus, because a literal application of the ‘member in good standing’ language is unlawful, posting a temporary notice stating that the collective bargaining agreement will not be enforced as it is drafted is not sufficient to protect . . . employees’ section 7 right to refrain from union activities.” Id. at 1005.

91. See Bloom v. NLRB, 153 F.3d 844 (8th Cir. 1998) (“Bloom II”).

92. Id. at 850.
tern Makers' and is in direct conflict with our mandate in Bloom I.”

Even though no employee can be required to join a union, “this provision turns truth upon its head and informs those it governs that all employees are required to become and remain union members.” The court also pointed out that the qualifications in the clause’s second sentence set forth “nothing from which an employee might possibly glean the knowledge that he may decline to join the union. In any event, no subsequent qualifying language, however cleverly crafted, should be deemed sufficient to negative the unqualified command expressed in the first sentence of the challenged provision.”

In rejecting the entire clause, the court was concerned that

when an employee who is approached regarding union membership expresses reluctance, a union frequently will produce or invoke the collective bargaining agreement in an attempt to pressure him into signing up. The employee, unschooled in semantic legal fictions, cannot possibly discern his rights from a document that has been designed by the union to conceal them. In such a context, ‘member’ is not a term of ‘art,’ . . . but one of deception.

Taking matters into its own hands, the Eighth Circuit remanded the case to the NLRB with specific instructions to delete the union-security clause in its entirety and to insert into the collective bargaining agreement the following provisions:

No employee shall be required to become or remain a member of the union as a condition of employment.

Each employee shall have the right to freely join or decline to join the union.

Each union member shall have the right to freely retain or discontinue his or her membership.

Employees who decline to join the union may be required, at a minimum, to pay a reduced service fee equivalent to his or her proportion-

93. Id.
94. Id.
95. Id. (footnote omitted).
96. Bloom II, 153 F.3d at 851.
ate share of union expenditures that are necessary to support solely representational activities in dealing with the employer on labor-management issues.

No employee shall be discriminated against on account of his or her membership or non-membership in the union.97

The court also served notice that it would no longer uphold or enforce union-security clauses that did not contain the above-quoted language or its "undiluted equivalent."98

Additional examples of judicial treatment of section 8(a)(3) and union-security clauses may be helpful in coming to a fuller understanding of the problem addressed in this project. In Nielsen v. International Ass'n. of Machinists, Local Lodge 2569,99 an employee claimed that an agency shop clause in his employer’s and union’s collective bargaining agreement was facially invalid under section 8(a)(3) and Beck because a reader of the clause could conclude that there were no exceptions to the duty to pay full dues or their equivalent.100 Rejecting that claim, the court stated that "Beck did not, either explicitly or implicitly, call into question the facial validity of union security clauses."101 Moreover, the court found that there was no evidence that the union acted arbitrarily, discriminatorily, or in bad faith when it negotiated the challenged union-security clause.102 "In the absence of such evidence, it does not violate a union’s duty of fair representation to have such a clause in a collective bargaining agreement."103

A more recent decision, Wegscheid v. Local Union 2911,104 holding that the plaintiffs’ claim was moot,105 discussed what the court termed

97.  Id.
98.  Id.
99.  94 F.3d 1107 (7th Cir. 1996).
100.  The agreement provided that,
[a]s a condition of continued employment, all employees included within the unit described . . . shall either become a member of the Union and pay dues thereto, or in lieu thereof, shall pay an amount equal to the Union’s initiation fee and shall thereafter pay to the Union each month . . . an amount equal to the regular monthly dues and fees in effect for other employees in the bargaining unit who are members of the Union.

Id. at 1108-09.
101.  Id. at 1115.
102.  See id.
103.  Id.
104.  117 F.3d 986 (7th Cir. 1997).
105.  See id. at 991. One count of the plaintiffs’ complaint alleged that union officers told the plaintiffs that, in order to keep their jobs, the plaintiffs would have to join the union and pay full union dues. See id. at 998. The union agreed to refund to the plaintiffs the union dues they had
"the likely effect of the misleading language of the collective bargaining agreement" which was language closely paraphrasing section 8(a)(3)’s first proviso. Concluding that the language was in fact misleading, the court noted that the clause "is a close and accurate paraphrase of the statute, read literally; but . . . the Supreme Court has glossed the statute to change its literal meaning, indeed virtually to invert it."

Read literally, section 8(a)(3) authorizes the collective bargaining agreement to compel all the employees in the bargaining unit to join the union and pay the full union dues. As construed judicially, it authorizes no such thing; all that the collective bargaining agreement can require is the payment of the agency fee. This has been settled law for some time, and the only realistic explanation for the retention of the statutory language in collective bargaining agreements, as the courts have observed, is to mislead employees about their right not to join the union.

The court emphasized that unions and employers have no privilege to incorporate section 8(a)(3)’s language into collective bargaining agreements where doing so misleads employees. "This language does not mean what it says, and if its inclusion without appropriate qualification misleads employees, either by itself or in conjunction with other misleading representations, the union cannot hide behind the fact that it is, after all, the words of Congress that it is repeating."

A facial invalidity claim was at issue in the Sixth Circuit's decision in Buzenius v. NLRB. "A union-security clause required employees to paid and to notify all employees of their right to pay an agency fee and not join the union and pay full dues, and that count was settled and dismissed with prejudice by agreement of the parties. See id. The settlement made the case moot, the Seventh Circuit concluded, because the plaintiffs did not claim on appeal that complete relief required a change in the collective bargaining agreement. See id. at 991. In other words, eliminating the challenged language in the agreement would not benefit the plaintiffs, even though other employees may have benefitted. See id. Because the plaintiffs had obtained all of the relief they required such that they would not be misled, a decision by the court as to the misleading language in the collective bargaining agreement would not affect their tangible interests. See id. Thus, and because the case became moot with the settlement of the count concerning the union officers' statements, the plaintiffs were left "with only an abstract quarrel with the harmless-harmless to them, at any rate-language of the collective bargaining agreement." Id.

106. See id. at 990.
107. Id.
108. Id. (citations omitted).
109. Wegscheid, 117 F.3d at 990.
110. Id. at 991.
become and remain ‘members of the Union in good standing’ as a condition of continued employment, without concurrent definition [of that phrase].” An employee covered by the clause resigned from the union and, asserting his Beck rights, objected to financially supporting the union’s non-collective bargaining activities. His resignation was ignored by the union and the deduction of money from his paycheck continued. The Board ruled that the union’s post-resignation conduct violated section 8(b)(1)(A), but refused to order the union to expunge or modify the union-security clause.

On appeal to the Sixth Circuit, the employee’s arguments were that the union-security clause misled employees with regard to their obligations as defined by the Supreme Court, that the “clause [was] facially invalid[,] and [that] the Board abused its discretion in failing to order the expunction [of the clause] from the CBA [collective bargaining agreement].” The Sixth Circuit agreed, noting that “[m]embership’ as used in § 8(a)(3), however, does not mean membership in the colloquial sense, i.e., formal union membership.” Noting that the Supreme Court had not squarely faced the issue of the permissible language of a section 8(a)(3) union-security clause at the time of its decision, the Sixth Circuit failed to conclude that the Court’s silence validated a “membership in good standing” clause without a contractual explanation. Although employees are free to join or refuse to join a union, a clause containing the “membership in good standing” language “leaves employees with the distinct impression that they are not free to make that choice. The plain language of such clauses is clear—join the union or be fired.”

In addition, the court said employees seeking to ascertain their rights under section 8(a)(3) would have to consult extraneous sources as well as subsequently posted temporary or one-time written notices. Notices would not remedy the problem since “the union-security clause, which cannot mean what it says and cannot be applied as drafted, remains in the [collective bargaining agreement] . . . . We cannot agree

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112. Id. at 788.
113. See id. at 789.
114. See id.
115. See id. at 789; see also Weyerhauser Paper Co., 320 N.L.R.B. at 349.
116. Buzenius, 124 F.3d at 789.
117. Id. at 790.
118. See id. at 791.
119. Id. at 792.
120. See id. at 793.
with such a result."\textsuperscript{121} In reaching that conclusion, the court recognized that Congress had sanctioned the use of union-security clauses through section 8(a)(3), and also recognized that a clause requiring "membership in good standing" comported with the actual meaning of that section.\textsuperscript{122} However, "§ 8(a)(3) does not mean what it literally says."\textsuperscript{123} Moreover,

[the Union has provided no legitimate reasons explaining why it needs to include 'membership in good standing' language, without further definition, in the [labor agreement]. Nor has the Union explained how requiring that the clause be modified to reflect § 8(a)(3)’s true meaning and employees’ true obligations would impose an undue hardship.]\textsuperscript{124}

Concluding that “the union may not hide behind § 8(a)(3) to justify this practice,”\textsuperscript{125} the court held that the Board abused its discretion in refusing to order that the unlawful language either be modified or removed from the collective bargaining agreement.\textsuperscript{126}

Also of note are the views of former NLRB Chairman William Gould.\textsuperscript{127} During his tenure on the Board, Gould argued that a valid union-security clause “must define membership as only the obligations to pay periodic dues and initiation fees related to representational costs.”\textsuperscript{128} Absent this definition, employees are misled “into believing that they can be terminated if they do not become formal, full-fledged union members.”\textsuperscript{129} Accordingly, Gould would require unions and employers to revise their labor agreements to include the foregoing definition of membership, and would refund dues and initiation fees to employees where it is shown that they became members because of an unlawful union-security clause.\textsuperscript{130}

In a 1998 opinion, Chairman Gould noted that “many workers and employers do not understand that ‘membership’ is what the Supreme

\textsuperscript{121} Buzenius, 124 F.3d at 793.
\textsuperscript{122} See id.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} See Buzenius, 124 F.3d at 793.
\textsuperscript{127} See General Drivers Union, Local No. 160 (Monson Trucking, Inc.), 324 N.L.R.B. 933, 938 (1997) (Gould, Chairman, concurring).
\textsuperscript{128} Id.
\textsuperscript{129} Id. at 939
\textsuperscript{130} See id. at 940; see also Local 443, Int’l Bhd. of Teamsters (Conn. Limousine Service, Inc.), 324 N.L.R.B. 633, 638 n.1 (1997) (Gould, Chairman, dissenting in part) (stating that union-security clauses requiring employees to become “members of the Union in good standing” are facially invalid).
Court has defined it to be in its 1963 *General Motors* holding.\(^{131}\) Notwithstanding the Court’s statement that full union membership cannot be lawfully required as a condition of employment, “neither unions, employers, nor the Board have undertaken to change or refine the standard language of most union-security clauses.”\(^{132}\) The chairman blamed the Board for its failure to act and for its role as an accomplice in not clearly advising employees of their rights.

> [T]he Board’s failure to do more to correct the misimpression of this term has allowed unions and employers to perpetuate it, and thus reap the benefits of the confusion over the use of the word “membership” in union-security clauses. By failing to require the parties to accurately define this word, the Board has permitted unions and employers to mislead the employees it represents into believing that they must join the union or lose their jobs. Any such scheme to keep employees uninformed about their rights is at odds with traditional concepts of trade unionism, that is, the protection and defense of the worker from exploitation and unfair or arbitrary treatment. In this regard, unions and employers have been permitted to sow confusion to the disadvantage of those which unions have a duty to represent fairly, and the Board . . . continues to be their accomplice.\(^{133}\)

To address and solve this problem, Chairman Gould proposed the following model union-security clause drafted to inform “the reader—lay people, lawyers, and labor relations experts alike—that ‘member’ as used therein is a term of art that requires only a financial commitment from the employee.”\(^{134}\)

On or after the thirtieth day . . . following the beginning of employment, the effective date of this agreement, or the execution date of this agreement, whichever is later, every employee covered by this agreement shall, as a condition of employment, become and remain a member of the Union. Membership as used herein shall mean only the obligation to pay periodic dues and initiation fees uniformly required, or, in the event that the employee objects to the payment of full dues and initiation fees, only the obligation to pay periodic dues and initiation fees related to representational costs.\(^{135}\)


\(^{132}\) Id.

\(^{133}\) Id.

\(^{134}\) Id. at 347.

\(^{135}\) Id. (emphasis added).
This model union-security clause, while more informative than the misleading clauses discussed in this Part, does not go far enough. The clause refers to union membership as a condition of employment and advises an employee that the only obligation of that membership is to pay periodic dues and initiation fees or, if the employee objects, a fee covering representational costs. Notably absent from Gould’s exemplar is any statement or indication that full union membership is not required; an employee could plausibly read the model clause as requiring some form of membership with a different fee obligation for those who object, not to membership, but to the payment of full dues and fees. As confusion on the issue of whether membership is or is not required may not be clarified by Gould’s model clause, more is required.

III. THE SUPREME COURT’S MARQUEZ DECISION

Section 8(a)(3)’s reference to “membership” was most recently considered in the United States Supreme Court’s decision in Marquez v. Screen Actors Guild, Inc. The Screen Actors Guild (“SAG”), a labor union representing entertainment industry performers, was party to a collective bargaining agreement with Lakeside Productions (“Lakeside”). The labor agreement provided that any performer who worked more than thirty days after her first employment in the motion picture industry was required to become “a member of the Union in good standing,” and had to pay periodic dues and initiation fees required as a condition of acquiring or retaining membership.

Naomi Marquez, a part-time actress, auditioned and was selected for a role in an episode of “Medicine Ball,” a Fox TV series produced by Lakeside. As Marquez had worked for more than thirty days in the

138.  See id.
139.  Marquez v. Screen Actors Guild, Inc., 124 F.3d 1034, 1037-38 (9th Cir. 1997), aff’d, 525 U.S. 33 (1998). “Every performer hereafter employed by any Producer... shall be a member of the Union in good standing.” Id. While Marquez’s action against the union was pending, the parties amended the collective bargaining agreement as follows:
   As defined and applied in this section, the term “member of the Union in good standing” means a person who offers to pay (and if the Union accepts the offer, pays) union initiation fees and dues as financial obligations in accordance with the requirements of the National Labor Relations Act.
   Id. at 1038 n.2. This amended version of the union-security clause was not before the Court in Marquez.
140.  See Marquez, 525 U.S. at 39.
141.  See Over to Congress, WALL ST. J. (Nov. 10, 1998), at A22.
industry, she was required to pay union dues and fees of approximately $500 before she could work for Lakeside. Marquez attempted to make arrangements with SAG which would have allowed her to pay the union fees after she was paid by Lakeside. That attempt was unsuccessful and Lakeside hired another actress to replace Marquez. Marquez filed suit alleging, \textit{inter alia}, that the union had breached its duty of fair representation by negotiating and enforcing a union-security clause requiring union "membership" and the payment of full dues and fees. According to Marquez, the labor agreement should have contained language informing her of her \textit{General Motors} right not to join the union and advising her of her additional \textit{Beck} right to pay only for the union's representational activities.

The narrow question addressed by the Supreme Court asked whether a union breaches its duty of fair representation by negotiating a union-security clause that tracks the language of section 8(a)(3) without explicitly explaining the refinements of that language in \textit{General Motors} and \textit{Beck}. Writing for a unanimous Court, Justice Sandra Day O'Connor concluded that SAG's negotiation of a union-security clause containing language derived from section 8(a)(3) was not arbitrary or in bad faith and did not violate the union's duty of fair representation. The union's negotiation of the union-security clause was "far from arbitrary," Justice O'Connor wrote, for the "clause can be enforced as written, [and] by tracking the statutory language, the clause incorporates all of the refinements that have become associated with that language." The Court's interpretation of section 8(a)(3) in \textit{General Motors} and \textit{Beck} concluded "that the section, fairly read, included the

\begin{itemize}
\item \textbf{142.} \textit{See id.}
\item \textbf{143.} \textit{See Marquez,} 525 U.S. at 39.
\item \textbf{144.} \textit{See id.} at 39. On the day of the filming, SAG's legal counsel faxed a letter to Lakeside stating that the union had no objection to Marquez working in the production. The letter did not save Marquez's job, however, as Lakeside used a replacement in the filming of the episode. \textit{See id.} at 39.
\item \textbf{145.} \textit{See id.} at 40.
\item \textbf{146.} \textit{See id.; see also supra note 26.}
\item \textbf{147.} \textit{See Marquez,} 525 U.S. at 40; \textit{see also supra note 33.}
\item \textbf{148.} \textit{See Marquez,} 525 U.S. at 40.
\item \textbf{149.} \textit{See id.} at 42. The Court did not consider or resolve the issue of whether SAG illegally enforced the union-security clause in requiring Marquez to become a union member or in requiring her to pay dues for non-collective bargaining activities. Nor did the Court decide whether the union breached its duty of fair representation by failing to adequately notify Marquez of her rights under \textit{General Motors} and \textit{Beck}. \textit{See id.}
\item \textbf{150.} \textit{See id.} at 46-47.
\item \textbf{151.} \textit{Id.} at 46.
\item \textbf{152.} \textit{Id.}
\end{itemize}
rights that we found. To the extent that these interpretations are not ob-
vious, the relevant provisions of § 8(a)(3) have become terms of art; the
words and phrasing of the section now encompass the rights that we an-
nounced in General Motors and Beck."153 Because the Court’s inter-
pretation of section 8(a)(3) “incorporates an employee’s right not to ‘join’
the union (except by paying fees and dues) and an employee’s right to
pay for only representational activities, we cannot fault SAG for using
this very language to convey these very concepts.”154

Having concluded that SAG’s conduct was not arbitrary, Justice
O’Connor turned to Marquez’s argument that the union acted in bad
faith by using statutory language to mislead employees about their
rights.155 Two grounds were presented in support of this argument: (1)
that SAG intended to mislead employees, and (2) that the union’s sole
purpose was to mislead.156 Not persuaded by either assertion, Justice
O’Connor concluded that the first ground (union intent to mislead) was
too broad in that Marquez contended that “even if the union always in-
forms workers of their rights and even if it enforces the union security
clause in conformity with federal law, it is bad faith for a union to use
the statutory language in the collective bargaining agreement because
such use can only mislead employees.”157 That argument fails, said Jus-
tice O’Connor, because it is “difficult to conclude that a union acts in
bad faith by notifying workers of their rights through more effective
means of communication and by using a term of art to describe those
rights in a contract workers are unlikely to read.”158

As for the second ground of the bad faith argument—that, in nego-
tiating the union-security clause, the union had no other purpose but to
mislead employees—Justice O’Connor reasoned that the statutory lan-
guage of section 8(a)(3), “which we have said incorporates all of the re-
finements associated with the language, is a shorthand description of
workers’ legal rights. A union might choose to use this shorthand pre-
cisely because it incorporates all of the refinements.”159 The fact that the
union used this language without explaining “all of the intricate rights
and duties associated with a legal term of art” is not bad faith conduct.160

153. Marquez, 525 U.S. at 46.
154. Id. at 46.
155. See id.
156. See id. at 46-47.
157. Id.
158. Marquez, 525 U.S. at 47.
159. Id. at 47.
160. Id.
"The logic of [Marquez’s] argument has no stopping point; it would require unions (and all other contract drafters) to spell out all the intricacies of every term used in a contract. Contracts would become massive and unwieldy treatises, yet there would be no discernible benefit from the increased mass." Concluding "that it may be perfectly reasonable for a union to use terms of art in a contract," the court held that the union did not violate the duty of fair representation in its negotiation of and agreement to the union-security clause.

The court’s unanimous decision validates the term of art reading and interpretation of section 8(a)(3), and stands for the proposition that unions and employers are not required to use language in collective bargaining agreements which accurately reflect the limits of Section 8(a)(3)’s membership requirement. The uninitiated worker who concludes that section 8(a)(3)’s membership requirement means what it says—that employees can be required to join the union as a condition of employment—cannot complain that she was misled or confused by the inclusion of the membership requirement in a union-security clause, for the section, as a matter of law, says and requires, in a “shorthand description of workers’ legal rights,” what it cannot compel. The ordinary worker must somehow know what Supreme Court Justices, NLRB

161. Id. at 47. One stopping point, proposed by Marquez’s counsel at oral argument before the Court, would require a union to explain in detail a union-security clause because that clause is the only part of a collective bargaining agreement in which the interests of unions and employees diverge. See id. Justice O’Connor was not convinced that divergence only occurred in such a clause. In her view, this argument would require unions to incorporate into labor agreements a section detailing a union’s obligations under the duty of fair representation, including court and NLRB decisions. See id. at 48. In addition, she continued, the NLRA provides that employees with religious objections to unions cannot be forced to pay any fees to the union, see 29 U.S.C. Section 169, and, pursuant to 29 U.S.C. Section 158(b)(5), unions cannot require workers to pay discriminatory or excessive fees, see Marquez, 525 U.S. at 48. "In other words, [Marquez’s] proposed stopping point is no stopping point at all. A union’s decision to avoid this slippery slope is not a fortiori a decision made in bad faith." Id.

162. Id.

163. See id. Concurring, Justice Kennedy, joined by Justice Thomas, observed that the Court "[did] not address circumstances in which there [was] evidence that a union-security clause such as this one was intended to deceive or injure workers. Our sole conclusion is that mere recitation of the statutory language does not, without more, violate the duty of fair representation." Marquez, 525 U.S. at 52 (Kennedy, J., concurring). The justice saw "no basis in our holding today for an inference that inclusion of the statutory language is somehow a defense when a violation of the fair-representation duty has been alleged and facts in addition to the bare language of the contract have been adduced to show the violation." Id. at 53 (Kennedy, J., concurring).

164. See id. at 48. (stating that unions need not explain all legal rights and duties associated with the collective bargaining agreements).

165. Id. at 47.
members, certain lawyers and law professors know, namely, that the term "membership" has been glossed, refined, and judicially amended to include rights, duties, and intricacies not found in the NLRA's text and not contained in materials readily accessible to laypersons, like Naomi Marquez, who are told that membership has its privileges—the "privilege" of union membership and the payment of full dues and initiation fees as a condition of working.

IV. A PROPOSED AMENDMENT

Union "membership" pursuant to NLRA section 8(a)(3) is and will continue to be determined by the Supreme Court. Marquez makes it clear that unions and employers may continue to use shorthand and terms-of-art in describing employees' membership obligations. Thus, any change in the statute will have to come from Congress. To that end, the following amendment to section 8(a)(3) (set forth in italics) is proposed:

It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any terms or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (I) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made . . . Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such

166. The NLRB has recently applied Marquez in holding that a union-security provision requiring union membership, with no definition of an employee's obligations, is not unlawful on its face. See Polymark Corp., 329 N.L.R.B. No. 7 (Sept. 1, 1999); Suffolk Banana Co., Inc., 328 N.L.R.B. No. 157, 162 L.R.R.M. (BNA) 1029 (July 29, 1999); see also Kroger, Inc., 327 N.L.R.B. No. 206, No. 9-CA-31116 & No. 9-CB-8672, 1999 WL 196659 (N.L.R.B. Mar. 31, 1999); United Paperworkers Int'l Union, Local No. 987 (Sun Chemical Corp.), 327 N.L.R.B. No. 177, 161 L.R.R.M. (B.N.A.) 1028 (Mar. 24, 1999); Ass'n of Retarded Citizens Employees Union (New York State Ass'n for Retarded Children, Inc.), 327 N.L.R.B. No. 88, No. 3-CB-6109, 1999 WL 39570 (N.L.R.B. Jan. 26, 1999).
membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; And provided further, That any employee covered by such agreement may lawfully refuse to join or remain a member of such labor organization as a condition of employment, and may instead choose to pay to the labor organization a fee for representational services rendered by said organization; that any union-security clause in a collective-bargaining agreement must expressly refer to and advise employees of this alternative to full union membership; that any employee declining membership may not be subjected to discrimination by a labor organization or employer on account of non-membership in a labor organization; and that any labor organization agreeing to the inclusion of a union-security clause in a collective-bargaining agreement must promptly inform employees of the rights and options set forth in this section.

This proposal addresses the problems caused by the current version of section 8(a)(3) and adds to that section the rules, requirements, and principles set forth in the Supreme Court’s rulings in General Motors, Pattern Makers' and Beck, and the NLRB’s decision in California Saw and Knife Works. To the extent that union-security clauses are based on and repeat the current section 8(a)(3)’s misleading “membership” requirement, the proposal addresses that problem by making it clear to employees that section 8(a)(3) does not compel full union membership or the payment of full dues and initiation fees. Additionally, the proposal codifies a union’s existing obligation under its duty of fair representation to inform employees of their rights with respect to union membership or the declination thereof, and reinforces workers’ section 7 right to engage in or refrain from union activities. Implementation of the requirements of the amended section 8(a)(3) can be carried out by the NLRB via a ruling requiring unions and employers to revise current collective bargaining agreements to include the membership requirement and the non-membership alternative.

This proposal will specifically and usefully address a recurring issue of importance to employees subject to union-security clauses requiring “membership” or “membership in good standing.” By amending section 8(a)(3) in a way that allows an employee to read the statute lit-

167. See supra notes 23-32 and accompanying text.
168. See supra note 37.
erally and, most importantly, accurately and not as a term of art, employee free choice and voluntary unionism is protected and promoted. As a result, the law as written is brought into line with the law as it has been construed by the Supreme Court and the NLRB.