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## ARTICLES

# THE NLRA DEFAMATION DEFENSE: DOOMED DINOSAUR OR DIAMOND IN THE ROUGH?

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## INTRODUCTION

With the National Labor Relations Act of 1935 (NLRA),<sup>1</sup> Congress intended to provide private-sector employees with the right to organize collectively for their mutual aid and protection in the workplace.<sup>2</sup> However, the NLRA faces a tsunami of criticism, much of which highlights its inadequacies with respect to protecting collective activity among employees. Scholars have noted that the NLRA has fallen far short of its seventy-four-year-old goal of protecting collective activity.<sup>3</sup> In this regard, it has been referred to as “ossified”<sup>4</sup> and as “a failed regime.”<sup>5</sup> It has been accused of not being able to “keep[] pace with changes in the composition of the U.S. work force and the structure of U.S. production systems” that accompany globalization.<sup>6</sup> In fact, “[v]arious commentators describe the [NLRA] . . . as dead, dying, or at least ‘largely irrelevant to the contemporary workplace’—a doomed legal dinosaur.”<sup>7</sup> Consequently, many labor scholars contend that the NLRA “must be reinvented.”<sup>8</sup>

1. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–69 (2006)). All references to the NLRA in this Article cite to the relevant section of 29 U.S.C.

2. See 29 U.S.C. § 151 (“It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”).

3. See, e.g., Anne Marie Lofaso, *Toward a Foundational Theory of Workers' Rights: The Autonomous Dignified Worker*, 76 *UMKC L. REV.* 1, 62 (2007); Benjamin I. Sachs, *Employment Law as Labor Law*, 29 *CARDOZO L. REV.* 2685, 2685–86 (2008).

4. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 *COLUM. L. REV.* 1527, 1530 (2002) [hereinafter Estlund, *Ossification*].

5. Sachs, *supra* note 3, at 2685–86.

6. See *id.* at 2686 (citing KATHERINE V.W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* 87–119 (2004)).

7. Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 *BERKELEY J. EMP. & LAB. L.* 569, 570 (2007) (citing James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 *N.C. L. REV.* 939, 942 (1996)).

8. Karl Klare, *The Horizons of Transformative Labour and Employment Law*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND*

In light of the NLRA's myriad limitations, some scholars have developed promising proposals to identify new legal bases for protecting collective activity among employees. For example, some scholars advocate for increased state regulation of labor relations to address the NLRA's inadequate protections of collective activity.<sup>9</sup> Alternatively, Benjamin Sachs has highlighted recent efforts to look beyond the NLRA—often referred to as “labor law”—for federal protection of collective activity.<sup>10</sup> He has pointed to federal employment law as the “legal mechanism that protects . . . collective activity from employer interference,” thereby acting “as a substitute form of labor law.”<sup>11</sup> For Sachs, the NLRA's inadequate protection of collective activity<sup>12</sup> has led to a “hydraulic effect,” whereby employees and their advocates are turning to employment laws, rather than the NLRA, to protect collective activity.<sup>13</sup> Sachs illustrates how the anti-retaliation provisions of the Fair Labor Standards Act (FLSA)<sup>14</sup> and Title VII of the Civil Rights Act<sup>15</sup> have protected collective activity among employees in certain circumstances.<sup>16</sup> Unlike the NLRA, these federal employment laws provide private rights of action for employees in federal court and relatively robust remedies for employees who are fired or who face other types of adverse employment actions in retaliation for making employment law complaints.<sup>17</sup> Sachs persuasively makes a case that in order to facilitate collective activity among employees, the remedies and

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POSSIBILITIES 3, 4 (Joanne Conaghan et al. eds., 2002). Other scholars have called for updates to the NLRA. See, e.g., Samuel Estreicher, *Employee Involvement and the “Company Union” Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. REV. 125 (1994); Jeffrey M. Hirsch & Barry T. Hirsch, *The Rise and Fall of Private Sector Unionism: What Next for the NLRA?*, 34 FLA. ST. U. L. REV. 1133 (2007); Lofaso, *supra* note 3.

9. See, e.g., Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355 (1990).

10. See Sachs, *supra* note 3, at 2687.

11. *Id.* at 2688.

12. The move away from the focus on the NLRA is due, in part, to recent limitations on the NLRA's protection of undocumented employees. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 146 (2002) (limiting the remedies available to undocumented immigrant employees who experience NLRA violations). However, in the employment law context, undocumented immigrant employees generally have access to a wider array of remedies. See generally Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497 (2004) (providing a comprehensive discussion of the employment law remedies available to undocumented immigrant employees).

13. Sachs, *supra* note 3, at 2687.

14. 29 U.S.C. § 215(a)(3) (2006).

15. 42 U.S.C. § 2003(a) (2006).

16. Sachs, *supra* note 3, at 2708–21.

17. *Id.* at 2690, 2708–31.

private rights of action available in anti-retaliation employment law cases should also be available in anti-retaliation labor law cases.<sup>18</sup>

While promising, these proposals do not focus on one of the most important threats to collective activity: state defamation<sup>19</sup> lawsuits filed against employees and worker organizations that have engaged in collective activity to improve workplace conditions. Employee speech that is sometimes fiercely critical of and offensive to employers is central to collective activity among employees.<sup>20</sup> In fact, hard-hitting statements and “trash talk” are no strangers to the rough-and-tumble arena of private-sector labor relations. For example, in an Ohio case, an employer brought a defamation claim after a labor union passed out handbills referring to the employer’s general manager as a “Little Hitler” who was running “a Nazi concentration camp.”<sup>21</sup> Even the United States Supreme Court has described private-sector labor disputes as “frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions.”<sup>22</sup> Not surprisingly, employers sometimes bring state defamation suits against employees or worker organizations. These employers, like all defamation plaintiffs, allege that the employees’ statements were falsehoods that were shared with a third party and resulted in harm to the employers’ reputations.<sup>23</sup>

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18. *Id.* at 2746–47.

19. For ease, this Article refers to defamation, slander, and libel as “defamation.” See *Developments in the Law—The Law of Cyberspace*, 112 HARV. L. REV. 1574, 1612 n.9 (1999) (describing defamation and its two types—libel and slander—as “any communication ‘that tends so to harm the reputation of another’”).

20. See John Bruce Lewis & Gregory V. Mersol, *Opinion and Rhetorical Hyperbole in Workplace Defamation Actions: The Continuing Quest for Meaningful Standards*, 52 DEPAUL L. REV. 19, 43 (2002) (“Labor disputes are hotbeds for potentially defamatory statements.”); *Teamsters’ Leaflet May Have Defamed Employer*, 11 NO. 2 GA. EMPL. L. LETTER 1, Sept. 1998 (noting that “a lot of ‘mudslinging’ goes on between the adversaries” during union campaigns).

21. *Yeager v. Local 20, Teamsters*, 453 N.E.2d 666, 667 (Ohio 1983); see also *Pease v. Int’l Union of Operating Eng’rs Local 150*, 567 N.E.2d 614, 616 (Ill. App. Ct. 1991) (describing how a labor union member referred to an employer in a newspaper article as “crazy” and as “dealing with a half a deck”).

22. *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 58 (1966).

23. The elements necessary to prove a defamation claim vary state to state, but scholars identify general trends among the states. See Nat Stern, *Creating a New Tort for Wrongful Misrepresentation of Character*, 53 U. KAN. L. REV. 81, 92 (2004). Stern notes,

A defamatory communication is one that tends so to harm the reputation of another as to lower him in the estimation of the community or to deter persons from associating or dealing with him. To state a cause of action for defamation, the plaintiff must allege that the defendant’s defamatory statement pertained to the plaintiff, was false, and was published with fault to a third person.

While there are no empirical studies of the number of defamation suits in the labor context, observers claim that employer defamation lawsuits are on the rise. In fact, it is widely believed that employers are increasingly bringing defamation lawsuits as employees and their organizations turn to less traditional modes of collective activity through means such as union corporate campaigns and new forms of worker organizations.<sup>24</sup>

This Article explores an underappreciated and promising NLRA protection of collective activity. It elaborates the NLRA's role as a *defense* in state defamation cases. Specifically, this Article explains how the "NLRA defamation defense" frees defendants from some forms of defamation liability when the allegedly defamatory statements are made during labor disputes. The defense has no effect on defamation liability in what this Article refers to as "more egregious" state defamation law cases. However, the defense forecloses liability in "less egregious" state defamation law cases. It makes it harder for defamation plaintiffs to win their cases because it requires them to satisfy a heightened standard of proof.<sup>25</sup> In this way, the NLRA defamation defense limits the ability of defamation lawsuits to serve as "a powerful weapon for shutting up those with whom [one] disagree[s]"<sup>26</sup> in the labor context. In other words, it reduces the likelihood that state defamation law will chill the free flow of speech and collective activity with the threat of monetary awards, sometimes in the millions of dollars.<sup>27</sup> While all parties to

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*Id.* In the vast majority of states, truth is a complete defense to a defamation claim. However, in extremely narrow circumstances, truth is not a complete defense in Massachusetts. *See, e.g., Noonan v. Staples, Inc.*, 556 F.3d 20, 26 (1st Cir. 2009). In *Noonan*, the court stated,

[T]he defendant may assert the statement's truth as an absolute defense to a libel claim . . . . Massachusetts law, however, recognizes a narrow exception to this defense: the truth or falsity of the statement is immaterial, and the libel action may proceed, if the plaintiff can show that the defendant acted with 'actual malice' in publishing the statement.

24. *See, e.g., Maurice Baskin & Herbert R. Northrup, The Impact of BE&K Construction Co. v. NLRB on Employer Responses to Union Corporate Campaigns and Related Tactics*, 19 LAB. LAW. 215, 217 (2003) (noting that employers have developed new litigation strategies to counter union corporate campaigns and that these strategies include common law defamation lawsuits).

25. *See id.* at 218 (explaining that because of the heightened burden of proof, "employers are required to show malice (i.e., that the union had knowledge of the falsity of its statements) . . . [and] are also required to allege special damages, which must be pleaded with specificity").

26. DONALD M. GILLMOR, POWER, PUBLICITY, AND THE ABUSE OF LIBEL LAW 5 (1992) (remarking on the role of defamation lawsuits in the media context).

27. Scholars have noted that Congress, by passing the NLRA, intended to restrict the chilling effects large monetary awards have on collective activity. *See, e.g., Eileen Silverstein, Against Preemption In Labor Law*, 24 CONN. L. REV. 1, 18 (1991) (commenting that, when enacting the NLRA, "Congress eschewed other

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labor disputes who face defamation claims can take advantage of the NLRA defamation defense, this Article focuses on the use of the defense by employees and both traditional and non-traditional worker organizations to highlight an important aspect of the NLRA's protection of collective activity.<sup>28</sup>

This Article, thus, redirects our gaze back to federal labor law—in particular the NLRA—as a source of protection for both traditional and new forms of collective activity among employees. It uncovers the NLRA's relevancy and adaptability to new workplace dynamics in a largely overlooked, but critical area outside of the National Labor Relations Board's (NLRB) domain: state defamation lawsuits filed against employees and worker organizations engaged in collective activity. It argues that the NLRA has the potential to protect collective activity and remain relevant through its role as a defense in state defamation lawsuits against employees and worker organizations engaged in *new* forms of collective activity. In this way, this Article joins the scholarship of Ellen Dannin and others that shows how some aspects of the oft-criticized NLRA, even as currently written, have hidden potential to protect collective activity.<sup>29</sup>

Part I of this Article describes the emergence and sources of the NLRA defamation defense within the broader context of the NLRA's speech policies and protections of collective activity. This Part elaborates the Supremacy Clause underpinnings of the defense. Part II illustrates the underappreciated aspects of the defense's protection of collective activity among employees. It does so with an analysis of all trials and summary judgment motion decisions referencing the NLRA defamation defense available through the LEXIS legal database since the Supreme Court established the defense forty-two years ago. Part III demonstrates the unrealized potential of the NLRA defamation defense and elaborates how the

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compensatory and punitive remedies on the ground that collective bargaining cannot flourish in an environment of lingering acrimony and large monetary awards”).

28. While the remainder of the Article focuses on defamation suits against employees and worker organizations engaged in collective action, the arguments for the breadth of the defense's application apply equally to employers who face defamation suits in the labor context. For an example of a case in which the court applied the NLRA defamation defense to union-plaintiff defamation claims against an employer, see *Tosh v. Buddies Supermarkets, Inc.*, 482 F.2d 329 (5th Cir. 1973). For employer free speech arguments and a critique of existing restrictions on employer speech, see generally Shawn J. Larsen-Bright, Note, *Free Speech and the NLRB's Laboratory Conditions Doctrine*, 77 N.Y.U. L. REV. 204 (2002).

29. See generally ELLEN DANNIN, *TAKING BACK THE WORKERS' LAW: HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS* (2006) (developing a litigation strategy to reinvigorate the NLRA).

defense may apply broadly to a wide range of new collective action strategies and new actors on the workplace-relations scene. For instance, this Part illustrates that the defense has the potential to reach union corporate campaigns as well as the collective activity of emergent worker organizations, such as worker centers, which increasingly serve as vehicles for low-wage and immigrant workers to improve their workplaces. Finally, Part IV assesses recent proposals to enhance state regulation of workplace relations and highlights the unintended perils they may create for the NLRA defamation defense.

### I. THE NLRA DEFAMATION DEFENSE

Prior analyses of free speech and collective activity in the NLRA context largely neglect what this Article will refer to as the “NLRA defamation defense.”<sup>30</sup> The defense, and the free speech it promotes, has its origins in the U.S. Constitution’s Supremacy Clause.<sup>31</sup> Because the federal law is “the supreme Law of the Land,” the Constitution blocks certain state laws from operating when they may conflict in some way with federal law.<sup>32</sup> In other words, federal law—in this instance, the NLRA—“preempts” conflicting state laws in some circumstances.<sup>33</sup> With its roots in Supreme Court interpretations of the Supremacy Clause, the NLRA defamation

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30. This is due, in part, to the fact that much free speech and collective activity analysis focuses largely on NLRB proceedings and the First Amendment, rather than on lawsuits outside of the NLRB. See, e.g., Cynthia L. Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921 (1992) [hereinafter, Estlund, *Employee Interests*]; Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356 (1995); Kate E. Andrias, Note, *A Robust Public Debate: Realizing Free Speech in Workplace Representation Elections*, 112 YALE L.J. 2415 (2003); Kate L. Rakoczy, Comment, *On Mock Funerals, Banners, and Giant Rat Balloons: Why Current Interpretation of Section 8(b)(4)(ii)(B) of the National Labor Relations Act Unconstitutionally Burdens Union Speech*, 56 AM. U. L. REV. 1621 (2007).

31. U.S. CONST. art. VI, cl. 2.

32. See *id.* (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

33. See David L. Gregory, *The Labor Preemption Doctrine: Hamiltonian Renaissance or Last Hurrah?*, 27 WM. & MARY L. REV. 507, 508 (1986) (“[T]he labor preemption doctrine . . . applies the federal preemption principles of the supremacy clause to labor relations issues.”); see also *Chamber of Commerce v. Brown*, 128 S. Ct. 2408, 2412 (2008) (describing the NLRA’s dual preemption doctrines and stating that “*Garmon* pre-emption . . . is intended to preclude state interference with the [NLRB’s] interpretation and active enforcement of the integrated scheme of regulation established by the NLRA,” and that “*Machinists* pre-emption[] forbids both the [NLRB] and States to regulate conduct that Congress intended [to] be unregulated” (internal quotation marks omitted) (citing *Lodge 76, Int’l Ass’n of Machinists v. Wis. Employment Relations Comm’n*, 427 U.S. 132, 140 (1976))).

defense is a judicially-created doctrine.<sup>34</sup> One will not find the defense by reading through the NLRA itself. In fact, the text of the NLRA is entirely silent with respect to its preemptive effect on potentially overlapping state laws, including defamation laws.<sup>35</sup> As one labor law scholar has noted, “Congress provided the tune, and left the lyrics partly to judicial improvisation.”<sup>36</sup>

There is an evident conflict between federal labor law, here embodied in the NLRA, and state defamation law. On the one hand, it is widely acknowledged that the NLRA promotes statutory free-speech policies that may go beyond what the First Amendment requires.<sup>37</sup> In *Chamber of Commerce v. Brown*,<sup>38</sup> the Supreme Court recently acknowledged that it has “characterized this policy judgment, which suffuses the NLRA as a whole, as ‘favoring uninhibited, robust, and wide-open debate in labor disputes,’ stressing that ‘freewheeling use of the written and spoken word . . . has been expressly fostered by Congress . . . .’”<sup>39</sup> The Supreme Court and scholars have repeatedly acknowledged that speech is important to employees’ NLRA section 7 right to “engage in concerted activities to persuade other employees to join for their mutual aid and protection,”<sup>40</sup> and to their NLRA section 9 right to share “information and opinions” before a NLRB-supervised election to determine whether a labor organization will serve as their

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34. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 239–40 (1959) (stating that the NLRA “inevitably gave rise to difficult problems of federal-state relations” in part because it was “drawn with broad strokes” and therefore “the details had to be filled in, to no small extent, by the judicial process”).

35. See 29 U.S.C. §§ 151–69 (2006); see also *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 58 (1966) (“Our task is rendered more difficult by the failure of the Congress to furnish precise guidance in either the language of the [NLRA] or its legislative history.”); *Garner v. Teamsters Local 776*, 346 U.S. 485, 488 (1953) (“The [NLRA] . . . leaves much to the states, though Congress has refrained from telling us how much.”).

36. Thomas S. Currier, *Defamation in Labor Disputes: Preemption and the New Federal Common Law*, 53 VA. L. REV. 1, 29 (1967).

37. While I focus here on statutory free speech rights, the NLRA’s free speech policies undoubtedly analogize to the First Amendment. See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1782 (2004) (stating that while “free speech ideas have been incorporated into some dimensions of statutory labor law, most of labor law proceeds unimpeded by the First Amendment”).

38. 128 S. Ct. 2408 (2008).

39. *Id.* at 2414 (quoting *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 272–73 (1974)).

40. *Austin*, 418 U.S. at 277 (quoting *NLRB v. Drivers Local 639*, 362 U.S. 274, 279 (1960)); see also 29 U.S.C. § 157; Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 737 (1997) (noting that NLRA section 7 protects “some rough and abusive language . . . as part of the inevitable high emotions that accompany labor disputes”).

collective bargaining representative.<sup>41</sup> In 1947, when Congress passed the Labor Management Relations Act,<sup>42</sup> amending the NLRA, it added a specific provision protecting certain aspects of speech from government restraint.<sup>43</sup> While the 1947 Taft-Hartley Amendments are often viewed as pro-employer amendments,<sup>44</sup> they also provide a little-noticed protection of employee and labor union speech. NLRA section 8(c) clarifies that “views, argument, or opinion” cannot be the basis of a NLRA unfair labor practice “if such expression contains no threat of reprisal or force or promise of benefit.”<sup>45</sup> As the Supreme Court recently stated in *Brown*, NLRA section 8(c) “protects speech by both unions and employers from regulation by the NLRB.”<sup>46</sup>

On the other hand, states have a longstanding and broad interest in protecting the reputations of their citizens from defamatory speech regardless of the context.<sup>47</sup> Defamatory speech, thus, is a traditional area of local, rather than federal, concern. In 1966, the Supreme Court acknowledged this federal-state tension, stating that, because “[l]abor disputes are ordinarily heated affairs[,] the language that is commonplace there might well be deemed actionable” as defamatory in some state courts.<sup>48</sup>

Before 1966, the majority of lower courts resolved this federal-state tension through total preemption of state defamation law.<sup>49</sup> In other words, courts largely interpreted the NLRA to require complete protection of labor speech from liability under state defamation law. The Supreme Court’s 1959 decision in *San Diego Building Trades*

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41. See *Austin*, 418 U.S. at 277 n.12; see also 29 U.S.C. § 159.

42. Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-44, 167, 171-87).

43. In the comments to § 158 of the U.S. Code, Congress provided that the “Act June 23, 1947, amended section . . . by inserting provisions protecting the right of free speech for both employers and unions.” See 29 U.S.C. § 158.

44. James A. Gross, *Worker Rights as Human Rights: Wagner Act Values and Moral Choices*, 4 U. PA. J. LAB. & EMP. L. 479, 482-84 (2002).

45. 29 U.S.C. § 158(c).

46. *Brown*, 128 S. Ct. at 2413; see also DANNIN, *supra* note 29, at 109-10 (providing a persuasive argument that section 8(c) has the potential to protect union speech).

47. States, as part of their police powers, have the constitutional authority to regulate some aspects of speech that injure the reputations of their citizens. See *Farmer v. United Brotherhood of Carpenters, Local 25*, 430 U.S. 290, 302-03 (1977); see also *Bill Johnson’s Rests. v. NLRB*, 461 U.S. 731, 742 (1983).

48. *Linn v. United Plant Guard Workers*, 383 U.S. 53, 58 (1966).

49. Currier, *supra* note 36, at 2 n.7 (“A majority of the courts faced with the problem prior to *Linn* took this position.” (citing cases)); see, e.g., *Sullivan v. Day Publ’g Co.*, 239 F. Supp. 677 (D. Conn. 1965); *Oss v. Birmingham*, 399 P.2d 655 (Ariz. 1965); *Chaffeurs Local 150 v. Superior Court*, 228 Cal. App. 2d 452 (Dist. Ct. App. 1964).

*Council v. Garmon*<sup>50</sup> served as a guide for many courts grappling with NLRA preemption in the defamation context. *Garmon* did not specifically address NLRA preemption of state defamation suits but set out a framework to determine when the NLRA preempts state law.<sup>51</sup> In discussing *Garmon* preemption, the Supreme Court has explained that the NLRA requires that “state courts . . . defer to the exclusive competence of the [NLRB] in cases in which the activity that is the subject matter of the litigation is arguably subject to the protections . . . or prohibitions . . . of the [NLRA’s unfair labor practice provisions].”<sup>52</sup> On the other hand, if the activity to be regulated by the state does not arguably fall within the NLRB’s ambit, it is “a merely peripheral concern” of the NLRA and is not preempted.<sup>53</sup> The lower courts largely applied *Garmon* to find that state defamation law trespassed upon the NLRB’s authority to regulate speech in the labor context.<sup>54</sup>

In its 1966 decision in *Linn v. United Plant Guard Workers, Local 114*,<sup>55</sup> the Supreme Court disagreed with the majority of lower courts and established a new type of NLRA preemption: the NLRA defamation defense.<sup>56</sup> A bare majority of Supreme Court justices struck a middle ground between requiring total preemption of defamation suits and allowing states free reign in this area.<sup>57</sup> *Linn* involved an allegedly defamatory leaflet that was circulated during a union organizing effort at Pinkerton’s Detective Agency in Detroit, Michigan.<sup>58</sup> The leaflet said:

- United Plant Guard Workers now has evidence
- A. That Pinkerton has 10 jobs in Saginaw, Michigan.
  - B. Employing 52 men.
  - C. Some of these jobs are 10 yrs. old!
  - (8) Make you feel kind sick & foolish.
  - (9) The men in Saginaw were deprived of their *right to vote* in three N.L.R.B. elections. Their names were not submitted [*sic*]. These

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50. 359 U.S. 236 (1959).

51. See *Int’l Longshoremen’s Ass’n v. Davis*, 476 U.S. 380, 381 (1986) (“[*Garmon*] set forth a general standard for determining when state proceedings or regulations are preempted by the [NLRA].”).

52. *Linn*, 383 U.S. at 60 (quoting *Local 100 of United Ass’n of Journeymen and Apprentices v. Borden*, 373 U.S. 690, 693–94 (1963)).

53. *Garmon*, 359 U.S. at 243.

54. See *Currier*, *supra* note 36, at 2 n.7.

55. 383 U.S. 53 (1966).

56. See *id.* at 64–65 (ruling that “state remedies for libel” would be permitted only when “the complainant can show that the defamatory statements were circulated with malice and caused him damage”).

57. See *Linn*, 383 U.S. 53 (5-4 decision).

58. *Id.* at 55–56.

guards were voted into the Union in 1959! These Pinkerton guards were *robbed* of pay increases. The Pinkerton managers [*sic*] were *lying* to us—all the time the contract was in effect. No doubt the Saginaw men will file criminal charges. Somebody may go to Jail!<sup>59</sup>

Linn, one of the managers, sued several employees and the union for one million dollars in damages pursuant to state defamation law.<sup>60</sup> The defendants argued that the NLRA preempted the state defamation suit entirely.<sup>61</sup>

After considering *Garmon*'s preemption doctrine, the *Linn* Court concluded that total preemption was not merited because states have a strong interest in regulating more egregious forms of defamation against their citizens<sup>62</sup> and this type of state regulation had “no relevance to the [NLRB]'s function.”<sup>63</sup> In other words, the Court concluded that states did not always have to defer to the exclusive competence of the NLRB because state defamation law addresses a harm (reputational damage) that is separate from the harms addressed by the NLRB (unfair labor practices).<sup>64</sup> After determining that the NLRB's role would not be injured, however, the *Linn* Court went on to conclude that the NLRA (and therefore the Supremacy Clause) required some circumscription of state defamation law in the labor context.<sup>65</sup> The Court reasoned that state regulation of allegedly defamatory statements during labor disputes must be limited in order to avoid “dampen[ing] the ardor of labor debate and truncate[ing] the free discussion envisioned by the [NLRA].”<sup>66</sup> The Court also sought to decrease the likelihood that defamation suits, which sometimes lead to “excessive damages,” would be “used as weapons of economic coercion.”<sup>67</sup>

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59. *Id.* at 56 (alterations in original).

60. *Id.*

61. *Id.*

62. *Id.* at 60–61.

63. *Id.* at 63.

64. *See id.* (reasoning further that “[t]he malicious publication of libelous statements does not in and of itself constitute an unfair labor practice” because the statements may not be sufficiently “coercive or misleading” to constitute a NLRA unfair labor practice); *see also* Gottesman, *supra* note 9, at 382 (noting that defamation preemption cases are not treated with standard *Garmon* analysis in part because “the state is enforcing a general law that happens to be applicable in a labor dispute, not a law focused specifically on labor relations”).

65. *Linn*, 383 U.S. at 64.

66. *Id.*; *see also* Healthcare Ass'n v. Pataki, 471 F.3d 87, 98 (2d Cir. 2006) (“*Linn* held that state defamation laws would be preempted by federal labor law if the defamation laws did not require malice and injury; otherwise, the defamation laws might allow ‘unwarranted intrusion upon free discussion envisioned by the [NLRA].’” (quoting *Linn*, 383 U.S. at 65)).

67. *Linn*, 383 U.S. at 64.

In resolving the tension between the state's interest in protecting its citizens from "defamatory attacks" and the NLRA's promotion of speech,<sup>68</sup> the *Linn* Court concluded that the NLRA requires a limitation on state defamation law in the labor context.<sup>69</sup> Citing NLRA section 8(c) as well as the NLRA's general promotion of free speech, the Court reasoned that requiring a heightened standard of proof—in other words, preempting some *less egregious* state defamation cases—struck a delicate balance between state defamation law and the NLRA.<sup>70</sup> The *Linn* Court borrowed the heightened *New York Times Co. v. Sullivan*<sup>71</sup> standard of proof for allegedly defamatory statements made about public officials<sup>72</sup> and applied it to the NLRA arena.<sup>73</sup> The Court in *New York Times* had concluded that, because the allegedly defamatory statements were made about public officials, the First Amendment required a heightened standard of proof.<sup>74</sup> The *Linn* Court was careful to point out that, by referencing the *New York Times* heightened standard of proof, it imported First Amendment principles into the NLRA context "by analogy, rather than under constitutional compulsion."<sup>75</sup> Thus, the NLRA defamation defense was required, not because of the First Amendment, but rather to accord with the NLRA's free speech policies and therefore the Supremacy Clause.

*Linn's* heightened standard of proof for NLRA labor dispute cases requires a defamation plaintiff to show that a defendant's statements were "a deliberate or reckless untruth,"<sup>76</sup> and that the statements caused actual harm.<sup>77</sup> In contrast, state defamation law outside of the labor dispute context often only requires the plaintiff to show that the defendant was negligent in making his or her untruthful statements to a third party and does not require demonstrable proof

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68. *Id.* at 57–58.

69. *See id.* at 64–65.

70. *Id.* at 62–65.

71. 376 U.S. 254 (1964).

72. *Id.* at 267. Three years after the Supreme Court decided *N.Y. Times*, it extended the protection to statements made about public figures. *See Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967).

73. *See Linn*, 383 U.S. at 65.

74. *See N.Y. Times*, 376 U.S. at 279–80 (noting that the First Amendment requires "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not").

75. *Linn*, 383 U.S. at 65.

76. *Id.* at 63.

77. *Id.* at 64–65.

that the statements led to actual harm.<sup>78</sup> As the *Linn* Court declared, during labor disputes, “the most repulsive speech enjoys immunity [from defamation liability] provided it falls short of a deliberate or reckless untruth.”<sup>79</sup> Moreover, according to *Linn*, even deliberate or reckless untruths are not actionable state defamation claims unless the defamation plaintiff can also prove that these untruths led to actual damages.<sup>80</sup>

By establishing this heightened standard and therefore only allowing state defamation law liability in *more egregious* cases, *Linn*’s NLRA defamation defense illustrates a type of statutory “prohibition against punishment or suppression of speech”<sup>81</sup> in the labor context. The defense protects allegedly defamatory statements from liability under state defamation law by requiring that courts adjudicate state defamation claims pursuant to the heightened standard of proof.<sup>82</sup>

In 1974, the Supreme Court further spelled out the NLRA defamation defense in *Old Dominion Branch No. 496 v. Austin*<sup>83</sup> and elaborated upon it through what many courts and commentators refer to as the opinion or hyperbole defense to defamation lawsuits in the labor context.<sup>84</sup> *Austin* involved an ongoing union organizing effort among postal employees.<sup>85</sup> After the postal employees selected the union as their collective bargaining representative, the union continued its efforts to organize the remaining postal employees that had not joined the union. In a newsletter, the union published the names of these remaining employees under the heading, “List of

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78. Several cases demonstrate the difficulty in meeting the heightened standard. See, e.g., *Chi. Dist. Council of Carpenters Pension Fund v. Reinke Insulation Co.*, 464 F.3d 651 (7th Cir. 2006) (upholding a summary judgment dismissal of complainant company’s claim that the union distributed a defamatory handbill); *Davis Co. v. United Furniture Workers*, 674 F.2d 557, 563 (6th Cir. 1982) (reversing a lower court’s decision in favor of the complainant company because the company could not show that the special bulletin distributed by the union was published with actual malice and knowledge of its falsity).

79. *Linn*, 383 U.S. at 63.

80. *Id.* at 63–65.

81. Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 114 (1995) [hereinafter Estlund, *Free Speech*].

82. Regardless of the outcome of a state defamation claim, however, the NLRB may conclude that speech is protected or prohibited pursuant to the NLRA. See *Linn*, 383 U.S. at 71.

83. 418 U.S. 264 (1974) (applying *Linn* to Executive Order No. 11491 and stating that “the same federal policies favoring uninhibited, robust, and wide-open debate in labor disputes are applicable here, and . . . the same accommodation of conflicting federal and state interests necessarily follows”).

84. See, e.g., Lewis & Mersol, *supra* note 20, at 45–46 (“Many courts, following the reasoning of [*Austin*], protected statements made in the context of labor disputes under the ‘hyperbole, rhetoric, epithet’ rationale . . . protecting hyperbole and opinion in labor disputes.”).

85. 418 U.S. at 266.

Scabs.”<sup>86</sup> The newsletter also included the following definition of a scab from “a well-known piece of trade union literature, generally attributed to author Jack London.”<sup>87</sup> The definition stated:

‘The Scab

‘After God had finished the rattlesnake, the toad, and the vampire,  
He had some awful substance left with which He made a scab.

‘A scab is a two-legged animal with a corkscrew soul, a water brain,  
a combination backbone of jelly and glue. Where others have  
hearts, he carries a tumor of rotten principles.

‘When a scab comes down the street, men turn their backs and  
Angels weep in Heaven, and the Devil shuts the gates of hell to  
keep him out.

‘No man (or woman) has a right to scab so long as there is a pool  
of water to drown his carcass in, or a rope long enough to hang his  
body with. Judas was a gentleman compared with a scab.  
For betraying his Master, he had character enough to hang himself.  
A scab has not.

‘Esau sold his birthright for a mess of pottage. Judas sold his Savior  
for thirty pieces of silver. Benedict Arnold sold his country for a  
promise of a commission in the British Army. *The scab sells his  
birthright, country, his wife, his children and his fellowmen for an  
unfulfilled promise from his employer.*

‘*Esau was a traitor to himself; Judas was a traitor to his God; Benedict  
Arnold was a traitor to his country; a SCAB is a traitor to his God,  
his country, his family and his class.*<sup>88</sup>

One of the employees in the “List of Scabs” sued the union pursuant to state defamation law.<sup>89</sup> In approaching this issue, the *Austin* Court reaffirmed *Linn*’s requirement that the defamation plaintiff prove that the defendant recklessly, or knowingly, published an untruth and that the untruth led to demonstrable harm.<sup>90</sup> The Court also clarified that, in the labor context, statements that cannot be “construed as representations of fact,” including “rhetorical hyperbole,” cannot be the basis of state defamation law liability.<sup>91</sup> The Court stated:

“[T]o use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like ‘unfair’ or ‘fascist’—is not to falsify facts.”

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86. *Id.* at 267.

87. *Id.* at 268.

88. *Id.*

89. *Id.* at 268–69.

90. *Id.* at 273.

91. *Id.* at 284, 286.

Such words were obviously used here in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization. Expression of such an opinion, even in the most pejorative terms, is protected under federal labor law.<sup>92</sup>

Applying the standard, the Court determined that the union could not be liable under state defamation law for the "List of Scabs" and its accompanying definition.<sup>93</sup>

Since *Linn* and *Austin*, the Supreme Court has not directly confronted any issues related to the NLRA defamation defense in any other case, but has frequently referenced it in other NLRA preemption cases outside of the defamation law context.<sup>94</sup>

## II. THE NLRA DEFAMATION DEFENSE AND THE PROTECTION OF COLLECTIVE ACTIVITY

The NLRA defamation defense is an important protection of collective activity because it *reduces* the likelihood that state defamation lawsuits will chill the speech that is so critical to collective activity. As labor scholar Thomas Currier argued in the late 1960s, the defense reduces the threat that employers will win state defamation law judgments against labor unions or employees engaged in collective activity.<sup>95</sup> He noted that without the NLRA defamation defense, "the potential size of defamation verdicts and the possibility of frequent resort to state defamation remedies might otherwise truncate free discussion in labor disputes . . . ."<sup>96</sup> According to Currier, while the NLRA defamation defense does not remove the threat of state defamation law entirely, it "reduce[s] the latitude" that courts have and "eliminate[s] at least some of the grosser anomalies that characterize the common law of defamation."<sup>97</sup> This is important because, as other labor scholars noted soon after the Supreme Court established the NLRA defamation defense in 1966, "[f]reedom of expression and healthy debate are equally indispensable and may be throttled by threats of libel and slander suits should they become weapons in industrial conflict."<sup>98</sup>

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92. *Id.* at 284 (quoting *Cafeteria Employees Union, Local 302 v. Angelos*, 320 U.S. 293, 295 (1943)).

93. *Id.* at 286.

94. *See, e.g.*, *Chamber of Commerce v. Brown*, 128 S. Ct. 2408, 2413–14 (2008); *Bill Johnson's Rests. v. NLRB*, 461 U.S. 731, 742 (1983).

95. Currier, *supra* note 36, at 29.

96. *Id.* at 6.

97. *Id.* at 2.

98. Committee on Labor Law of the Federal Bar Council, *Concerning Problems of Defamation and Freedom of Expression in Labor Relations*, 23 INDUS. & LAB. REL.

*Intercity Maintenance Co. v. Local 254 Service Employees International Union*<sup>99</sup> demonstrates the challenge of meeting the heightened standard of proof required by the NLRA defamation defense.<sup>100</sup> *Intercity* involved allegedly defamatory statements that a union made during an organizing campaign among janitors in Rhode Island.<sup>101</sup> In an effort to pressure the janitorial employer, the union sent a letter to a hospital that utilized the janitorial employer's services.<sup>102</sup> Among other things, the letter stated that the janitorial employer "expose[d] its cleaners to chemical and biological hazards including HIV and Hepatitis B virus."<sup>103</sup> According to the court, the union had acted recklessly and had "made scant effort to investigate the veracity of these charges" before including them in the letter.<sup>104</sup> However, even though the defamation plaintiff "succeeded in proving that the defendants . . . [were] lawless, marauding, disingenuous, character assassins who deserve[d] their comeuppance," the defamation claim was not sent to the jury because the plaintiff did not "allege and prove specific or special damages" resulting from the statements.<sup>105</sup> Because there was a labor dispute, the NLRA preempted the less-exacting, more plaintiff-friendly state law standard that would have presumed damages without any proof.<sup>106</sup> Instead, the plaintiffs had to meet the NLRA defamation defense's heightened standard by alleging and proving that the defendant intentionally lied, or acted recklessly, and that the statements led to actual harm.<sup>107</sup>

Empirical studies of news media defamation cases confirm that the heightened standard of proof makes it considerably more difficult for a defamation plaintiff to win his or her case. When such cases are brought by public officials or public figures, the same heightened *New York Times* standard of proof applies as in NLRA defamation defense cases.<sup>108</sup> In an early study still considered definitive with

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REV. 101, 101 (1969); see also Lewis & Mersol, *supra* note 20, at 20 (discussing the effect of defamation lawsuits on collective activity in a more contemporary context).

99. 241 F.3d 82 (1st Cir. 2001).

100. See *id.* at 90 ("[P]laintiffs who endure even malicious libels during a labor dispute must present evidence of harm from defamation in order to recover, notwithstanding the law of states such as Rhode Island in which damages would otherwise be presumed.").

101. *Id.* at 85–86.

102. *Id.*

103. *Id.* at 89.

104. *Id.*

105. *Id.* (internal quotations omitted).

106. *Id.*

107. *Id.* at 89–90.

108. *New York Times Co. v. Sullivan*, 376 U.S. 254, 283–84 (1964) (setting out a heightened standard of proof in defamation claims brought by public officials); *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 65 (1966) (applying the

respect to this issue, scholars compared defamation cases in which courts required the heightened standard of proof (i.e., those brought by public officials or figures) with defamation cases in which courts did not require the heightened standard of proof (i.e., those brought by private citizens).<sup>109</sup> This media study found that a defamation plaintiff was sixty percent less likely to win when the heightened standard of proof was required.<sup>110</sup> More recent studies are consistent with this finding. For example, a national study of summary judgment motions to dismiss defamation cases brought by public figures or public officials showed that courts, applying the heightened standard of proof, dismissed the claims eighty-five percent of the time between 1980 and 1996.<sup>111</sup> However, in that same period, courts dismissed private plaintiff defamation claims through summary judgment motions only sixty-eight percent of the time.<sup>112</sup>

This Author's LEXIS legal database research and coding of all federal and state cases that cite *Linn* (from the date of the *Linn* decision in 1966 through February 22, 2009) further indicates that defendants are highly successful in dismissing defamation claims when the court applies the NLRA defamation defense. While it is important to acknowledge that the vast majority of defamation cases never make it to the LEXIS database,<sup>113</sup> some motions and trials related to the NLRA defamation defense do make it to the database and may provide at least some insight into the usefulness of the defense. Defamation defendants were successful in winning twelve out of nineteen trials that required application of the NLRA

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*N.Y. Times* heightened standard of proof to defamation claims brought in the labor context); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 146–55 (1967) (applying the *N.Y. Times* heightened standard of proof to defamation claims brought by public figures).

109. RANDALL P. BEZANSON, GILBERT CRANBERG & JOHN SOLOSKI, *LIBEL LAW AND THE PRESS: MYTH AND REALITY* 122 (Free Press, 1987).

110. *Id.*

111. David A. Logan, *Libel Law in the Trenches: Reflections on Current Data on Libel Litigation*, 87 VA. L. REV. 503, 510 (2001) (citing Press Release, Media Law Resource Center, New LDRC Study Shows Highest Incidence of Summary Judgment Grants to Defendants in Media Defamation Cases (Aug. 1997), <http://www.medialaw.org/Template.cfm?Section=News&Template=/ContentManagement/ContentDisplay.cfm&ContentID=717>).

112. *Id.* Similarly, between 1983 and 2004, media defendants won 71.4 percent of all motions to dismiss defamation cases that *public* plaintiffs brought against them. Press Release, Media Law Resource Center, *Motions to Dismiss May be Winning Strategy for Media in Libel and Privacy Lawsuits* (Oct. 2004), [http://www.medialaw.org/Content/NavigationMenu/About\\_MLRC/News/2004\\_Bulletin\\_No\\_3B.htm](http://www.medialaw.org/Content/NavigationMenu/About_MLRC/News/2004_Bulletin_No_3B.htm). In contrast, they won only 51.9 percent of all motions to dismiss defamation cases that *private* plaintiffs brought against them. *Id.*

113. For relevant limitations on the use of LEXIS/Westlaw searches in empirical studies, see Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1558–61 (2008).

defamation defense.<sup>114</sup> Moreover, in six out of six trials where the court explicitly rejected the NLRA defamation defense, the defamation defendants lost.<sup>115</sup> Furthermore, defamation defendants were granted summary judgment dismissals before trial in forty-four out of fifty-six attempts.<sup>116</sup> This is particularly notable because courts are reluctant to grant summary judgment dismissals of defamation claims early in litigation, as such cases are highly fact dependent.<sup>117</sup>

While the NLRA defamation defense provides important protection of collective activity among employees, this Article does not argue that the defense provides comprehensive protection of worker organization and employee speech during collective activity. For instance, the defense does not stop employers, employees, or unions from filing lawsuits in response to allegedly defamatory

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114. To find relevant cases, my research assistant and I searched “Federal & State Cases, Combined” on the LEXIS legal database for a citation to *Linn*. We used *Linn*’s numerical citation—“383 U.S. 53”—as our search term. The search yielded 698 cases that cited *Linn*. After reviewing these cases, I then identified a much smaller group of nineteen cases in which the court applied the NLRA defamation defense to a trial. I coded each trial based on the highest court opinion related to the trial. Thus, if a trial outcome was appealed to a higher court, I coded it based on the outcome of the trial on appeal.

115. The coding yielded six trials involving an explicit consideration and rejection of the application of the NLRA defamation defense to a defamation suit involving the workplace. *Hughes v. N. Cal. Carpenters Reg’l Council*, No. A112272, 2007 WL 1448746 (Cal. Ct. App. May 17, 2007); *Hotel and Rest. Employees Union v. Zurzolo*, 233 N.E.2d 784 (Ind. Ct. App. 1968); *J & J Constr. Co. v. Bricklayers & Allied Craftsmen, Local 1*, 631 N.W.2d 42 (Mich. Ct. App. 2001), *rev’d*, 664 N.W.2d 728 (Mich. 2003); *Lundgren v. Pawtucket Firefighters Ass’n Local 1261*, 595 A.2d 808 (R.I. 1991); *Caruso v. Local 690*, 730 P.2d 1299 (Wash. 1987); *Oetzman v. Ahrens*, 427 N.W.2d 421 (Wis. Ct. App 1988).

116. The coding yielded fifty-six summary judgment motion outcomes that applied the NLRA defamation defense. Similar to the trials, each summary judgment motion was coded based on the highest court opinion on that issue. Thus, if a summary judgment motion was appealed, the motion was coded based on the outcome of the motion on appeal. If the summary judgment motion was not appealed but the case later went to trial, the outcome of the summary judgment motion was separately coded, as well as the outcome of the trial. A few summary judgment motions contained mixed results whereby the plaintiff won summary judgment with respect to some of the allegedly defamatory statements and the defendant won summary judgment with respect to other allegedly defamatory statements. In those situations, the summary judgment outcome in favor of the plaintiff was coded, and a summary judgment outcome in favor of the defendant was separately coded. Because nomenclature varies from state to state, a motion to dismiss was coded as a summary judgment motion to dismiss if it was based on something more than solely the complaint. In other words, motions to dismiss based on the plaintiff’s failure to properly plead actual malice in the complaint were not counted as summary judgment motions to dismiss.

117. While the LEXIS data cannot speak to whether these defamation defendants were *more* successful than other defamation defendants where the standard was *not* applied, my data confirms that defamation defendants are highly successful when the defense applies.

statements, thereby imposing litigation costs upon all parties.<sup>118</sup> The NLRA defamation defense also does not protect employees from termination or other adverse employment actions resulting from their allegedly defamatory statements. An employee could only find relief for these adverse employment actions through NLRA unfair labor practice charges at the NLRB<sup>119</sup> or, in some states, through common law causes of action.<sup>120</sup> Nonetheless, the NLRA defamation defense has historically protected collective activity by reducing the likelihood that the threat of state defamation trial awards will hamper speech during collective activity. As this Article elaborates next, the defense also has the potential to apply to new forms of collective activity among employees.

### III. THE CONTINUING RELEVANCE OF THE NLRA DEFAMATION DEFENSE

The NLRA defamation defense has the potential to remain relevant in the face of modern workplace relations and new worker-organizing strategies because it can apply in a wide array of circumstances. *Linn*, *Austin*, and other Supreme Court cases that cite the NLRA defamation defense direct courts to apply a heightened standard of proof to statements made during labor disputes.<sup>121</sup> The NLRA defines “labor dispute” expansively to include “any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether

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118. For a discussion of defamation litigation costs in the media context, see LARRY SABATO, *FEEDING FRENZY* 70 (1991). For a discussion of defamation litigation costs in the labor context, see Paul More, *Protections Against Retaliatory Employer Lawsuits After BE&K Construction v. NLRB*, 25 BERKELEY J. EMPL. & LAB. L. 205, 222 (2004).

119. 29 U.S.C. § 158(a) (2006).

120. See, e.g., Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 332 (2005) (referring to the “dynamic body of wrongful discharge law” in the employment arena).

121. See *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 270–71 (1974) (referring to the NLRA defamation defense as applicable to allegedly defamatory statements “published during labor disputes,” “occurring during labor disputes,” and “made in the course of labor disputes”); *Watts v. United States*, 394 U.S. 705, 708 (1969) (describing the defense as applicable to allegedly defamatory statements “used in labor disputes”); see also *Bill Johnson’s Rests. v. NLRB*, 461 U.S. 731, 741–42 (1983) (stating that “an employer has the right to seek local judicial protection from tortious conduct during a labor dispute”); *Local 926, Int’l Union of Operating Eng’rs v. Jones*, 460 U.S. 669, 681 n.11 (1983) (citing the defense and referring to “a malicious and injurious libel in the course of a labor dispute”); *Farmer v. United Brotherhood of Carpenters, Local 25*, 430 U.S. 290, 300 (1977) (referring to the defense as applicable to “conduct occurring in the course of a labor dispute”).

the disputants stand in the proximate relation of employer and employee.”<sup>122</sup> Similar to the Supreme Court, the United States Courts of Appeals that cite the NLRA defamation defense refer to the standard as broadly applicable to allegedly defamatory statements made “in the context of,” “during,” or “in the course of” a labor dispute.<sup>123</sup>

Additionally, the NLRA defamation defense can apply to defamation suits that spring from labor disputes: (A) even when the NLRB would not protect or would prohibit the allegedly defamatory statements in a separate unfair labor practices proceeding; (B) even when the defamation plaintiff and defamation defendant do not have an employer-employee relationship; and (C) even when the allegedly defamatory statements are not made by or about a NLRA labor organization or its members. Thus, the NLRA defamation defense is an aspect of the NLRA that can adapt to changing circumstances and can remain a relevant source of protection for collective activity.

*A. Applies Even When the NLRB Would Prohibit or Would Not Protect Allegedly Defamatory Speech*

The NLRA defamation defense applies in defamation suits that arise during labor disputes even when the NLRB, through an unfair labor practice proceeding, would not protect employees from adverse employment actions that flow from the statements, or when the NLRB would prohibit the behavior. Employees may seek protection from certain unfair labor practices by filing charges against their employers with the NLRB pursuant to section 8(a) of the NLRA.<sup>124</sup> NLRA section 8(a)(1) declares that it is an unfair labor practice for an employer to coerce or interfere with an employee’s right to engage in NLRA-protected concerted activity.<sup>125</sup> Similarly, NLRA

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122. 29 U.S.C. § 152(9).

123. *See, e.g.*, *Steam Press Holdings, Inc. v. Haw. Teamsters, Local 996*, 302 F.3d 998, 1004 (9th Cir. 2002) (referring to “statements . . . made in the context of a labor dispute”); *Intercity Maint. Co. v. Local 254, Serv. Employees Int’l Union*, 241 F.3d 82, 90 (1st Cir. 2001) (referring to statements made “during a labor dispute”); *Dunn v. Air Line Pilots Ass’n*, 193 F.3d 1185, 1191 (11th Cir. 1999) (referring to statements “published in the context of a labor dispute”); *Fry v. Airline Pilots Ass’n*, 88 F.3d 831, 844 (10th Cir. 1996) (referring to “written materials disseminated in the course of a labor dispute”); *Beverly Hills Foodland, Inc. v. United Food Commercial Workers Union, Local 655*, 39 F.3d 191, 194 (8th Cir. 1994) (referring to statements that “occurred within the context of a ‘labor dispute’”).

124. 29 U.S.C. § 158(a)(1), (3).

125. *See* 29 U.S.C. § 157 (“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 . . . .”); 29 U.S.C. § 158(a)(1) (“It shall be an unfair labor practice for an employer . . . to

section 8(a)(3) makes it an unfair labor practice for an employer to discriminate against employees for engaging in NLRA-protected concerted activity.<sup>126</sup>

Although these NLRA 8(a) provisions provide certain protections, they do not protect every statement made by worker organizations or employees engaged in collective activity. For example, the Supreme Court's 1953 *Jefferson Standard*<sup>127</sup> decision established that NLRA section 8(a) does not protect employees engaged in collective activity from adverse employment actions that flow from disloyal statements that are not sufficiently linked to the underlying labor dispute.<sup>128</sup> Nonetheless, as this Article elaborates upon below, statements may fall under the protection of the NLRA's defamation defense in a state defamation law action even when NLRA section 8(a) does not protect employees from the consequences of these same statements in a NLRB proceeding.

Separately, NLRA section 8(b) provisions prohibit labor organizations from engaging in certain activity. Among other things, NLRA section 8(b) provisions make it an unfair labor practice for a labor organization to restrain or coerce employees and restrict labor organizations from some forms of pressure on employers that are neutral or secondary to the primary dispute.<sup>129</sup> The NLRA section 8(b) unfair labor practice provisions may prohibit labor organizations from making certain statements. However, labor organizations may be shielded from defamation liability in a state proceeding for these same statements if the plaintiff cannot meet the NLRA defamation defense's heightened standard of proof.

The broad reach of the NLRA defamation defense to allegedly defamatory statements that the NLRA's unfair labor practice provisions would not protect, or would prohibit, has its roots in the

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interfere with, restrain, or coerce employees in the exercise of [the employees' NLRA section 7 rights].").

126. See 29 U.S.C. § 158(a)(3) ("It shall be an unfair labor practice for an employer . . . [to discriminate] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.").

127. NLRB v. Local 1229, Int'l Brotherhood of Elec. Workers (*Jefferson Standard*), 346 U.S. 464 (1953).

128. See *id.* at 475–81. In that case, employees made public statements about the poor quality of their employer's television broadcasting after collective bargaining talks broke down. *Id.* at 467–68. The employer fired the employees because they made these statements and the employees filed NLRA section 8(a) unfair labor practice charges. *Id.* at 469. The Supreme Court determined that the employer's termination of the employees did not violate NLRA section 8(a) because the employees were disloyal and the content of the statements was not sufficiently linked to the ongoing labor dispute. *Id.* at 475, 477.

129. See 29 U.S.C. § 158(b).

preemption doctrine. *Linn* extended the NLRA's preemptive reach in the defamation context beyond activities that the NLRB directly regulates pursuant to the unfair labor practice provisions of NLRA sections 8(a) and 8(b).<sup>130</sup> Prior to *Linn*, the *Garmon* decision required NLRA-preemption of state regulation when the activities were "arguably protected or prohibited by"<sup>131</sup> the NLRA's unfair labor practice provisions. It did so in order to protect the NLRB's exclusive role in adjudicating unfair labor practice charges.<sup>132</sup> After considering *Garmon's* preemption doctrine, the *Linn* Court concluded that state regulation of allegedly defamatory statements made during labor disputes had nothing to do with the NLRB's function; therefore, it was unnecessary to make an inquiry into whether the activity would be "arguably protected or prohibited by" the NLRA's unfair labor practice provisions.<sup>133</sup> Instead, the Court declared that the relevant inquiry for courts deciding whether to apply the NLRA defamation defense is *whether the allegedly defamatory statements were made during a labor dispute*.<sup>134</sup> In arriving at its holding, the *Linn* Court explicitly rejected a narrow analytical focus on whether NLRA sections 8(a) or 8(b) would arguably protect or prohibit the allegedly defamatory statements.<sup>135</sup> The lower court had determined that the state defamation claim was NLRA-preempted because, given the content of the statements, they "would arguably constitute an unfair labor practice under Section 8(b)" of the NLRA.<sup>136</sup> However, the *Linn* Court disagreed with the lower court's analysis and redefined the preemption inquiry more broadly as whether the statements were made "during a labor dispute."<sup>137</sup>

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130. See Norton J. Come, *Federal Preemption Since Garmon*, 17 LAB. L.J. 195, 199–201 (1966) (discussing *Linn's* adaptation of *Garmon*).

131. The Supreme Court has referred to *Garmon's* "arguably protected or prohibited by" NLRA preemption standard in a number of cases. See, e.g., *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 110 (1989) (citing *Garmon* and stating that "state jurisdiction over conduct arguably protected or prohibited by the NLRA is pre-empted in the interest of maintaining uniformity in the administration of the federal regulatory jurisdiction"); *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 394 (1986) ("As the *Garmon* line of cases directs, the pre-emption inquiry is whether the conduct at issue was arguably protected or prohibited by the NLRA.").

132. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959) (requiring that state courts "defer to the exclusive competence of the [NLRB] if the danger of state interference with national policy is to be averted").

133. *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 63–64 (1966).

134. See *id.* at 55.

135. *Id.* at 63.

136. *Id.* at 55.

137. *Id.* at 63–65; see also *Bill Johnson's Rests. v. NLRB*, 461 U.S. 731, 742 (explaining that the *Linn* Court held that "an employer can properly recover

Moreover, although the *Linn* and *Austin* Courts were undoubtedly aware of the *Jefferson Standard* decision, they did not limit the reach of the NLRA defamation defense to NLRA section 8(a)-protected statements that are loyal and sufficiently linked to a labor dispute. As mentioned above, the Court explicitly wanted to divorce the *Garmon* “arguably protected or prohibited by” inquiry from the NLRA defamation defense inquiry. Similarly, when setting out the NLRA defamation defense, the Supreme Court did *not* say that the defense applied only if the NLRA section 8(b) provisions would not prohibit those statements. When the Supreme Court decided *Linn* in 1966, and *Austin* in 1974, it was undoubtedly aware of its 1947 amendments to the NLRA, which added section 8(b) and its explicit prohibitions of some labor organization activity.

Another preemption doctrine developed in the NLRA context, commonly referred to as the “*Machinists* preemption doctrine,”<sup>138</sup> similarly illustrates the NLRA’s broad preemptive reach over activities that are not directly regulated through the NLRA’s unfair labor practice provisions. The *Machinists* preemption doctrine acknowledges that the NLRA established “a zone free from all regulations, whether state or federal.”<sup>139</sup> In other words, the NLRA preempts some state laws even if the NLRA takes only a laissez-faire approach to the state-regulated activity and fails to directly regulate it through explicit unfair labor practice protections or prohibitions. Thus, *Linn* and *Austin* preemption of less egregious state defamation claims (the NLRA defamation defense) falls in between the *Garmon* and *Machinists* preemption doctrines because it applies to allegedly defamatory statements (1) that the NLRB *would* separately protect or prohibit through the NLRA’s unfair labor practice provisions, and (2) that the NLRB *would not* separately protect or prohibit, as long as the statements were made during a NLRA labor dispute.

The Supreme Court has recently confirmed that the NLRA preempts state law even when such law does not touch upon an area that is “arguably protected or prohibited by” the NLRA’s section 8(a) and 8(b) unfair labor practice provisions. In *Chamber of Commerce v.*

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damages in a tort action *arising out of a labor dispute* if it can prove malice and actual injury”) (emphasis added)).

138. See *Lodge 76, Int’l Ass’n of Machinists v. Wis. Employment Relations Comm’n*, 427 U.S. 132 (1976).

139. *Chamber of Commerce v. Brown*, 128 S. Ct. 2408, 2417 (2008) (quoting *Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I.*, 507 U.S. 218, 226 (1993); see also *Machinists*, 427 U.S. at 144 (stating that the NLRA intends some activity “to be controlled by the free play of economic forces” (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971))).

*Brown*,<sup>140</sup> the Supreme Court considered both the NLRA's *Machinists* preemption doctrine and the NLRA's speech policies.<sup>141</sup> The Court determined that the NLRA preempted a California state law because it would have excessively limited employers' free speech with respect to "assist[ing], promot[ing], or deter[ring] union organizing."<sup>142</sup> The state law at issue in the case limited the kinds of statements employers could make about unionization but did not necessarily trench upon activity that was "arguably protected or prohibited by" the NLRA's unfair labor practice provisions.<sup>143</sup> In other words, the California law did not directly relate to an area that the NLRA protects or prohibits through its section 8(a) and 8(b) unfair labor practice provisions.<sup>144</sup> The Court concluded that the NLRA preempted the state law entirely because Congress, intending a laissez-faire approach to some aspects of labor relations, largely left uncoercive speech unregulated.<sup>145</sup> Similarly, in *Linn* and *Austin*, the Supreme Court concluded that Congress intended to leave less egregious defamations unregulated by state defamation law.

Finally, the NLRA's definition of "labor dispute," both on the NLRA's face and as interpreted by the Supreme Court in analogous Norris-LaGuardia Act (NLA)<sup>146</sup> cases, in no way limits the NLRA's preemptive reach to activities that are "arguably protected or prohibited by" its unfair labor practice provisions. While the Supreme Court has not spoken directly on the issue in the NLRA defamation defense context, the Court's NLA decisions provide helpful analogies that underscore the irrelevance of the "arguably protected or prohibited by" inquiry.<sup>147</sup> The NLA is analogous to the NLRA because the NLA and NLRA definitions of "labor dispute" are virtually identical and federal courts have interpreted the definitions

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140. 128 S. Ct. 2408 (2008).

141. *Id.* at 2412.

142. *Id.* at 2410, 2417–18.

143. *Id.* at 2412.

144. *Id.* at 2414–15.

145. *See id.* at 2417 (noting that while the NLRB "has policed a narrow zone of speech to ensure free and fair elections," the overwhelming emphasis is on unbounded speech).

146. 29 U.S.C. § 101 *et seq.* (2006).

147. The NLA establishes a rigorous procedure that largely restricts federal courts from issuing an injunction in "a case involving or growing out of a labor dispute." 29 U.S.C. § 104. The NLA states in relevant part that "[n]o court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts: . . . (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence." *Id.*

as consistent with each other.<sup>148</sup> Moreover, similar to the NLRA defamation defense, the NLA's partial protection against injunctions only applies when there is a labor dispute.

In the NLA context, the Supreme Court has clarified that even activity that is "neither protected nor prohibited" by the NLRA's unfair labor practice provisions can fit into the definition of a NLRA or NLA "labor dispute." In *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*,<sup>149</sup> union members participated in a work stoppage in 1981 as a protest against the Soviet Union's invasion of Afghanistan.<sup>150</sup> The employer requested an injunction to end the work stoppage,<sup>151</sup> arguing that "the political motivation underlying the Union's work stoppage" removed the controversy from the NLA's "labor dispute" definition.<sup>152</sup> The employer analogized to the NLRA and reasoned that because the work stoppage was politically motivated, it would not be protected by the NLRA's unfair labor practice provisions and therefore did not qualify as a "labor dispute" under the NLRA or the NLA.<sup>153</sup> The *Jacksonville* Court rejected the employer's argument, stating that "[t]he objective of the concerted activity is relevant in determining whether such activity is [protected or prohibited by the NLRA's unfair labor practice provisions], but *not* in determining whether the activity is a 'labor dispute' under [NLRA section] 2(9)."<sup>154</sup>

*B. Applies Even When No Employer-Employee Relationship  
Exists Between Disputants*

Unlike some aspects of the NLRA, the NLRA defamation defense does not distinguish between primary and secondary labor disputes and applies regardless of whether an employer-employee relationship exists between parties to a dispute. Thus, an employee or worker

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148. See *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 711 n.11 (1982) ("[T]he definition of a 'labor dispute' in § 2(9) of the NLRA, 29 U.S.C. § 152(9), is virtually identical to that in § 13(c) of the Norris-LaGuardia Act, 29 U.S.C. § 113(c), and the two provisions have been construed consistently with one another."); see also Richard Litvin, *Fearful Asymmetry: Employee Free Choice and Employer Profitability in First National Maintenance*, 58 *IND. L.J.* 433, 475 (1983) ("Nothing in the legislative history of the [NLRA] suggests that Congress intended 'terms and conditions of employment' to carry a narrower meaning than it had in Norris-LaGuardia . . .").

149. 457 U.S. 702 (1982).

150. *Id.* at 704–05.

151. The employer argued in part that the work stoppage violated its collective bargaining agreement with the union. *Id.* at 706.

152. *Id.* at 708–09.

153. *Id.* 709–10.

154. *Id.* at 712 n.11.

organization engaged in a labor dispute can assert the NLRA defamation defense in response to a defamation suit even when the allegedly defamatory statements did not target a primary employer. In 1947, Congress amended the NLRA to differentiate between primary disputes and secondary disputes within the broader definition of a NLRA “labor dispute.”<sup>155</sup> Specifically, the addition of NLRA section 8(b)(4) prohibited labor organizations from engaging in certain activities, such as boycotting and picketing, that are directed toward a non-primary employer.<sup>156</sup> NLRA section 8(b)(4)’s publicity proviso clarifies that it does not “prohibit publicity, other than picketing, for the purpose of truthfully advising the public . . . that a product or products are produced by an employer with whom the labor organization has a *primary dispute* and are distributed by another employer . . . .”<sup>157</sup> Thus, NLRA section 8(b)(4) requires the NLRB to distinguish between primary and non-primary labor disputes.<sup>158</sup> However, courts do not have to make such a distinction to apply the NLRA defamation defense to state defamation claims.

Several cases demonstrate how the NLRA defamation defense may be applied even when no employer-employee relationship exists between parties to a dispute. For instance, in *Johnston Development Group, Inc. v. Carpenters Local 1578*,<sup>159</sup> neutral employers brought defamation claims against a union after they successfully won an injunction against the union.<sup>160</sup> The court applied the NLRA defamation defense to the neutral employers’ defamation claim and denied the plaintiffs’ application for relief.<sup>161</sup>

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155. See *Nat’l Woodwork Mfrs. Ass’n v. NLRB*, 386 U.S. 612, 623-26 (1967) (discussing Congress’s 1947 amendments to the NLRA, which differentiated between primary and secondary disputes, as responses to the perception that the NLRA’s “broad immunity” had led to “labor abuses”).

156. See 29 U.S.C. § 158(b)(4) (2006) (describing activities which constitute unfair labor practices for a labor organization).

157. *Id.* (emphasis added).

158. Other sections of the NLRA also require the NLRB to distinguish between primary and secondary disputes. See, e.g., *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (applying NLRA section 8(e) to hold that “employees working for firms with whom a construction union has a primary dispute are protected against secondary picketing designed to force them off their current job”); N. PETER LAREAU, NATIONAL LABOR RELATIONS ACT: LAW & PRACTICE § 12.05 (Matthew Bender, 2d ed. 2009) (“Section 8(g) also does not apply to a union’s picketing at the premises of a health care employer, if the picketing is aimed at the employees of another employer, present on the health care employer’s premises, with whom the union has a primary dispute.”).

159. 712 F. Supp. 1174 (D.N.J. 1989).

160. See *id.* at 1176 (explaining that the NLRB had previously filed an injunction with the court pursuant to 29 U.S.C. § 160(l)).

161. *Id.* at 1184.

Similarly, in *San Antonio Community Hospital v. Southern California District Council of Carpenters*,<sup>162</sup> the United States Court of Appeals for the Ninth Circuit applied the NLRA defamation defense to allegedly defamatory statements made about an entity with which a union did not have a primary dispute.<sup>163</sup> The union had a primary dispute with Best Interiors, a construction subcontractor of San Antonio Community Hospital.<sup>164</sup> To put pressure on the subcontractor, the union displayed a banner outside the hospital that stated in large capital letters that the “medical facility [was] full of rats.”<sup>165</sup> The banner stated in smaller letters that the union had a dispute with Best Interiors.<sup>166</sup> The hospital sued the union, raising state defamation claims and requesting that the court enjoin the union from displaying the banner.<sup>167</sup> The *San Antonio* court found that the hospital met the NLRA defamation defense’s heightened standard of proof on the defamation claim and granted the injunction.<sup>168</sup>

In *Hasbrouck v. Sheet Metal Workers Local 232*,<sup>169</sup> the Ninth Circuit applied the defense even though the company that the union targeted with its statements had no employees at the time the statements were made.<sup>170</sup> That case involved a union that had historically tried to “persuade” Hasbrouck, a sheet metal and furnace business, to hire members of the union.<sup>171</sup> Hasbrouck refused to hire anyone at all and instead operated almost exclusively as a one-man shop.<sup>172</sup> After the union placed Hasbrouck on a “Do Not Patronize” list,<sup>173</sup> Hasbrouck brought a defamation suit and argued that the NLRA defamation defense did not apply.<sup>174</sup> Citing the “history of discussion between both sides regarding the employment situation in plaintiff’s furnace shop,” the Ninth Circuit applied the NLRA

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162. 125 F.3d 1230 (9th Cir. 1997).

163. *Id.* at 1233.

164. *Id.* at 1232–33.

165. *Id.* at 1233.

166. *Id.*

167. *Id.*

168. *See id.* at 1235. The court stated, “Because the injunction must be predicated on the Hospital’s defamation claims, the Supreme Court’s decisions in [*Linn* and *Austin*] come into play. These cases stand for the general proposition that ‘libel actions under state law [are] pre-empted by the federal labor laws to the extent that the State [seeks] to make actionable defamatory statements in labor disputes which [do not meet the heightened standard of proof].’” *Id.* (quoting *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 273 (1974)).

169. 586 F.2d 691 (9th Cir. 1978).

170. *Id.* at 692, 694.

171. *Id.* at 694.

172. *Id.* at 692.

173. *Id.*

174. *Id.* at 692–94.

defamation defense.<sup>175</sup> It determined that the defense applied because “[u]nder the broad statutory definition, this was a [NLRA] ‘labor dispute’ as a matter of law.”<sup>176</sup>

Similarly, courts apply the NLRA defamation defense to allegedly defamatory statements made during union area standards campaigns despite the fact that those campaigns sometimes do not involve a direct employment relationship between members or future members of the union and the targeted company.<sup>177</sup> Area standards disputes often involve union attempts to pressure companies in the same industry to meet “area standards” with respect to wages and benefits.<sup>178</sup> In *Ruzicka Electric & Sons, Inc. v. International Brotherhood of Electrical Workers, Local 1*,<sup>179</sup> an Eighth Circuit case, such a dispute existed between International Brotherhood of Electrical Workers, Local 1, which represents eastern Missouri electricians, and Ruzicka Electric & Sons, a Missouri electrical contractor.<sup>180</sup> In the course of the union’s efforts to expose the company for paying “substandard wages and fringe benefits,”<sup>181</sup> a union representative told parties who may have contracted with Ruzicka that Ruzicka’s performance on another project was “shoddy,” “dangerous,” and “against the code.”<sup>182</sup> Applying the NLRA defamation defense,<sup>183</sup> the Eighth Circuit upheld the district court’s dismissal of Ruzicka’s defamation claim.<sup>184</sup>

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175. *Id.* at 694.

176. *Id.*

177. For examples of cases where the court applied the NLRA defamation defense to statements made during area standards disputes, see *Barss v. Tosches*, 785 F.2d 20 (1st Cir. 1986), and *Manchester Resorts, L.P. v. Sw. Reg’l Council of Carpenters*, No. 02-CV-1987-K, 2003 U.S. Dist. LEXIS 2392 (S.D. Cal. Jan. 15, 2003).

178. See Tzvi Mackson-Landsberg, Note, *Is a Giant Inflatable Rat an Unlawful Secondary Picket Under Section 8(b)(4)(ii)(B) of the National Labor Relations Act?*, 28 CARDOZO L. REV. 1519, 1525–26 n.37 (2006) (stating that area standards campaigns are “sometimes directed at issues other than organizing workers” and focus on targeting a company for “undermining the living standards of others in the area by paying their workers substandard wages or by patronizing those who do”); see also *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978) (“[T]he right to organize is at the very core of the purpose for which the NLRA was enacted. Area-standards picketing, in contrast, has only recently been recognized as a § 7 right.”).

179. 427 F.3d 511 (8th Cir. 2005).

180. *Id.* at 513.

181. *Id.* at 514.

182. *Id.* at 517.

183. *Id.* at 523.

184. *Id.*

C. *Applies Even When No Labor Organization Is Involved*

Finally, the NLRA defamation defense applies even when allegedly defamatory statements do not involve a NLRA “labor organization”<sup>185</sup> in any way. Under the NLRA’s definition of “labor dispute,” a labor dispute may arise without participation of a NLRA labor organization. Moreover, employees can engage in NLRA concerted activity without the involvement of a labor organization. The NLRA, and by extension, the NLRA defamation defense, requires “concerted” activity by or on behalf of more than one employee.<sup>186</sup> Specifically, NLRA section 7 grants employees a right to “engage in *concerted* activities to persuade other employees to join for their mutual aid and protection.”<sup>187</sup> Nothing in the NLRA, however, requires the involvement of a labor organization to satisfy the NLRA concertedness requirement.

In fact, scholars have noted that one of the “best-kept secrets of labor law” is that the NLRA even protects certain collective activities that are not aimed at forming a labor organization or bargaining with an employer.<sup>188</sup> Both the NLRB and the Supreme Court have

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185. See 29 U.S.C. § 152(5) (2006) (defining “labor organization” as “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work”).

186. Thus, the efforts of one employee acting on his or her own behalf are not recognized by the NLRA and therefore are unlikely to fall under the protection of the NLRA defamation defense. The NLRA defamation defense, however, can apply to one employee acting on behalf of other employees. See 29 U.S.C. § 151; NLRB v. City Disposal Sys., Inc., 465 U.S. 822 (1984) (concluding that a sole employee can engage in concerted activity in some circumstances); Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964) (“It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.”). For a critique arguing that judicial interpretations of NLRA section 7 are too narrow, see Estlund, *Employee Interests*, *supra* note 30, at 924–25 (“Section 7 is meant to protect employees who act together to advance the interests they share with their co-workers. The notion that employees’ shared interests extend only to their wages and working conditions is compelled neither by the language nor by the intent of section 7, and should be rejected.”).

187. See *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 277 (1974) (emphasis added) (quoting *NLRB v. Drivers Local Union 639*, 362 U.S. 274, 279 (1960)). The cases involving allegedly defamatory statements of labor organizations that were discussed in the previous Section of this Article assumed concerted activity.

188. William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 267 n.35 (2002) [hereinafter Corbett, *Waiting*] (citing scholarship which notes that people are often unaware of NLRA protection in non-union settings). But see William R. Corbett, *The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability*, 27 BERKELEY J. EMP. & LAB. L. 23, 27 (2006) (“The recent trends,

confirmed that the NLRA applies to some collective activity among employees that does not involve labor organizations in any way.<sup>189</sup> In 1997, for instance, the NLRB concluded that an employer committed a NLRA unfair labor practice by firing a non-union employee who had written an email to co-workers to gain support for a proposed change to the company's vacation policy.<sup>190</sup>

Because the NLRA is often viewed as the law of labor unions, the NLRA's broader protections of collective activity, including speech, is often overlooked. Cynthia Estlund has noted that:

The NLRA is rarely used by and is largely unfamiliar to nonunion employees outside the organizing context. But [NLRA] section 7 is a potentially significant source of free speech rights in the workplace on issues of concern to workers; it protects speech about unionization or other forms of employee representation, discussion of work-related grievances, and petitioning for their redress.<sup>191</sup>

Regardless of the frequency of its use in non-union settings, NLRA section 7 undoubtedly applies to collective activity in workplaces whether or not there is union involvement.<sup>192</sup>

While the Supreme Court has not directly considered whether the NLRA defamation defense applies to the activities of non-labor organizations, its consideration of the issue in an analogous situation suggests that the defense applies to new (non-union) forms of worker organizations engaging in collective activity. In *New Negro Alliance v. Sanitary Grocery Co.*,<sup>193</sup> one of the Court's earliest cases defining what constitutes a NLA "labor dispute," the Supreme Court considered whether the activity of non-labor organizations falls within the NLA's

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decisions, and appointments at the NLRB indicate that the NLRA's future as a source of rights and protections for nonunion workers will be insignificant at best.").

189. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 15–17 (1962) (extending NLRA section 7 protection to non-union employees); Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 941 (2007) ("On several occasions, the NLRB has reaffirmed that [NLRA section 7] protects non-union employees."). But see *IBM Corp.*, 341 N.L.R.B. 1288, 1288 (2004) (overruling a previous NLRB decision which provided non-employees the right to have a representative present during investigatory interviews that could lead to discipline).

190. *Timekeeping Systems, Inc.*, 323 N.L.R.B. 244, 244–45 (1997); see also Corbett, *Waiting*, *supra* note 188, at 287–91 (discussing the NLRA's application to new forms of communication and technology); Rafael Gely & Leonard Bierman, *Social Isolation and American Workers: Employee Blogging and Legal Reform*, 20 HARV. J.L. & TECH. 287, 314 (2007) (discussing the protection of employee blogging about work-related issues in some circumstances).

191. Estlund, *Free Speech*, *supra* note 81, at 118–19.

192. See Corbett, *Waiting*, *supra* note 188, at 266–67 (adding that NLRA section 7, therefore, may be a source of "reinvigoration of the NLRA").

193. 303 U.S. 552 (1938).

definition.<sup>194</sup> It concluded that non-labor organizations that engage in labor disputes can benefit from the NLA's partial protection from injunctions.<sup>195</sup> In arriving at this conclusion, the Court explicitly acknowledged that a labor dispute may exist even when no labor organization is involved.<sup>196</sup> The New Negro Alliance (the "Alliance"), a civil rights group, demanded that Sanitary Grocery Company (the "Grocery") respond to racial inequities in its workplace by hiring African-American clerks in some of its stores.<sup>197</sup> When the Grocery did not respond to this request,<sup>198</sup> the Alliance sent a representative to picket with a placard in front of one of the Grocery's stores.<sup>199</sup> The placard said, "Do Your Part! Buy Where You Can Work! No Negroes Employed Here!"<sup>200</sup> The Alliance also communicated to the Grocery that it would initiate a similar picket at two other store locations.<sup>201</sup> The Grocery requested a court injunction to stop the picketing.<sup>202</sup> The lower court granted the injunction, concluding that the NLA did not apply because the activity did not constitute a labor dispute under the NLA, and the D.C. Circuit affirmed.<sup>203</sup> The Supreme Court reversed and held that the dispute was a NLA labor dispute.<sup>204</sup> The Court stated:

The desire for fair and equitable conditions of employment on the part of persons of any race, color, or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association.<sup>205</sup>

By holding that the dispute fell within the definition of a NLA labor dispute, the *Alliance* Court concluded that the dispute involved terms or conditions of employment despite the fact that the Alliance members were not part of a labor organization and "were not asserting economic interests commonly associated with labor unions."<sup>206</sup>

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194. *Id.* at 559–63.

195. *Id.* at 562–63.

196. *Id.* at 559–61.

197. *Id.* at 554–56.

198. *Id.* at 556.

199. *Id.* at 556–57.

200. *Id.* at 557.

201. *Id.* at 556–57.

202. *Id.* at 554.

203. *Id.* at 554, 559.

204. *Id.* at 561–63.

205. *Id.* at 561.

206. See *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 714 (1982) (discussing the *Alliance* Court's reasoning); Seth Kupferberg, *Political Strikes, Labor Law, and Democratic Rights*, 71 VA. L. REV. 685, 720–21 (1985) (discussing

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*D. Two Examples*

It may be counterintuitive to some that the NLRA defamation defense can apply both to new union organizing strategies that intend to circumvent the NLRB and to new worker organizations that do not want to be considered NLRA-regulated labor organizations. Nonetheless, this Section demonstrates the defense's broad reach to these contemporary arenas. Specifically, this Section describes a key component of (1) new union strategies (corporate campaigns) and (2) the most common new worker organization (worker centers), and explains how the NLRA defamation defense could provide, and in some cases already has provided, protection for these kinds of collective activity.

*1. Union corporate campaigns*

Frustrated with the NLRA and the NLRB in particular, some labor unions have called for the NLRA's retirement.<sup>207</sup> In fact, "many of the more activist organizing unions have been selectively boycotting the [NLRB] for quite some time."<sup>208</sup> Due in part to their frustration with the NLRA and the NLRB, some labor unions have shifted their organizing efforts away from strategies involving the NLRB and are increasingly using "corporate campaigns" to achieve their collective activity goals.<sup>209</sup> Corporate campaigns "involve the use of non-traditional methods to secure tactical gains in organizing and bargaining."<sup>210</sup> Estlund describes union corporate and comprehensive campaigns in the following way:

The "corporate campaign" . . . seeks concessions from employers by targeting directors, customers, suppliers, lenders, and investors

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*Alliance* and stating that the "Supreme Court extended the term 'labor dispute' in the Norris-LaGuardia Act beyond the terms and conditions of employment in the sense of wages, hours, unionization or betterment of working conditions. . . . [T]he Court found that the dispute was clearly over conditions of employment and stated that the Act does not concern itself with the background or the motives of the dispute" (internal quotations omitted)).

207. See Christopher Ruiz Cameron et al., *At Age Seventy, Should the National Labor Relations Act Be Retired: Proceedings of the 2005 Annual Meeting, Association of American Law Schools Section on Labor Relations and Employment Law*, 9 EMP. RTS. & EMP. POL'Y J. 121, 137 (2005) (referring to debate among union lawyers about "whether or not to give up, if not on the Act, then on the NLRB").

208. *Id.*

209. See Sanford M. Jacoby, *The Future of Labor and Finance*, 30 COMP. LAB. L. & POL'Y J. 111, 119 (2008) ("Today, these campaigns are most closely associated with Change To Win and its constituent unions, chiefly the Food and Commercial Workers (UFCW), the Laborers (LIUNA), SEIU, the Teamsters, and UNITE-HERE. Some AFL-CIO unions, notably the Steelworkers, also have embraced the approach.").

210. *Id.*

with publicity and other forms of pressure. A broader term—the “comprehensive campaign”—may better describe campaigns that appeal directly to the public by way of rallies, pickets, speeches, and leafleting in public streets and parks, often with the active support of churches and other community organizations outside the labor movement itself.<sup>211</sup>

Corporate campaigns sometimes use aggressive and potentially defamatory publicity as part of union efforts to pressure employers to agree to union demands.<sup>212</sup> As one management attorney recently claimed, “[U]nions are increasingly engaging in . . . tactics[] such as . . . mailing defamatory letters about a company to potential customers.”<sup>213</sup> Union tactics also include “embarrassing a firm’s executives and business partners” and publicizing union-initiated lawsuits and government complaints against employers.<sup>214</sup>

Given the intensity and range of these information-based publicity tactics, employers—be they primary, secondary, or neutral employers—often find them highly offensive.<sup>215</sup> Not surprisingly, union corporate campaigns have led to defamation lawsuits against unions and union members.<sup>216</sup> Indeed, some argue that the rise in defamation suits against unions is a response to corporate

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211. Estlund, *Ossification*, *supra* note 4, at 1605.

212. See JAROL B. MANHEIM, TRENDS IN UNION CORPORATE CAMPAIGNS: A BRIEFING BOOK 16–17 (2005), available at [http://www.uschamber.com/publications/reports/06union\\_campaigns.htm](http://www.uschamber.com/publications/reports/06union_campaigns.htm) (listing common union tactics); Geri L. Dreiling, *Fighting Fire with Fire: When Unions Turn Up the Heat, Companies Fight Back With Lawsuits*, 92 A.B.A. J. 18, 18 (2006) (stating that “corporate campaigns can ‘include investigations into the company, including background information a company would not like the public to see’”).

213. Tresa Baldas, *Court Rulings, Regulatory Actions Fuel Labor Battles*, Nat’l L.J., Nov. 10, 2006, <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=900005552022>; see also *Professional Janitorial Service Files Lawsuit Against SEIU*, CLEANLINK, May 4, 2007, <http://www.cleanlink.com/news/article.asp?id=6678&keywords=union,%20seiu,%20lawsuit> (reporting a statement made by an employer that company officials were “looking forward to seeing what a Texas jury thinks of the SEIU’s campaign to defame . . . our company”).

214. Jacoby, *supra* note 209, at 119–20.

215. See More, *supra* note 118, at 214 (“Creating a media spectacle that highlights the issues at stake in a labor dispute and embarrasses the target employer often involves creative appropriation of the corporation’s logo or motto.”); see also Paul Snitzer, *New Union Tactics: Mock Funerals, Lies About Dirty Laundry and Other Low Blows*, MONDAQ BUSINESS BRIEFING, March 27, 2008, available at <http://www.thefreelibrary.com/New+Union+Tactics%3a+Mock+Funerals%2c+Lies+About+Dirty+Laundry+And+Other...-a0177154490> (“Union-sponsored corporate campaigns against healthcare employers are intended to embarrass the employers in the public eye by portraying them as some type of ‘evildoer’ to be shunned.”).

216. See *Cintas v. UNITE*, No. 1:04-CV-00317, 2005 U.S. Dist. LEXIS 45435, at \*3-6 (S.D. Ohio Feb. 16, 2005) (referring to a defamation claim brought in the context of a corporate campaign); Jennifer Gordon, *Law, Lawyers, and Labor: The United Farm Workers’ Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PA. J. LAB. & EMPL. L. 1, 63 (2005) (noting that corporate campaigns often generate bad publicity which “may become the basis for a defamation lawsuit”).

campaigns.<sup>217</sup> A recent newspaper article reported that employers believe defamation suits are merited as a response to such conduct as posting “nasty fliers and Internet comments” that unfairly harm employers’ reputations.<sup>218</sup> The article further reported that, “as unions become more proficient in conducting corporate campaigns, more employers are willing to fight back by alleging [that] union tactics violate state laws against slander.”<sup>219</sup> Also, some argue that “[p]robably the most common employer response to false and distorted corporate campaign tactics has been to sue for defamation under state law.”<sup>220</sup> This commentary suggests that the stakes for an effective defense against defamation suits are particularly high today.<sup>221</sup>

Despite widespread pessimism regarding the continued relevance of the NLRA for unions involved in corporate campaigns, some courts adjudicating cases involving union corporate campaigns and the case analysis in the previous Sections of this Part suggest otherwise. In *Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees Local 483*,<sup>222</sup> for example, a California appellate court applied the NLRA defamation defense to a defamation claim concerning union statements made on television that implicated the employer in illegal activity.<sup>223</sup>

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217. See Dreiling, *supra* note 212, at 18 (arguing that “pulling out the legal stops can pay off for companies”); More, *supra* note 118, at 215 (stating that the “broadening of labor’s campaign tactics . . . significantly expands the number of legal targets available to an employer”); Baldas, *supra* note 213 (stating that “companies are using litigation to ‘spend the union into the ground’”).

218. L.M. Sixel, *Free Speech Too Nasty?*, HOUSTON CHRON., May 17, 2007.

219. *Id.*

220. See, e.g., Baskin & Northrup, *supra* note 24, at 218; see also Ray Stern, *In Its War for New Members, a Labor Union Is Using Dirty Tricks to Turn Hispanics Against Bashas*, PHOENIX NEW TIMES, Jan. 24, 2008 (“In response to the corporate campaign, Bashas’ slapped the UFCW and its most strident advocates with a defamation lawsuit last month.”).

221. It is important to note that some believe that retaliatory defamation lawsuits are on the rise because of the Supreme Court’s 2002 decision in *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002). See Paul Salvatore & Brian Rauch, *Taking A Page From the Unions’ Playbook: Employers Litigating Against Union Corporate Campaigns*, METRO. CORP. COUNSEL, Apr. 2007, at 49 (citing the Supreme Court’s *BE&K* decision and stating that “[c]onsequently, employers have been filing an increased number of lawsuits against organizing tactics”). The Supreme Court’s holding in *BE&K* made it more difficult to prove to the NLRB that an employer filed a lawsuit (including a state defamation lawsuit) as a means to retaliate against employees who had engaged in NLRA-recognized collective action. See William B. Gould IV, *Labor Law and Its Limits: Some Proposals for Reform*, 49 WAYNE L. REV. 667, 671 (2003) (referring to defamation suits, stating that the NLRB’s ability “to limit such conduct” has been “reigned” in by the *BE&K* case).

222. 82 Cal. Rptr. 2d 10 (Ct. App. 1999).

223. *Id.* at 14–16.

In another corporate campaign case, *Beverly Hills Foodland v. United Food & Commercial Workers Union, Local 655*,<sup>224</sup> the Eighth Circuit affirmed the lower court's application of the NLRA defamation defense even though allegedly defamatory statements were made after the union organizing efforts had ended.<sup>225</sup> In that case, the union's public statements about the employer suggested that the employer was "unfair to black employees."<sup>226</sup> The food market sued, arguing that this language was defamatory and that the NLRA defamation defense and its heightened standard of proof did not apply because the statements were made after the termination of the union's organizing efforts.<sup>227</sup> The Eighth Circuit rejected the employer's argument and determined that the statements "occurred within the context of a 'labor dispute.'"<sup>228</sup> The court stated that "[c]ourts have routinely found that a labor dispute exists in situations which do not involve any organizing activities by a union."<sup>229</sup>

The application of the NLRA defamation defense in the corporate campaign context demonstrates the continuing relevance of the NLRA defamation defense despite union attempts to move away from the NLRA in other areas. Without the defense, union efforts to promote collective activity through corporate campaigns would not be protected from the full reach of state defamation lawsuits.

## 2. Worker centers

Worker centers often view themselves as alternatives to unions and NLRA labor organizations.<sup>230</sup> These centers exemplify the typical form of alternative worker organizations.<sup>231</sup> Janice Fine, after studying more than 130 worker centers in the United States, identified those centers as "community-based mediating institutions that provide support to and organize among communities of

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224. 39 F.3d 191 (8th Cir. 1994).

225. *See id.* at 193 (noting that after the union failed to organize food market employees, it sent the employer a letter notifying it "that the Union was terminating its organizational efforts").

226. *Id.* at 194.

227. *Id.*

228. *Id.* at 194–95.

229. *Id.*

230. *See* Catherine K. Ruckelshaus, *Labor's Wage War*, 35 *FORDHAM URB. L.J.* 373, 397 (2008).

231. For a discussion of alternative worker organizations, see generally JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* (2005); Scott Cummings, *The Internationalization of Public Interest Law*, 57 *DUKE L.J.* 891 (2008); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 *HARV. C.R.-C.L. L. REV.* 407 (1995); Alan Hyde, *New Institutions for Worker Representation in the United States: Theoretical Issues*, 50 *N.Y.L. SCH. L. REV.* 385 (2005–06).

low-wage workers.”<sup>232</sup> The groups that worker centers focus on—low-wage workers and other workers in transitory industries—are often not strategic or feasible targets for labor unions.<sup>233</sup> Nonetheless, worker centers and unions have engaged in collaborations in the past and may do so more often in the future.<sup>234</sup> Because worker center members are often at the bottom end of the labor market, worker centers’ activities often target some of the most severe labor and employment law abuses through lawsuits, organizing efforts, and legislative advocacy.<sup>235</sup> Moreover, worker centers organize some of the most vulnerable participants in the U.S. labor market, including undocumented workers who do not have legal authorization to work in the United States.<sup>236</sup> Thus, for many constituencies, these centers represent a critical new institution that protects workers and promotes collective activity.

A viable defense against defamation suits is likely to become more critical for worker centers. Similar to union corporate campaigns, worker centers often use aggressive publicity and other forms of speech to pressure employers to change their employment practices.<sup>237</sup> These efforts address a wide range of workplace-related issues, from wages and vacation time to health and safety in the workplace.<sup>238</sup> Some of the actions of worker centers may offend employers and provoke lawsuits.<sup>239</sup> Even though they are still relatively new entrants to the workplace relations scene, worker

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232. JANICE FINE, *WORKER CENTERS: ORGANIZING NEW COMMUNITIES AT THE EDGE OF THE DREAM* 11 (2006).

233. See Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 *CLINICAL L. REV.* 355, 361–62 (2008) (noting the rise of worker centers in the context of weakening unions).

234. See Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 *N.Y.L. SCH. L. REV.* 465, 513 (2006) (“The recent historic split within the AFL-CIO presents a great opportunity for worker centers to forge new alliances with unions and become an integral part of the emerging new Labor Movement.”).

235. See Miriam A. Cherry, *Working (with) Workers: Implementing Theory*, 41 *SUFFOLK U. L. REV.* 731, 733–34 (2008).

236. See *id.* at 733 (“These worker centers usually assist low-wage or immigrant workers, the most underserved and vulnerable groups.”).

237. See, e.g., *Redeye Grill, L.P. v. Rest. Opportunities Ctr.*, No. 117382/05, 2006 WL 2726823, at \*1 (N.Y. Sup. Ct. Aug. 16, 2006) (describing how a worker organization used “megaphones, whistles and a nine-foot inflatable skunk” to announce that it was filing a lawsuit to recover “stolen tips”).

238. See, e.g., Benjamin I. Sachs, *Labor Law Renewal*, 1 *HARV. L. & POL’Y REV.* 375, 379–80 (2007) (describing the efforts of a group of Houston janitors to gain a variety of benefits).

239. See, e.g., *Redeye Grill*, 2006 WL 2726823, at \*1 (describing the plaintiff restaurant’s assertion that the picketing worker organization was “motivated by the desire to drive business away from [the restaurant]”).

centers and their members have already faced defamation suits in response to their information-based tactics.<sup>240</sup>

One might argue that worker centers must qualify as NLRA “labor organizations” before they may take advantage of the NLRA defamation defense, and there is an ongoing debate over whether worker centers can be included as such an organization.<sup>241</sup> If they are included, worker center activities would be subject to NLRA restrictions.<sup>242</sup> Nevertheless, according to this Article’s legal analysis,<sup>243</sup> inquiry into whether the NLRA defamation defense applies has nothing to do with whether the defamation defendant is a NLRA labor organization. Rather, courts should apply the NLRA defamation defense to defamation suits against worker centers and their members as long as the allegedly defamatory statements are made during a labor dispute involving concerted activity.

The allegedly defamatory statements attributed to worker centers and their members are often made during a labor dispute. That is, those statements are often made in the context of “any controversy concerning terms, tenure or conditions of employment.”<sup>244</sup> Scholars have observed that many worker center activities are also likely to fall within the NLRA’s broad definition of concerted activity for mutual aid and protection.<sup>245</sup> Among other things, worker centers file legal claims on behalf of groups of employees, organize employees around their mutual interests, and engage in confrontations with employers, including pickets, walkouts, and boycotts.<sup>246</sup>

Although an exhaustive analysis of defamation suits against worker centers is beyond the scope of this Article, worker centers have raised the NLRA defamation defense in at least two cases.<sup>247</sup> In one case,

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240. The Restaurant Opportunities Center of New York, for instance, has “faced a multitude of lawsuits for its activity.” LABOR AND EMPLOYMENT RESEARCH FUND, PAPER WORK CENTER THESIS, THE WORKER CENTER MOVEMENT AND TRADITIONAL LABOR LAWS 17 (Dec. 20, 2007), available at <http://repositories.cdlib.org/lerf/WorkCentersThesis>; see also Sameer Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879, 1896 (2007) (stating that lawyers have defended worker centers against defamation lawsuits).

241. For an argument that worker centers are NLRA “labor organizations,” see David Rosenfeld, *Worker Centers: Emerging Labor Organizations—Until They Confront the National Labor Relations Act*, 27 BERKELEY J. EMP. & LAB. L. 469 (2006).

242. See *id.* at 499 (discussing obstacles that NLRA labor organizations face).

243. See discussion *supra* Part III.C.

244. 29 U.S.C. § 152(9) (2006).

245. See, e.g., Rosenfeld, *supra* note 241, at 482 (referring to Jennifer Gordon and Janice Fine’s “recogni[tion] that worker centers do encourage pickets, organizing, boycotts, strikes, and other forms of concerted activity”).

246. *Id.* at 482, 497, 504.

247. *Garment Workers Ctr. v. Superior Court*, 12 Cal. Rptr. 3d 506 (Ct. App. 2004); *Park v. Kor. Immigrant Workers Advocates*, No. B154294, 2002 WL 938274 (Cal. Ct. App. May 9, 2002).

for example, an employer sued several non-profit workers' rights entities claiming, among other things, that the entities "defamed [the employer] by proclaiming in their demonstrations, leafleting, press releases and web site postings [that the employer] owed these workers substantial amounts of unpaid wages and other employment benefits for sewing clothes."<sup>248</sup> In the other case, an employer sued a worker center for its allegedly defamatory statements that the employer did not properly remedy wage violations.<sup>249</sup> Among other things the worker center members stated, "Hey, Hey, Ho, Ho, Exploitation's got to go," in front of the employer's restaurant.<sup>250</sup> It is unknown how these courts would have responded to the defamation defendants' invocation of the NLRA defamation defense because the cases were resolved before the courts adjudicated the issues. Nonetheless, according to the foregoing analysis, courts can apply the NLRA defamation defense in defamation cases against worker centers and their members regardless of whether worker centers constitute NLRA labor organizations.

It is important to preserve the NLRA defamation defense, given Congress's intent to protect collective activity and given the relevance of the defense to traditional as well as new forms of worker organizations and union strategies. While perhaps not quite a "diamond in the rough," the defense provides at least some protection for collective activity at a time when the NLRA is already gasping for air.<sup>251</sup> Nevertheless, as the following Part discusses, some recent proposals for reforms, which are intended to enhance protections for collective activity, may unintentionally undermine the defamation defense and the important protection it provides for collective activity.

#### IV. THE PERILS OF A NARROWER NLRA PREEMPTION DOCTRINE

Proposals to modernize the NLRA such that it better supports collective activity in the workplace should take care to explicitly retain the NLRA defamation defense. To illustrate this point, this Article shows how an oft-cited proposal to narrow the NLRA's preemption doctrine may unintentionally imperil the NLRA defamation defense and its unrealized potential.

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248. *Garment Workers*, 12 Cal. Rptr. 3d at 508.

249. *Park*, 2002 WL 938274, at \*2.

250. *Id.* at \*3.

251. See Joel Rogers, *Reforming U.S. Labor Relations*, 69 CHI.-KENT L. REV. 97, 101-10 (1993) (describing the decline of the NLRA).

A. *Prior Scholarship on the NLRA's Preemption Doctrine*

While most scholarship on NLRA's preemption of state law has historically argued for a broad reading of NLRA preemption and, therefore, for leaving little room for state regulation of labor relations,<sup>252</sup> some have recently criticized the breadth of the NLRA's preemptive reach and have called for increased state law intervention.<sup>253</sup> Historically, many labor scholars argued that the NLRA's policies promoting collective activity were best served by a uniform federal regime of regulation that would minimize local-level inexperience with, and biases against, collective activity among employees.<sup>254</sup> More recently, however, some have called for decreased NLRA preemption of state laws, often focusing on the opportunities less preemption would create for state legislation aimed at fostering collective activity in more labor-friendly states.<sup>255</sup> Moreover, a few such calls contend that broad readings of NLRA preemption often "block[] . . . state common law innovation"<sup>256</sup> that could foster collective activity among employees in the workplace.

These scholars, however, often do not specifically address how a simplistic application of a narrower NLRA preemption doctrine, albeit intended to promote collective activity, may unintentionally decrease the availability of the NLRA defamation defense. This oversight may in part be due to the fact that the Supreme Court's *Linn* and *Austin* cases are often cited as exceptions to the NLRA's broad preemption doctrine.<sup>257</sup> Thus, those calling for further narrowing of the NLRA's preemption doctrine may assume that the

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252. See, e.g., David L. Gregory, *The Labor Preemption Doctrine: Hamiltonian Renaissance or Last Hurrah?*, 27 WM. & MARY L. REV. 507, 518 (1986).

253. See, e.g., Richard B. Freeman, *Will Labor Fare Better Under State Labor Relations Law?*, 58 PROCS. LAB. & EMP. REL. ASS'N ANN. MEETING 125 (2006) (arguing that labor would fare better under state labor relations law); Paul Secunda, *Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States*, 29 COMP. LAB. L. & POL'Y J. 209, 240 (2007) (arguing that state legislation regarding "captive audience meetings" should not be preempted by the NLRA); Silverstein, *supra* note 27, at 4 (challenging the traditional protocol for federal regulation of labor relations). For an example of state-level efforts to circumvent broad federal preemption, see generally Matthew T. Bodie, *The Potential for State Labor Law: The New York Greengrocer Code of Conduct*, 21 HOFSTRA LAB. & EMP. L.J. 183 (2003).

254. See, e.g., Harry H. Wellington, *Labor and the Federal System*, 26 U. CHI. L. REV. 542, 542 (1959) (arguing that labor regulation should be an "exclusive, nation-wide regime" and that state intervention should be minimal).

255. See Secunda, *supra* note 253, at 231-48; see also Silverstein, *supra* note 27, at 3 (calling for scholars to "rethink the traditional belief in strong federal preemption as beneficial for organized labor and as necessary to promote collective bargaining").

256. See Estlund, *Ossification*, *supra* note 4, at 1530-31 (referring to scholarship that calls for common law protection of collective activity).

257. See, e.g., Silverstein, *supra* note 27, at 21-22.

defamation context would proceed unaltered by a new doctrine that further narrows NLRA preemption. But, the Supreme Court's *Linn* and *Austin* decisions did not simply present an exception to broad preemption. Rather, those decisions affirm that, while the NLRA defamation defense is narrow in that it does not preempt egregious defamation cases, it is broad in that it does *entirely* preempt less egregious defamation cases.

*B. The Continuum Proposal*

According to an oft-cited proposal for narrowing the NLRA preemption doctrine to better protect collective activity—referred to here as the “continuum proposal”—states should be “free to regulate labor relations, in parallel with the NLRA and beyond, except where state law conflicts with an interest protected by the NLRA *or* where there is a continuum of federal protection-prohibition across the subject area to which the state law applies.”<sup>258</sup> Accordingly, the NLRA should continue to preempt state regulation of activities that Congress intended the NLRA to regulate, in every situation, through explicit protections or prohibitions. For example, under the continuum proposal, the NLRA should continue to preempt picketing because *all* picketing activity is either explicitly protected by or explicitly prohibited by the NLRA. Picketing thus falls on the continuum of federal protection or prohibition.<sup>259</sup>

On the other hand, this proposal recommends that the NLRA should not preempt state regulatory interventions regarding activities that Congress did not intend the NLRA to directly regulate in every circumstance.<sup>260</sup> These activities, such as union access to an employer's premises, do not fall on the protected or prohibited continuum.<sup>261</sup> Sometimes union access to an employer's premises is neither explicitly protected nor prohibited by the NLRA.<sup>262</sup> States, according to this view, should be able to fully regulate the “area

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258. Gottesman, *supra* note 9, at 426 (emphasis added). Scholars have widely cited Gottesman's NLRA preemption proposal. *See, e.g.*, Catherine L. Fisk & Michael M. Oswalt, *Preemption and Civic Democracy in the Battle over Wal-Mart*, 92 MINN. L. REV. 1502, 1507 n.20 (2008); Wilson McLeod, *Rekindling Labor Law Successorship in an Era of Decline*, 11 HOFSTRA LAB. L.J. 271, 343 (1994); David A. Morand, *Questioning the Preemption Doctrine: Opportunities for State-Level Labor Law Initiatives*, 5 WIDENER J. PUB. L. 35, 52 (1995); Secunda, *supra* note 253, at 213.

259. Gottesman, *supra* note 9, at 357.

260. *Id.* at 359–60.

261. *Id.* at 359.

262. *Id.* at 358.

beyond” those that the federal government comprehensively regulates.<sup>263</sup>

Yet, encouraging courts to engage in this type of NLRA preemption analysis could unintentionally lead to the deterioration of the NLRA defamation defense. This is because such an analysis of whether an activity is protected or prohibited by the NLRA is difficult in the common law world of state defamation law. Currently, state courts must consider whether the allegedly defamatory statements were made during a labor dispute in order to decide whether to apply the NLRA defamation defense.<sup>264</sup> But a simplistic application of the continuum proposal may lead courts to inquire, on a case-by-case basis, whether the NLRB would protect or prohibit particular statements. Speech is sometimes NLRB-regulated and is sometimes entirely unregulated by the NLRB. The proposal could, therefore, unintentionally lead courts to assess whether the NLRA’s unfair labor practice provisions under NLRA section 8(a) or 8(b) would “arguably protect or prohibit” the allegedly defamatory speech in order to decide whether to apply the NLRA defamation defense. This would entail a hypothetical analysis similar to the following: if an employee experienced an adverse employment action because of allegedly defamatory statements, would the NLRB interpret the NLRA’s unfair labor practice provisions to protect that employee from the adverse employment action? If the answer is yes, the activity is federally regulated by the NLRA and NLRA defamation defense would apply. If the answer is no, the activity is not federally regulated and the NLRA defamation defense would not apply. But as the cases discussed in the following section illustrate, such an analysis jeopardizes the viability and potential of the NLRA defamation defense.

### C. Case Studies

In three recent defamation cases in the labor context, state trial courts erroneously inquired whether the allegedly defamatory speech at issue was “arguably protected or prohibited by” the NLRA’s unfair labor practice provisions in order to determine whether they should

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263. *Id.* at 360; *see also* Secunda, *supra* note 253, at 213 (summarizing succinctly the continuum proposal, noting that “federal labor laws come in two varieties—those where the entire field is occupied by federal law (‘conduct on a continuum’) and those areas where the federal law just provides some restrictions (‘conduct not on a continuum’)”).

264. *See, e.g.*, *Jacobs v. Budak*, No. 2007-T-0033, 2008 WL 2332543, at \*5 (Ohio Ct. App. June 6, 2008) (applying the NLRA defamation defense after determining that there was a labor dispute).

apply the defamation defense.<sup>265</sup> These cases illustrate the potential perils of applying the continuum proposal to the defamation context. These three courts applied an equivalent of the continuum proposal. As a result, in all three instances the courts did not apply the NLRA defamation defense and its heightened standard of proof to the defamation claims. All three cases resulted in unfavorable jury outcomes, at least initially, for the defendants. Viewed together, these examples demonstrate that proposals like the continuum proposal could result in reduced application of the NLRA defamation defense and increased unpredictability as to whether a court will apply the defense. Both of these dynamics threaten to further chill speech and accompanying collective activity in the NLRA context.<sup>266</sup>

### I. Maki

In *J. Maki Construction Co. v. Chicago Regional Council of Carpenters*,<sup>267</sup> the trial court concluded that the NLRA defamation defense did not apply because the NLRA's unfair labor practice provisions would not protect an employee from adverse employment actions flowing from the allegedly defamatory statements.<sup>268</sup> In *Maki*, a union engaging in an area standards labor dispute with a construction company made allegedly defamatory statements about the company on a handbill that it distributed to the public.<sup>269</sup> The handbill contained a limerick, which referenced the dispute and stated that the company's work

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265. *Sutter Health v. UNITE HERE*, No. 2:05-CV-1081, 2005 U.S. Dist. LEXIS 20892, at \*4 (E.D. Cal. Aug. 10, 2005), *remanded*, No. SCV17938 (Cal. Sup. Ct.), *appeal filed*, No. C054400 (Cal. Ct. App. Apr. 15, 2008); *Hughes v. N. Cal. Carpenters Reg'l Council*, No. A112272, 2007 WL 1448746, at \*7 (Cal. Ct. App. May 17, 2007); *J. Maki Constr. Co. v. Chi. Reg'l Council of Carpenters (Maki II)*, 882 N.E.2d 1173, 1176-77 (Ill. App. Ct.), *cert. denied*, 889 N.E.2d 1116 (Ill. 2008).

266. For a case explicitly rejecting reasoning similar to the continuum proposal, see *Raffensberger v. Moran*, 485 A.2d 447, 451 (Pa. Super. Ct. 1984). In that case, the court rejected a proposal that the court consider whether the allegedly defamatory statements at issue in that case fell on a protected-prohibited continuum. *Id.* at 451. The court stated, "Clearly, *Linn* is not limited to situations involving the provisions of sections 7 and 8 of the NLRA. The application of *Linn*, rather, turns on the scope of the judicial definition of a 'labor dispute' in the context of a libel case." For a similar critique regarding the "vagaries of judicial line-drawing" in a different context, see Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1 (1990). Estlund argues that a First Amendment analysis that requires courts to determine whether matters are of public concern "looms as a significant threat to freedom of speech." *Id.* at 3.

267. 882 N.E.2d 1173 (Ill. App. Ct. 2008).

268. *Id.* at 1181.

269. *Id.* at 1177.

product was, among other things, “crappy.”<sup>270</sup> The trial court refused to apply the NLRA defamation defense, stating that there was no “connection between the handbill and the existence of a labor dispute.”<sup>271</sup> In doing so, the trial court drew a parallel to the Supreme Court’s *Jefferson Standard* case, which found no NLRA section 8(a) protection for adverse employment actions flowing from disloyal speech unconnected to an ongoing labor dispute.<sup>272</sup>

The trial court determined that NLRA section 8(a) would *not* protect adverse employment actions flowing from the allegedly defamatory statement in a hypothetical NLRB case, which meant that the NLRA defamation defense did *not* protect the statement in the defamation case.<sup>273</sup> The *Maki* jury ordered the union defendants to pay \$2,353,000 in damages, “the highest [jury award] in Illinois outside of [the Chicago area] to be reported . . . since 1985.”<sup>274</sup> The Appellate Court of Illinois, however, overturned the trial court’s ruling.<sup>275</sup> Referring to the NLRA defamation defense, the appeals court concluded that, similar to the statements in *Austin*, the use of the word “crappy” was made in a “loose, figurative sense” and could not be the basis for defamation liability.<sup>276</sup>

## 2. Sutter Health

In *Sutter Health v. UNITE HERE*,<sup>277</sup> the trial court employed similar logic and determined that the NLRA defamation defense did not apply.<sup>278</sup> In *Sutter Health*, a union that was engaged in a labor dispute with a laundry subcontractor made allegedly defamatory statements about the subcontractor and its major clients, Sutter Health and

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270. *See id.* (noting that the bottom of the handbill stated that “[t]he Carpenters Union is currently engaged in a labor dispute with Maki Construction over the payment of substandard wages and benefits”).

271. *Id.* at 1182. The trial court reasoned that *Linn* did not apply to “statements made during the course of a labor dispute that had no rational relationship to the subject matter of the dispute.” *J. Maki Constr. Co. v. Chi. Reg’l Council of Carpenters (Maki I)*, No. 05 L 503, 2007 WL 1108443 (Ill. Cir. Ct. Jan. 19, 2007) (citing *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966)).

272. *Maki I*, 2007 WL 1108443 (citing *Jefferson Standard*, 346 U.S. 464 (1953)).

273. *Id.*

274. John Flynn Rooney, *Lake County Jury Hammers Union for Defaming Builder*, CHI. DAILY L. BULL., Sept. 22, 2006, at 1; Barbara Rose, *Union Defamed Builder, Jury Finds; Carpenters Ordered to Pay \$2.35 Million*, CHI. TRIB., Sept. 22, 2006, at C1.

275. *Maki II*, 882 N.E.2d at 1183.

276. *Id.* at 1184.

277. No. 2:05-CV-1081, 2005 U.S. Dist. LEXIS 20892, at \*4 (E.D. Cal. Aug. 10, 2005), *remanded*, No. SCV17938 (Cal. Sup. Ct.), *appeal filed*, No. C054400 (Cal. Ct. App. Apr. 15, 2008). UNITE HERE unsuccessfully tried to remove the case to federal court, arguing that the federal court had jurisdiction over the secondary boycott claims. *See id.* at \*2.

278. *Id.* at \*9.

Sutter hospitals.<sup>279</sup> In a postcard, the union referenced its labor dispute with the subcontractor and alleged that the linens in the hospital's birthing center may contain "blood, feces, and harmful pathogens."<sup>280</sup> The bottom of the postcard stated in smaller typeface that UNITE HERE was currently "engaged in a labor dispute with Angelica Textile Services," the primary linen subcontractor for Sutter.<sup>281</sup>

It appears that the *Sutter Health* trial court refused to apply the NLRA defamation defense to the allegedly defamatory statements in part because it determined that NLRA section 8(a) would not protect the statements.<sup>282</sup> It also reasoned that, because NLRA section 8(b) would prohibit the statements about a neutral party (the hospital), the NLRA defamation defense could not be applied to those statements in a defamation case.<sup>283</sup> The jury returned a \$17 million verdict favorable to Sutter.<sup>284</sup> The union is currently appealing the award, which is "one of the highest ever awarded against a labor union in the United States."<sup>285</sup> UNITE HERE is requesting that a California appellate court either reverse the verdict and enter judgment for the union, or reverse and remand for a new trial based on the heightened standard required by the NLRA's partial protection of defamatory speech doctrine.<sup>286</sup> As of the date this Article went to print, the appeal is still pending.<sup>287</sup>

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279. *Id.* at \*2. *Sutter Health* involved a union's efforts to pressure Angelica Textile Services to accept recognition of the union. Appellant UNITE HERE's Opening Brief at \*1, *Sutter Health v. UNITE HERE*, No. C054400 (Cal. Ct. App. Apr. 15, 2008), 2008 WL 2478283. According to the union-defendant, which represented some of Angelica's employees, its dispute with Angelica was over "the best way to provide Angelica's non-union employees a free choice in deciding whether they wish to be represented by the union." *Angelica Corporation and UNITE HERE Resolve Labor Dispute*, BUS. WIRE, June 14, 2005, available at [http://findarticles.com/p/articles/mi\\_m0EIN/is\\_2005\\_June\\_14/ai\\_n13814369/](http://findarticles.com/p/articles/mi_m0EIN/is_2005_June_14/ai_n13814369/).

280. *Sutter Health*, 2005 U.S. Dist. LEXIS 20892, at \*4.

281. Appellant UNITE HERE's Opening Brief, *supra* note 279, at Exh. A.

282. The *Sutter Health* trial court agreed with Sutter that no NLRA labor dispute existed under the circumstances and declined to charge the jury to apply the heightened standard of proof. 2005 U.S. Dist. LEXIS 20892, at \*1-2, \*5-8, \*15-19. Sutter had argued that there was no NLRA labor dispute because the union statements, (1) discussed something other than working conditions or a labor dispute, and (2) were made about an employer (Sutter) with whom the union did not have a primary labor dispute. *Id.* at \*15-19.

283. *Id.* at \*1-2, \*5-8, \*15-19.

284. See *Union Must Pay Millions in Defamation Case*, L.A. TIMES, July 22, 2006, at B4 (reporting the \$17.3 million jury award in *Sutter*).

285. Mehul Srivastava, *Jury Award Stings Union: UNITE Here Hit With \$17.2 Million Decision in Sutter Defamation Suit*, SACRAMENTO BEE, July 22, 2006, at A1 (stating that if the jury award is affirmed, it could "cripple" the union's finances).

286. Among other things, the union is arguing that there was a labor dispute such that the heightened standard should have applied regardless of whether the statements were made about a non-primary employer and regardless of whether the

### 3. Hughes

In *Hughes v. Northern California Carpenters Regional Council*,<sup>288</sup> the state trial and appellate courts determined that the NLRA defamation defense should not be applied to allegedly defamatory statements made during a labor dispute.<sup>289</sup> *Hughes* involved a union engaged in an area standards labor dispute with a drywall subcontractor.<sup>290</sup> During the labor dispute, the union distributed a handbill that referenced the labor dispute generally<sup>291</sup> and made a statement that the subcontractor had committed a crime (by allegedly exposing himself to the picketers) and was a danger to children.<sup>292</sup> Instead of applying the NLRA defamation defense and the defense's heightened standard of proof, the appellate court determined that the defense did not apply because the statements would not be protected by NLRA section 8(a).<sup>293</sup> The court said:

The flyer was a personal attack on Hughes himself, seeking to portray him as someone who engaged in sex crimes and posed a sexual danger to children. It was not relevant to the Union's area standards picketing or any labor dispute, nor was it regarding an

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statements had content discussing something other than working conditions and the primary labor dispute. Appellant UNITE HERE's Opening Brief, *supra* note 279, at 10.

287. Various documents have been filed in relation to the appeal. Respondent's Brief in Answer to Amici Curiae Brief, No. C054400 (Cal. Ct. App. Apr. 13, 2009), 2009 WL 1346661; Appellant UNITE HERE's Reply Brief, No. C054400 (Cal. Ct. App. Jan. 22, 2009), 2009 WL 480320; Respondent's Brief, No. C054400 (Cal. Ct. App. Apr. 15, 2008), 2008 WL 2478283.

288. No. A112272, 2007 WL 1448746 (Cal. Ct. App. May 17, 2007).

289. *Id.* at \*3, \*6.

290. *Id.* at \*1. The union believed Hughes was paying wages that were "less than an 'area standard' figure published by the State of California." *Id.* As the court described, "[T]he Union was not attempting to organize the workers at Hughes Drywall, but was instead engaged in 'area standards' picketing." *Id.* at \*5.

291. One side of the flyer mentioned the "ongoing dispute" and the union's picketing at Hughes. *Id.* at \*5 n.6.

292. *Id.* at \*2-3. The events preceding the defamation suit were heated. On one occasion, while the union was picketing outside of Hughes Drywall, Hughes "held a union jacket in front of his groin and pretended to urinate on it." *Id.* at \*2. There was a factual dispute as to whether Hughes "actually expose[d] himself during the incident." *Id.* As the court explained,

Two of [Hughes's employees and his son] also testified that Hughes did not expose himself during the incident. The picketers had a different view. [A union member] testified that he was on the picket line that day, and saw Hughes remove his penis from his pants and rub it on the Union jacket. . . . [A]nother picketer, saw Hughes partially unzip his pants and rub the Union jacket on his crotch.

*Id.* Not long after a union representative reported the incident to the police, "Hughes again attempted to express his views of the Union by lowering his pants and 'moon[ing]' the picketers," stating "kiss my ass." *Id.* The union used a copy of the police report regarding the incident to prepare a flyer that it distributed to the public and to businesses in the area. *Id.*

293. *Id.* at \*6.

issue conceivably subject to the protections of [section] 7 or the prohibitions of [section] 8 of the [NLRA].<sup>294</sup>

While the outcome of the jury trial was affirmed on appeal by the state's highest court, the \$1.5 million award was reduced to approximately \$650,000.<sup>295</sup>

These three case studies demonstrate the hazards of revising NLRA preemption theory in such a way that it would increase state law adjudication of whether NLRA sections 8(a) and 8(b) protect or prohibit certain allegedly defamatory statements. Such adjudication is more complex than the inquiry called for by current doctrine. Widely accepted current doctrine merely asks state courts to adjudicate whether the allegedly defamatory statements were made *during* labor disputes. Of course, it is unknown whether the trial outcomes in these cases would have been different if the trial courts had applied the NLRA defamation defense. Nonetheless, the failure to apply the NLRA defamation defense meant that the jury evaluated the defamation claims based on the less exacting, and therefore more plaintiff-friendly, state law standards of proof. Thus, these cases illustrate that a simple application of the continuum proposal would likely reduce the frequency with which the NLRA defamation defense is applied. It may therefore unintentionally deteriorate the NLRA defamation defense and stunt its potential to protect new forms of collective activity.

A less often cited aspect of the continuum proposal acknowledges that states should be “free to regulate labor relations, in parallel with the NLRA and beyond, except where state law conflicts with an interest protected by the NLRA.”<sup>296</sup> Defamation law is one of the areas that potentially conflicts with an essential interest protected by the NLRA: that of free speech during a labor dispute. To avoid conflict with the NLRA's free speech policies, the NLRA's preemption doctrine should not be narrowed in such a way that would direct courts to engage in “arguably protected or prohibited by” inquiries on a case-by-case basis. Such a doctrine threatens to chill speech<sup>297</sup> and interfere with the NLRA's underlying purpose of

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294. *Id.*

295. *California Court Affirms Defamation Finding Against Carpenters, Cuts Punitive Damages*, BNA DAILY LABOR REP., May 25, 2007, at A3.

296. Gottesman, *supra* note 9, at 426 (emphasis added).

297. By focusing on the NLRA's preemption doctrine in a particular context—the defamation context—I contribute to the agenda of developing a “nuanced analysis” that considers where federal-level regulation is best and where “state and local heterogeneity would be most beneficial.” See Hirsch & Hirsch, *supra* note 8, at 1172 (“[G]reater state and local labor regulation may expand welfare-enhancing worker

protecting collective activity by protecting *less egregious* defamatory speech from the reach of state defamation law.<sup>298</sup> Instead, future proposals should take care to retain the NLRA defamation defense and its mandate that courts consider only whether an allegedly defamatory statement was made during a labor dispute.

#### CONCLUSION

In accordance with Congressional intent, the NLRA defamation defense has promoted speech and collective activity among employees for their mutual aid and protection. In this way, the NLRA's freedom of speech policies allow some "freedom to defame," albeit only with respect to less egregious forms of defamation. Speech is undoubtedly an important outlet that allows workers and their organizations to innovate in the face of new challenges. Moreover, while many aspects of the NLRA are beleaguered and out of step with modern workplace relations,<sup>299</sup> the defamation defense provides the NLRA with some potential to remain relevant in the context of new challenges, new worker organizations, and new worker organizing strategies.<sup>300</sup> It is still too early to put the final nail in the NLRA's coffin.

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voice and participation in certain geographic areas, but is not a particularly promising avenue for the country as a whole.<sup>301</sup>)

298. In this way, this Article joins existing literature that is similarly skeptical about the prospects of state involvement in labor relations. *See generally* Jeffrey Hirsch, *Taking States Out of the Workplace*, 117 YALE L.J. 225 (2008).

299. *See* Gould, *supra* note 221, at 668 ("The Act has done a less than stellar job in promoting the statutory objectives . . .").

300. *See* Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223, 225 (2005) (referring to the NLRA as having "potential for reinvigorating the labor movement and saving the soul of this country . . . [and] embody[ing] values that were intended to, and still can, transform our workplaces and our society"). *See generally* Kati L. Griffith, *Globalizing U.S. Employment Statutes Through Foreign Law Influence: Mexico's Foreign Employer Provision and Recruited Mexican Workers*, 29 COMP. LAB. L. & POL'Y J. 424 (2008) (demonstrating that foreign law can influence federal employment law in some circumstances and noting that the U.S. labor and employment law regime has some potential "to remain relevant and cope with challenges linked to increasing global economic integration.").