Third-Party Inflammatory Appeals to Prejudice: Race, Religion, and Union Elections

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Introduction

On May 10, 2010, the executive director of the Virginia National Association for the Advancement of Colored People (NAACP) held a press conference railing against Ashland Nursing and Rehabilitation Center (Ashland)—calling it "a cesspool of inhumanity."[1] Reporters heard the following: Ashland's nurses, predominantly black, were treated like "chattel enslaved captives."[2] Sometimes, "the nurses were told that they could not leave the building and had to sleep on the floor and get food from vending machines."[3] Six of the nurses were forced to empty their purses in front of supervisors, and several reported being "targeted because of their skin color, publicly and illegally strip-searched, ridiculed and later harassed."[4] These inflammatory allegations circulated widely in the local media in May and June of that year.[5] On the day of the press conference, the Virginia NAACP executive director connected some of the nurses with representatives of the United Food and Commercial Workers International Union.[6] On September 21, the union filed a petition to represent a bargaining unit of Ashland employees.[7] Rumors soon spread among employees that Ashland was planning to fire all of its black workers, and, during a November 3 representation election, employees voted thirty-one to twenty-eight in favor of union representation.[8]

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1. *See* Ashland Facility Operations, LLC v. NLRB, 701 F.3d 983, 987 (4th Cir. 2012).
2. *Id.*
3. *Id.*
4. *Id.* Of the six nurses, five were black and one was white. *Id.*
5. *See id.*
6. *Id.* He later introduced the nurses to a union vice president, but after June, he did not provide any assistance to the union regarding its Ashland organizing campaign. *Id.*
7. *See id.*
8. *Id.* at 988.

These racially inflammatory allegations turned out to be false or exaggerated. There were no strip-searches, no instances of forced sleeping on the floor or forced eating from vending machines, no mass firings of black workers—in fact, between June and the November 3 election, seventeen of Ashland's twenty-eight new hires were black.[9] As counsel for Ashland argued, the allegations were incendiary propaganda that the executive director of the Virginia NAACP injected into the election for "no purpose but to poison the workplace and turn employees against management—and each other—on racial grounds."[10]

This Note considers what standard the National Labor Relations Board (NLRB or Board) or a reviewing court should use to determine whether to set aside a union representation election because of third-party inflammatory appeals to racial or religious prejudice. Should the Board treat such third-party appeals differently than those made by the union or the employer? Despite a circuit split on this question,[11] there is little academic scholarship focusing on how the NLRB and courts do or should address third-party inflammatory appeals.[12]

This Note defends and expands upon the NLRB's position that it should give less weight to third-party inflammatory appeals to race or religion than it does to those of primary parties. Part I of the Note describes the general doctrine regarding speech during representation election campaigns. Part II analyzes Board law, policy issues, and the circuit split regarding third-party inflammatory appeals to race or religion. Part III proposes a framework for handling inflammatory appeals.

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9. *See* Opening Brief of Petitioner Ashland Facility Operations, LLC at *14–15, Ashland Facility Operations, LLC v. NLRB, 701 F.3d 983 (4th Cir. 2012) (No. 11-2004 (L)), 2011 WL 7017542 (citing to the parties' joint appendix).

10. *Id.* at *44.

11. *See infra* notes 64–65 and accompanying text.

12. *See, e.g.*, Marion Crain, *Whitewashed Labor Law, Skinwalking Unions*, 23 BERKELEY J. EMP. & LAB. L. 211, 229, 241 n.168 (2002) (in a footnote, concluding "courts and the Board apply a less rigorous 'third party' standard"); Tammy L. deCastro, *Discrimination and Unionization Elections: A Common Sense Approach to* Sewell, 52 RUTGERS L. REV. 1161, 1187–89 (2000) (broad overview of *Sewell* doctrine (*see infra* Part I.D) and also discussing third-party-employee speech); Charlotte LeMoyne, *The Unresolved Problem of Race Hate Speech in Labor Union Elections*, 4 GEO. MASON U. C.R.L.J. 77, 105–06 (1993) (noting several early cases in the circuit split on third-party statements, but focusing on primary-party racially inflammatory speech); Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 432 (1995) (analyzing third-party coercion in representation elections, but not addressing third-party inflammatory racial or religious appeals); John W. Teeter, Jr. & Christopher Burnett, *Representation Elections, Anti-Semitism and the National Labor Relations Board*, 5 VA. J. SOC. POL'Y & L. 341, 369–71 (1998) (criticizing the NLRB for tolerating anti-Semitism, identifying the Board's approach to third-party appeals as one of four problems, and arguing for a shift towards the Seventh Circuit's *Katz* approach (*see infra* Part II.E.1)).

I. Background

A. Definition of Primary Parties and Third Parties

In union representation elections, the two primary parties are: (1) the employer and (2) the union.[13] All other interested groups—for example, politicians, the NAACP, clergy, and even the employees voting in the representation election—are third parties. It is important not to conflate employees with the union itself; although employees may or may not support the union, the employees are not themselves primary parties. This distinction can be somewhat fluid, however, because third parties—including employees—sometimes act as agents of the primary parties.[14] For example, a union or an employer might recruit an employee to act as its spokesperson.[15] An employee may also be a primary party's agent if the employee appears to act as the primary party's agent and the primary party knowingly fails to repudiate the agency relationship.[16]

B. General Shoe *Doctrine of Laboratory Conditions*

Union representation elections share some properties with political elections. Both are adversarial processes in which opposing primary parties campaign for votes. In both kinds of elections, primary parties and third parties each have a qualified right to exercise free speech in the form of campaigning. Most political elections in the United States boil down to a plain dichotomous choice: vote for Candidate A or Candidate B.[17] Likewise, union representation elections end with a plain choice: vote "Yes Union" or "No Union." However, the

13. Some argue that this classification is flawed and that employees and unions should be viewed as the two primary parties in union representation elections. From this perspective, employees decide whether to "hire" union representation and the employer is a third party. *See* Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law,* 77 MINN. L. REV. 495, 498–99 (1993) ("The core defect in union election law . . . is the employer's status as a [primary] party . . . ."); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1813 (1983) (criticizing the assumption "that the employer is legitimately entitled to play the same role in a representation campaign against the union that the Republican Party plays in a political campaign against the Democrats" as a barrier to labor law reform). From yet another perspective, the employer and the employees could be the main parties in the employment relationship, and the union is the interloping third party. For purposes of this Note, however, the employer and the union are considered the two primary parties.

14. The National Labor Relations Act (NLRA) incorporates the common law of agency. *See In re Strack & Van Til Supermarkets*, 340 N.L.R.B. 1410, 1416 (2004) ("It is well established that, under Section 2(13) of the Act, employers and unions are responsible for the acts of their agents in accordance with ordinary common-law rules of agency."); *see also* Int'l Longshoremen's Ass'n v. NLRB, 56 F.3d 205, 207, 211–13 (D.C. Cir. 1995).

15. *See* RESTATEMENT (THIRD) OF AGENCY § 3.01 Creation of Actual Authority (AM. LAW INST. 2006).

16. *See* RESTATEMENT (THIRD) OF AGENCY § 3.03 Creation of Apparent Authority (AM. LAW INST. 2006); *id.* cmt. b (a principal may manifest assent through actions or inactions).

17. Trichotomous if you include the option to abstain from voting.

scope of constitutional protection for speech is different for the two types of elections.[18] Relying on its governing statute,[19] the NLRB's regulation of representation election speech is less permissive than judicially imposed limitations on political speech.[20]

In *General Shoe Corp.*,[21] the NLRB articulated the "laboratory conditions" doctrine, analogizing union representation elections to experiments aimed at determining the "uninhibited desires of the employees."[22] The NLRB declared that its duty[23] is to establish laboratory conditions and order new elections in the rare cases where the standard of laboratory conditions drops too low.[24]

The Board has since identified various factors that might destroy the necessary laboratory conditions, including "threats of physical violence and retaliation;"[25] "promises of benefits, threats of economic reprisals, deliberate misrepresentations of material facts by an employer or a union, deceptive campaign tactics by a union, or . . . a general atmosphere of fear and confusion caused by a participant or by members

18. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc. 425 U.S. 748, 778 & n.3 (1976) (Stewart, J., concurring). Justice Stewart noted that "[t]he scope of constitutional protection of communicative expression is not universally inelastic." *Id.* at 778. With regard to the labor relations context, he explained:

> Speech by an employer or a labor union organizer that contains material misrepresentations of fact or appeals to racial prejudice may form the basis of an unfair labor practice or warrant the invalidation of a certification election. Such restrictions would clearly violate First Amendment guarantees if applied to political expression concerning the election of candidates to public office. Other restrictions designed to promote antiseptic conditions in the labor relations context . . . [also] would be constitutionally intolerable if applied in the political arena.

Id. at 778 n.3 (citing Sewell Mfg. Co., 138 N.L.R.B. 66 (1962)) (other citations omitted).

19. Section 9(c) of the NLRA establishes the union representation election process, including the Board's direction of elections and certification of results. *See* 29 U.S.C. § 159(c) (2012).

20. As the Board stated in Sewell Mfg. Co., 138 N.L.R.B. 66, 69–70 (1962):

> A Board election is not identical with a political election. In the latter, public officials conducting the election have no responsibility beyond the mechanics of the election. . . . [T]he law permits wide latitude in the way of propaganda—truth and untruth, promises, threats, appeals to prejudice. . . .
>
> By way of contrast, the Board not only conducts elections, but it also oversees the propaganda activities of the participants in the election. . . . [I]t seeks "to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees."

Id. (quoting Gen. Shoe Corp., 77 N.L.R.B. 124, 127 (1948)).

21. 77 N.L.R.B. 124 (1948).

22. *Id.* at 127.

23. According to the Board, this duty "flows from its function, which is: 'to conduct elections in which the employees have the opportunity to cast their ballots in an atmosphere conducive to the sober and informed exercise of the franchise . . . .'" *See* Did Bldg. Servs., Inc. v. NLRB, 915 F.2d 490, 497 & n.7 (9th Cir. 1990) (quoting Sewell Mfg. Co., 138 N.L.R.B. 66, 70 (1962)).

24. *See General Shoe*, 77 N.L.R.B. at 127.

25. *See* RJR Archer, Inc., 274 N.L.R.B. 335, 345 (1985).

of the general public."[26] However, after vacillating for years on how to treat misrepresentations, the Board decided in *Midland National Life Insurance Co.*[27] that it would no longer regulate misrepresentations except for document forgeries "which render the voters unable to recognize propaganda for what it is."[28]

C. Coercive Threats of Violence or Retaliation

Intimidation or coercion of employees can upset laboratory conditions by inhibiting employee free choice during union representation elections.[29] Coercion may take the form of either express threats of physical violence toward an employee's person or property[30] or general threats of "unidentified reprisal."[31] The Board will set aside an election if a primary party's threats "disrupted the voting procedure or destroyed the atmosphere necessary to the exercise of a free choice in the representation election."[32] Various Board and court decisions have considered whether third-party appeals to race or religion should be assessed by this coercive threats standard or by the standard applied to primary-party appeals to race or religion.[33]

D. The Sewell *Doctrine Regarding Inflammatory Racial or Religious Appeals to Prejudice*

In *Sewell Manufacturing Co.*,[34] the Board expanded on *General Shoe* to prohibit election propaganda that appeals to racial prejudice and is not germane to the election.[35] In *Sewell*, 1,322 employees cast ballots: 331 for the union and 985 against.[36] The union filed an objection "that the Employer, by various propaganda means, had used appeals to racial prejudice to prevent a free election."[37] In the four months before the election, the employer distributed to employees copies of *Militant Truth*—a monthly publication containing articles about

26. *See* Sewell Mfg. Co., 138 N.L.R.B. 66, 70 & nn.6–11 (1962).

27. 263 N.L.R.B. 127 (1982).

28. *Id.* at 133. For a history of the Board's varying treatment of misrepresentations, see Douglas M. Lieberman, *Campaign Misrepresentations Since* Midland National Life*: A Survey and Appraisal*, 3 HOFSTRA LAB. L.J. 89, 89–93 (1985).

29. Such coercion constitutes an unfair labor practice because section 7 of the NLRA guarantees employees the right to choose union representation, and section 8(a)(1) makes it an unfair labor practice for an employer to interfere with section 7 rights. *See* 29 U.S.C. §§ 157, 158(a)(1) (2012); *accord* Churchill's Catering Corp., 276 N.L.R.B. 775, 778 (1985).

30. *See RJR Archer*, 274 N.L.R.B. at 336.

31. *See Churchill's*, 276 N.L.R.B. at 810.

32. NLRB v. Claxton Mfg. Co., 613 F.2d 1364, 1371 (1980) (quoting NLRB v. Golden Age Beverage Co., 415 F.2d 26, 32 n.5 (5th Cir. 1969)).

33. *See, e.g.*, *infra* notes 156–160 and accompanying text; *see also infra* notes 78, 85, 100, 136–140, 203 and accompanying text.

34. 138 N.L.R.B. 66 (1962).

35. *See id.* at 71.

36. *Id.* at 66.

37. *Id.*

racial matters both related and unrelated to labor issues.[38] During the two weeks before the election, the employer mailed and distributed other racially charged documents, apparently attempting to relate white workers' fears of racial integration to labor issues.[39] These included: (1) a large picture of a black man dancing with a white woman, with a caption stating: "The C.I.O. Strongly Pushes and Endorses the F.E.P.C.";[40] (2) another prominent picture of a white man dancing with a black woman and a caption stating, in part, "UNION LEADER JAMES B. CAREY DANCES WITH A LADY FRIEND"; and (3) documents accusing the union of politically and financially supporting civil rights groups.[41]

The Board's Acting Regional Director (ARD) found that the employer's actions did not justify overturning the election because there was "no misrepresentation, fraud, violence, or coercion" and because the allegedly prejudicial statements were true.[42] The ARD compared *Sewell* to *Sharnay Hosiery Mills, Inc.*,[43] in which an employer mailed a letter to employees two weeks before a representation election; the letter discussed the position of the union in favor of racial integration and the AFL-CIO's[44] contributions to the NAACP.[45] The NLRB upheld the *Sharnay* election results, saying that "mere mention of the racial issue" was not per se improper and "the letter contained no threats of reprisal or promises of benefit and did not exceed the permissible bounds of preelection propaganda."[46]

In *Sewell*, the Board disagreed with its ARD and asserted that, unlike political elections, the NLRB administers representation elec-

38. *Id.* at 66–68.

39. *See id.*

40. F.E.P.C. is the acronym for the Fair Employment Practices Committee, which prohibited the U.S. government and government contractors from discriminating on the basis of race, creed, color, or national origin. *See Fair Employment Practices Committee*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/topic/Fair-Employment-Practices-Committee (last visited Jan. 6, 2016). President Franklin D. Roosevelt created and expanded the F.E.P.C. through executive orders during World War II, but Congress declined to make it permanent and the F.E.P.C. was dissolved in 1946. *See id.* The representation election in *Sewell* took place in July 1961, just months after President John F. Kennedy's March 1961 executive order establishing the President's Committee on Equal Employment Opportunity, and several years before Congress created the Equal Employment Opportunity Commission (EEOC) and enacted the Civil Rights Act of 1964 (Title VII). *See Sewell*, 138 N.L.R.B. at 66; *50th Anniversary of the EEOC: The Law*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/history/50th/thelaw.cfm (last visited Jan. 6, 2016).

41. *Sewell*, 138 N.L.R.B. at 66–68.

42. *Id.* at 69 (quoting Sharnay Hosiery Mills, Inc., 120 N.L.R.B. 750, 751 (1958)).

43. 120 N.L.R.B. 750 (1958).

44. The union in *Sharnay* was an AFL-CIO member. *Id.* at 750. The AFL-CIO is a confederation of over fifty unions representing 12.5 million American workers. *See About the AFL-CIO*, AFL-CIO, http://www.aflcio.org/About (last visited Jan. 6, 2016).

45. *Sharnay*, 120 N.L.R.B. at 750.

46. *Id.* at 751.

tions and it must restrict certain kinds of speech or conduct to ensure an appropriate process.[47] The Board noted that the list of factors that might destroy laboratory conditions is "not fixed and immutable. [The list has] been changed and refined, generally in the direction of higher standards."[48] The Board also explained that it tolerates some propaganda as "prattle" or "puffing,"[49] but propaganda that crosses the line into appeals to racial prejudice, not germane to election issues, is impermissible.[50] Nonetheless, statements with racial overtones are not always condemned. Temperate and factually correct statements of the union's or employer's position may be acceptable.[51]

On the same day it decided *Sewell*, the Board framed the contours of its new doctrine in *Allen-Morrison Sign Co.*[52] In *Allen-Morrison*, the Board considered employer literature similar to that in *Sewell*. Unlike in *Sewell*, however, the Board found the literature permissible.[53] About one week before a representation election, Allen-Morrison sent employees a letter discussing racial segregation.[54] The letter stated that each person was entitled to a personal viewpoint on segregation and integration and that the national unions favored integration.[55] The NLRB reasoned that the statements were "indisputably germane to the election"[56] and "temperate in tone."[57] Two days before the election, the employer also sent employees a short letter attaching a reprint from an issue of *Militant Truth*—the same objectionable publication in *Sewell*—which discussed union support of integration and

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47. *See supra* note 20.
48. Sewell Mfg. Co., 138 N.L.R.B. 66, 70 (1962).
49. *See id.* 70–71.
50. *See id.* at 71.

> [A]ppeals to racial prejudice on matters unrelated to the election issues or to the union's activities are not mere "prattle" or puffing. They have no place in Board electoral campaigns. They inject an element which is destructive of the very purpose of an election. They create conditions which make impossible a sober, informed exercise of the franchise. The Board does not intend to tolerate as "electoral propaganda" appeals or arguments which can have no purpose except to inflame the racial feelings of voters in the election.

Id.

51. *See id. Sewell* reasoned that if

> a [primary] party limits itself to *truthfully* setting forth another [primary] party's position on matters of racial interest and does not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals, [the NLRB] shall not set aside an election on this ground. However, the burden will be on the [primary] party making use of a racial message to establish that it was truthful and germane . . . .

Id. at 71–72.

52. 138 N.L.R.B. 73 (1962).
53. *Id.* at 75–76.
54. *Id.* at 73–74.
55. *Id.*
56. *Id.* at 73.
57. *Id.* at 75.

union activity in a nearby city.[58] Over the dissent of one member, who thought "the Employer exceeded the limits of permissible campaigning," the NLRB majority stated: "We are not able to say that the Employer in this case resorted to inflammatory propaganda on matters in no way related to the choice before the voters . . . ."[59] The Board declined to set aside the election.[60]

E. Scorecard: Sewell *as Applied to Employer and Union Appeals to Race or Religion*

The Supreme Court has not adopted or rejected *Sewell*, although in a footnote to a concurring opinion in 1976, Justice Potter Stewart cited *Sewell* favorably.[61] Absent Supreme Court guidance, all but two circuits have explicitly accepted *Sewell* in the context of employer and union speech.[62] The First Circuit has not addressed *Sewell*. The Ninth Circuit has considered *Sewell*, but has neither accepted nor rejected it in the context of employer and union speech.[63] Circuit decisions are divided on whether and how to apply *Sewell* to third-party racial and religious inflammatory appeals to prejudice.[64] The split deepened in 2012.[65]

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58. *Id.* at 74–75.

59. *Id.* at 75.

60. *Id.* at 75.

61. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc. 425 U.S. 748, 778 n.3 (1976) (Stewart, J., concurring). The Court analyzed commercial freedom of speech in the context of statutory bans on advertising prescription drug prices. *See id.* at 749–50 (majority opinion). In his concurring opinion, Justice Stewart cited *Sewell* for the proposition that the scope of constitutional protection of speech varies based on its content and speech that misrepresents facts or appeals to racial prejudice warrants less protection. *Id.* at 778 & n.3 (Stewart, J., concurring).

62. *See, e.g.*, Honeyville Grain, Inc. v. NLRB, 444 F.3d 1269, 1273–75 (10th Cir. 2006); NLRB v. Foundry Div. of Alcon Indus., Inc., 260 F.3d 631, 635 n.6 (6th Cir. 2001); Family Serv. Agency S.F. v. NLRB, 163 F.3d 1369, 1378 (D.C. Cir. 1999); Case Farms of N.C., Inc. v. NLRB, 128 F.3d 841, 849 (4th Cir. 1997); M & M Supermarkets, Inc. v. NLRB, 818 F.2d 1567, 1573 (11th Cir. 1987); NLRB v. Vought Corp.—MLRS Sys. Div., 788 F.2d 1378, 1383 (8th Cir. 1986); NLRB v. Utell Int'l, Inc. 750 F.2d 177, 179–80 (2d Cir. 1984); NLRB v. Katz, 701 F.2d 703, 706–07 (7th Cir. 1983); NLRB v. Silverman's Men's Wear, Inc., 656 F.2d 53, 60 (3d Cir. 1981); NLRB v. Bancroft Mfg. Co., 516 F.2d 436, 442 (5th Cir. 1975).

63. *See* Did Bldg. Servs., Inc. v. NLRB, 915 F.2d 490, 497 (9th Cir. 1990) ("We have not yet applied the *Sewell* rule in this circuit."). Without deciding whether *Sewell* applied in the context of primary party statements, the Ninth Circuit found *Sewell* inapplicable to prejudiced remarks by an employee—a third party. *Id.*; *see also* NLRB v. Family Hous. & Adult Res., Inc., 141 F.3d 1177 (9th Cir. 1998) (unpublished table decision) (no set-aside because race was not a sufficiently significant aspect of the election under *Sewell* and employees' free vote was not seriously infringed upon under *Did Building*).

64. *Compare Katz*, 701 F.2d at 706–07 (Seventh Circuit extends *Sewell* to third-party conduct), *with Did Bldg.*, 915 F.2d at 497–98 (Ninth Circuit does not apply *Sewell* to third-party conduct), *and M & M*, 818 F.2d at 1572–73 (Eleventh Circuit arguably agreeing with the Ninth Circuit approach, but see *infra* note 160); s*ee also Alcon*, 260 F.3d at 635 (Sixth Circuit analyzing the split).

65. *See* Ashland Facility Operations, LLC v. NLRB, 701 F.3d 983, 993 (4th Cir. 2012) (resolving competing views within the Fourth Circuit, aligning with Ninth and Eleventh circuits).

II. Analysis

A. The NLRA Disproportionately Places the Burden of Election Set-Asides on Unions

Section 10(e) of the NLRA empowers the Board to petition the federal courts of appeals for enforcement of a "final order" in an unfair labor practice case,[66] and section 10(f) permits any person aggrieved by a "final order" to appeal.[67] Under section 9, both employers and unions can allege that something improper interfered with laboratory conditions.[68] However, there is a significant disparity between employers' and unions' abilities to obtain review of Board election certifications. Because Board election certifications are not "final orders" that would permit appellate court review under section 10, there is no straightforward path to judicial review of Board certification decisions.[69] An employer that loses an election, however, can simply refuse to bargain with the union and raise the election objections as a defense to the unfair labor practice complaint.[70] This leaves the union with no choice but to give up on the election or file a charge under section 8(a)(5) of the NLRA.[71]

Unions have no parallel procedural tactic to obtain judicial review.[72] If a union loses an election, it has no right to bargain and thus cannot violate a duty to bargain with the employer.[73] Therefore, courts of appeals hear cases in which *employers* seek to overturn NLRB elections.[74] This disparity puts unions in a bind—if unions lose elections, they lose. If unions win elections, they face lengthy litigation that preserves the pre-election (non-union) status quo until resolution of the case.[75] Even after overwhelming union victories, there can be long litigation delays before the union eventually wins on appeal.[76] Further, unions tend to lose election re-runs and may be too discouraged to litigate.[77] Strict regulation of third-party conduct

66. *See* 29 U.S.C. § 160(e) (2012).

67. *See id.* § 160(f).

68. Section 9 gives the Board power to regulate union representation elections. *See id.* § 159(c).

69. *See* AFL v. NLRB, 308 U.S. 401, 409 (1940) ("[A] certification in representation proceedings . . . authorized by § 9, is nowhere spoken of as an order, and no procedure is prescribed for its review apart from an order prohibiting an unfair labor practice.").

70. Thus the employer can "convert" the case into an unfair labor practice proceeding. This is known as a technical refusal to bargain. *See* Becker, *supra* note 13, at 586.

71. *See* 29 U.S.C. § 158(a)(5) (2012).

72. *See* deCastro, *supra* note 12, at 1168, 1176 n.116.

73. *See id.*

74. *See id.*

75. *See, e.g.*, Crain, *supra* note 12, at 242, 245, 248–50 (citing examples of long delays).

76. *See, e.g.*, Family Serv. Agency S.F. v. NLRB, 163 F.3d 1369, 1372, 1384 (D.C. Cir. 1999) (litigation delayed bargaining for over two years despite a two-thirds vote in favor of the union).

77. *See* Julius G. Getman, *Ruminations on Union Organizing in the Private Sector*, 53 U. CHI. L. REV. 45, 67 (1986).

would increase opportunities for employer-initiated litigation, disproportionately harming unions.

B. The NLRB Gives Less Weight to Third-Party Conduct

The Board gives different amounts of weight to different types of conduct. For example, in *Midland National Life Insurance Co.*, the Board said that it would "intervene in cases where a party has used forged documents . . . [and] protect against other campaign conduct, such as threats, promises, or the like, which interferes with employee free choice."[78] *Midland* did not specifically discuss third-party conduct or inflammatory racial or religious appeals.[79] In other cases, the Board has said that it regulates third-party election conduct but gives it less weight than that of a primary party.[80] The doctrine of assigning less weight to third-party conduct predates *Sewell*.[81] In *Sewell*, the Board regulated inflammatory appeals made by a primary party, but it did not clarify how it would treat similar appeals made by third parties.[82] In 2012, the NLRB General Counsel's brief filed in *Ashland Facility Operations, LLC v. NLRB*—a case about third-party inflammatory appeals to racial prejudice—contended that "the Board Gives Less Weight to the Conduct of Third Parties than to Party Conduct."[83] The brief asserted that the petitioner's "reliance on the *Sewell* line of precedent—which primarily addresses a [primary] party's own involvement in a campaign—is a stretch from the start."[84] Nonetheless, under *General Shoe*, the Board's first responsibility is to ensure a fair election regardless of whether a primary party or third party disturbed laboratory conditions.[85] Thus, the NLRB must give some weight to third-party inflammatory appeals—setting aside elections

78. Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127, 133 (1982).

79. *See id.*

80. *See, e.g.*, *In Re* Sea Breeze Health Care Ctr., Inc., 331 N.L.R.B. 1131, 1144 (2000) ("[I]t is well settled that the Board accords less weight to the conduct of nonparties in determining whether an election should be set aside."); *see also* Crain, *supra* note 12, at 241 n.168 ("courts and the Board apply a less rigorous 'third party' standard where the union cannot be connected to the racial commentary made by third parties").

81. *See* Orleans Mfg. Co., 120 N.L.R.B. 630, 633 (1958) (Four years prior to *Sewell*, the Board stated: "While the Board will consider conduct not attributable to any of the parties in determining whether an election should be set aside, the Board accords less weight to such conduct than to conduct of the parties.")

82. *See* Sewell Mfg. Co., 138 N.L.R.B. 66, 71–72 (1962).

83. *See* Brief for the National Labor Relations Board at *14, Ashland Facility Operations, LLC v. NLRB, 701 F.3d 983 (4th Cir. 2012) (Nos. 11-2004, 11-2132); 2012 WL 136942 (citing NLRB v. Herbert Halperin Distrib. Corp., 826 F.2d 287, 290 (4th Cir. 1987) ("Less weight is accorded the comments and conduct of third parties than to those of the employer or union.")).

84. *See id.* at *36.

85. *See* Gen. Shoe Corp., 77 N.L.R.B. 124, 127 (1948); *see also Z*eiglers Refuse Collectors, Inc. v. NLRB, 639 F.2d 1000, 1007 (3d Cir. 1981) ("The Board and the courts have acknowledged that even though the threats made were not attributable to the union, an election will nevertheless be set aside where the conduct created a general atmosphere inimical to the employees' exercise of a free and fair choice.").

that are truly compromised—but it gives third-party conduct less weight than it gives to the conduct of primary parties.[86]

C. Board Inability to Curb Third Parties by Setting Aside Elections; Primary-Party Inability to Curb Third Parties; Third-Party Inability to Affect Elections

Several reasons justify the Board's policy of tolerating third-party speech that would warrant setting aside an election if communicated by a union or employer. First, the risk of a set-aside may not deter a third party because, by definition, it is not directly affected by the election outcome.[87] The Board is thus unable to sanction the bad actor.[88] Granted, the Board does not set aside elections to punish bad actors, but to fulfill its statutory obligation to assure fair elections.[89] However, the Board should take into account the functional results of its decisions: when it strictly regulates third-party appeals by setting aside election results, it harms the party that won and helps the party that lost.[90] In *Sewell*, the Board recognized this consequence in the context of primary-party speech and equitably adjusted the burden of proof, holding that "the burden will be on the party making use of a racial message to establish that it was truthful and germane, and where there is doubt as to whether the total conduct of such party is within the described bounds, the doubt will be resolved against him."[91] *Sewell*'s burden scheme is ill-suited in the case of a third party that never bears any burden of persuasion in NLRA cases.

Second, while some third-party interests closely align with those of a primary party, a primary party may be unable to control "rogue" third parties with independent interests. If a primary party sincerely attempted to discourage a third party's improper racial or religious appeal, it would be inconsistent with *Sewell*'s equitable burden scheme to punish the primary party by setting aside its election victory. An example—outside the context of race or religion—of primary parties' difficulty controlling third parties is the 2014 defeat of the United Auto Workers' (UAW) effort to represent employees at a Volkswagen plant in Chattanooga, Tennessee.[92] In that campaign, Volkswagen did not oppose the unionization drive, but instead "pledged to remain neutral, [and] in some ways offer[ed] quiet sup-

86. This distinction—and Board reluctance to regulate—dissipates if a putative third party acts as a primary party's actual or apparent agent rather than as a true third party. *See supra* notes 14–16.

87. *Herbert Halperin*, 826 F.2d at 290.

88. *See id.*

89. *See supra* notes 23–24 and accompanying text; *see also* 29 U.S.C. § 159 (2012).

90. This harm falls disproportionately on unions. *See supra* Part II.A.

91. Sewell Mfg. Co., 138 N.L.R.B. 66, 72 (1962).

92. Steven Greenhouse, *Volkswagen Vote Is Defeat for Labor in South*, N.Y. TIMES (Feb. 14, 2014), http://www.nytimes.com/2014/02/15/business/volkswagen-workers-reject-forming-a-union.html.

port to the union."[93] Volkswagen "urged 'third parties' to remain neutral and stay out of the unionization battle."[94] However, Volkswagen could not prevent Tennessee politicians—with their own agendas—from campaigning vigorously against the union.[95] The UAW president blamed the defeat on this outside pressure, noting that while a majority of the plant's workers had signed cards in 2013 saying they favored union representation, the workers voted 712 to 626 against the UAW in February 2014.[96]

Lastly, because of their detachment from the election, third parties generally have less power than primary parties to affect election outcomes.[97] It makes even less sense to regulate inflammatory propaganda of remote third parties than it does to regulate misrepresentative propaganda of closely involved primary parties—a course the Board rejected in *Midland*.[98] Although the Board tries to ensure adequate *laboratory conditions*, it recognizes that it cannot establish artificial conditions because elections do not occur in actual *laboratories*.[99] Especially in the case of third-party inflammatory appeals, the Board should be hesitant to set aside an election.[100]

D. The Nature of Racial and Religious Discrimination Has Changed

During congressional debate over the labor dispute bill that eventually became the NLRA, black leaders advocated for the addition of an anti-discrimination provision.[101] One proposed amendment stated, in part, "no labor organization which denies the right of membership therein to or discriminates against any person on account of race, color, or creed . . . shall be entitled to the benefits of the provisions

93. *Id.*
94. *Id.*
95. *See id.*
96. *See id.*
97. *See* NLRB v. Herbert Halperin Distrib. Corp., 826 F.2d 287, 290 (4th Cir. 1987) ("[T]hird party statements do not have the institutional force of statements made by the employer or the Union.").
98. *See* Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127, 133 (1982).
99. *See* Liberal Mkt., Inc., 108 N.L.R.B. 1481, 1482 (1954).
100. *Herbert Halperin*, 826 F.2d at 290 (quoting Methodist Home v. NLRB, 596 F.2d 1173, 1183 (4th Cir. 1979) (Elections should "be set aside for third-party conduct only if 'the election was held in a general atmosphere of confusion, violence, and threats of violence, such as might reasonably be expected to generate anxiety and fear of reprisal, to render impossible a rational uncoerced expression of choice . . . .'").
101. *See* Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 122–23 & n.141 (2011) (citing *National Labor Relations Act: Hearings on S. 2926 Before the S. Comm. on Education & Labor*, 73d Cong. 695 (1935), *reprinted in* 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1035 (1949) (brief of William E. Taylor, Chairman, Legislative Committee, District Branch, NAACP)).

of this act."[102] Although Senator Robert F. Wagner reportedly supported anti-discrimination amendments, the American Federation of Labor (AFL) fought and defeated them.[103]

Between 1935 and the passage of Title VII of the Civil Rights Act of 1964 (Title VII),[104] the NLRB faced numerous cases in which employers attempted to divide employees by appealing to their racial prejudices: fears of integration, whites' fears of displacement by blacks, and blacks' fears of displacement by whites.[105] Without an anti-discrimination provision in the NLRA, "the Board adopted a relatively laissez-faire position on the question of [employers'] racial appeals in" representation elections, treating them "no differently from other types of employer speech."[106] That changed in *Sewell* when the Board adopted a specific rule restricting racially inflammatory appeals to prejudice.[107] *Sewell* was decided in 1962 before passage of Title VII. Thus, in 1962, *Sewell* served as a stopgap anti-discrimination measure for union elections in the absence of explicit statutory direction.[108] Today, however, parties invoke the doctrine in efforts to overturn elections because of racial appeals made by both employers and unions.[109] Title VII makes *Sewell* less important as a bulwark against racism.[110]

Further, changes in the tenor of U.S. race relations since 1962 diminish *Sewell*'s utility in two ways and support cabining *Sewell* within its original confines—prohibiting primary-party inflammatory appeals to prejudice.[111] First, racism in the workplace has become less explicit.[112] *Sewell* excels only as a test for explicit racism because it seeks out overt "appeals or arguments which can have no purpose except to inflame the racial feelings of voters in the election."[113] As overt racism diminishes, there is less need for a doctrine focused on overtly discriminatory speech,[114] especially third-party racist speech.

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102. *Id.* at 123 & n.144 (citing *National Labor Relations Act Hearings*, *supra* note 101, at 1036).

103. *Id.* at 123.

104. 42 U.S.C. §§ 2000e through 2000e-17 (2012).

105. *See* Crain, *supra* note 12, at 230.

106. *See id.* at 231.

107. *See* Sewell Mfg. Co., 138 N.L.R.B. 66, 71 (1962).

108. *See* Crain, *supra* note 12, at 234.

109. *See id.*

110. *See id.* ("Title VII . . . diminished the moral justification for the Board's *Sewell* rule.").

111. *See Sewell*, 138 N.L.R.B. at 71.

112. *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001) ("Cognitive bias, structures of decisionmaking, and patterns of interaction have replaced deliberate racism . . . as the frontier of . . . inequality.").

113. *See Sewell*, 138 N.L.R.B. at 71.

114. *See* Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1893 (2009) ("Discrimination in today's workplace is largely implicit, making it . . . very difficult to prove.").

Second, because of persistent latent racism, there is a great need to openly discuss race and conduct that has adverse effects on systemically disadvantaged racial groups. As Justice Sonia Sotomayor put it in a 2014 affirmative action case: "race matters."[115] Attempts to make *Sewell* more searching—by vigorously extending it to third parties—risk chilling legitimate references to race during union elections or overturning elections in which such issues are appropriate. This would be a bad result. Race is frequently germane to union elections because race is everywhere; its relevance stems from "the long history of racial minorities being denied access to the political process[,] . . . because of persistent racial inequality in society[,] . . . [and] for reasons that really are only skin deep, that cannot be discussed any other way. . . ."[116] As the Board recognized in *Sewell*, race can be a legitimate topic to discuss.[117] For example, in *Ashland*—the case discussed in this Note's introduction—several nurses reached out to a third party, the NAACP, with race-based employment concerns.[118] By extending *Sewell* to third parties in cases like *Ashland*, the Board would chill discussion of racial grievances and punish primary parties for discussions beyond their control.

It would be especially inconsistent and troubling to expand *Sewell* to cover more racial and religious appeals because of the Board's *Midland* policy not to regulate misrepresentations.[119] After *Midland*, expanding *Sewell* could leave race and religion the only taboo topics during elections. Such prohibitions would not diminish discrimination in the workplace or during union representation elections because "[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race . . . ."[120]

E. Circuit Split on Third-Party Inflammatory Appeals to Race or Religion

Federal courts of appeals review election set-aside decisions only in the context of unfair labor practice cases in which the NLRB has ordered an employer to bargain after a union election victory.[121] Courts have consistently accepted *Sewell* when regulating primary-party

115. Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN), 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting).

116. *Id.*

117. *See Sewell*, 138 N.L.R.B. at 71–72 (race discussion must be germane to the election, truthful, and not inflammatory).

118. *See* Brief for the National Labor Relations Board at *18, Ashland Facility Operations, LLC v. NLRB, 701 F.3d 983 (4th Cir. 2012) (Nos. 11-2004, 11-2132), 2012 WL 136942 (citing to the joint appendix in the case); *see also supra* Introduction.

119. *See* Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127, 133 (1982); *see also supra* text accompanying notes 27–28.

120. *See Schuette*, 134 S. Ct. at 1676 (Sotomayor, J., dissenting).

121. *See supra* Part II.A.

racial or religious inflammatory appeals.[122] The circuits are split, however, on whether and how *Sewell* applies to third-party appeals.[123]

1. The Seventh Circuit Extends *Sewell* to Third-Party Appeals

In *NLRB v. Katz*,[124] a case considering how *Sewell* applies to third-party statements made before a representation election, the Seventh Circuit saw no difference between racially or religiously inflammatory statements made by a primary party and those of a third party.[125] In *Katz*, the union held meetings at a Catholic church for a manufacturing company's workers who were predominantly Catholic.[126] A priest—who did not represent either the union or the employer and thus was a third party—urged employees to vote for the union.[127] He made comments about management, such as "Paul and Mrs. Katz are Jewish and they're getting rich while we're getting poor," and he referenced *Holocaust*, a movie about Nazi treatment of Jews during World War II.[128] Another third party, an employee, told others that a supervisor said: "All these dumb Mexicans you know what they want—more money. They are greedy because they never had anything."[129]

The Seventh Circuit compared the facts in *Katz* to those in the Third Circuit's decision in *NLRB v. Silverman's Men's Wear, Inc.*[130] In *Silverman's*, the court denied enforcement of an NLRB bargaining order because a union officer—a primary party—referred to a manager as "a 'stingy Jew' in front of twenty employees."[131] Finding *Silverman's* persuasive, the Seventh Circuit held that the distinction whether inflammatory statements were made by a primary or third party was irrelevant.[132] Instead, "[t]he relevant legal inquiry is whether the inflammatory remarks *could have* impaired the employees' freedom of choice in the subsequent election."[133] The Seventh Circuit concluded that the third-party statements in *Katz* could have influenced workers' voting decisions.[134] Accordingly, the court denied the NLRB's petition for enforcement.[135]

122. *See supra* notes 62–63 and accompanying text.
123. *See supra* notes 64–65 and accompanying text.
124. 701 F.2d 703 (7th Cir. 1983).
125. *Id.* at 707.
126. *Id.*
127. *See id.* at 705.
128. *Id.*
129. *Id.* at 705–06.
130. 656 F.2d 53 (3d Cir.1981).
131. *Katz*, 701 F.2d at 706.
132. *Id.* at 707.
133. *Id.* (emphasis added).
134. *See id.*
135. *Id.*at 709.

The *Katz* court hedged, however, by setting forth an additional rationale to deny the NLRB's petition—third-party threats of violence.[136] Some employees had allegedly violently threatened other employees who supported the union and told them that the union had said the company would retaliate against those who did not vote for it.[137] By advancing this alternative rationale, *Katz* left unclear exactly which facts were central to its decision.[138] The court further obscured its reasoning by finding it was unnecessary to determine whether the offending employee statements were attributable to the union on a theory of agency, or whether the employee who made the statements was a true third party.[139] Either way, the court explained, the threats sufficiently spoiled the election's laboratory conditions.[140]

In a subsequent case, *Clearwater Transport, Inc. v. NLRB*,[141] the Seventh Circuit seemed to withdraw partially from *Katz*'s suggestion that an election should be set aside if inflammatory remarks could have impaired the electorate's free choice. In *Clearwater*, the court considered an anti-Semitic remark by an employee—a third party—during an employee meeting days before a union representation election.[142] The court purported to apply the *Katz* test, but shifted from *Katz*'s "*could have* impaired the employees' freedom" standard[143] to requiring evidence of an *actual* effect.[144]

It is not clear, however, whether the Seventh Circuit truly changed its test in *Clearwater*. The court considered rejecting *Katz* and adopting a new standard but it explicitly declined to do.[145] Further, *Katz* and *Clearwater* are entirely consistent at their cores. In *Katz*,

136. *See id.* at 708.

137. *Id.*

138. *See id.* The Seventh Circuit's reliance on third-party threats tracks the Eleventh and Ninth Circuits' reasoning in similar cases. *See infra* Parts II.E.2–3. The Eleventh Circuit developed a standard for third-party inflammatory racial or religious appeals by borrowing from the standard for third-party threats. *See M & M Supermarkets, Inc. v. NLRB*, 818 F.2d 1567, 1572–73 (11th Cir. 1987). The Ninth Circuit agreed with this approach. *See* Did Bldg. Servs., Inc. v. NLRB, 915 F.2d 490, 498 (9th Cir. 1990) ("We think that the Eleventh Circuit's approach in developing a separate third-party test by analogy to the context of coercive misconduct is correct.").

139. *Katz*, 701 F.2d at 708–09.

140. *Id.*

141. 133 F.3d 1004 (7th Cir.1998).

142. *See id.* at 1007, 1009.

143. *Katz*, 701 F.2d at 707 (emphasis added).

144. *See Clearwater*, 133 F.3d at 1011 ("The fatal problem with Clearwater's argument is the fact that it did not provide any evidence that [the employee]'s remark *had* an effect on the election.") (emphasis added).

145. *See Clearwater*, 133 F.3d at 1009 ("While the standards set forth by the Ninth and Eleventh Circuits may more accurately describe the relevant inquiry, we decline to adopt them at this time . . . because we find that even under the more inclusive standard of *Katz*, the Board's decision is correct."). For a discussion of the Ninth and Eleventh Circuits' standards, see *infra* the text accompanying notes 157 and 170 and see generally Parts II.E.2 and II.E.3.

the court found that third-party inflammatory appeals had destroyed the requisite laboratory conditions.[146] In *Clearwater*, the court considered "one isolated bigoted remark, not an extensive tirade," and there was no evidence that the remark actually "had an effect on the election."[147] Both cases involved comments that negatively affected the *General Shoe* laboratory conditions requirement, and neither case focused on whether a primary party or third party made the comments.

2. The Eleventh Circuit Adopts a Different Test

In *M & M Supermarkets, Inc. v. NLRB*,[148] the company held employee meetings to explain its point of view on an upcoming election.[149] At one meeting, an employee—a third party—who supported the union said the company's owners were "damn Jews . . . [taking money] from the poor hardworking people."[150] The union won the election by a close margin, but the company refused to bargain, asserting that the employee inflamed voters' religious prejudices.[151] The Board overruled the employer's objection because: (1) there was insufficient evidence that the employee was the union's agent, and (2) the employee's activities were unobjectionable as third-party conduct and insufficient to render a fair election impossible.[152]

Without citing *Katz*, the Eleventh Circuit considered the proper standard for invalidating representation elections because of religious or racial inflammatory appeals.[153] Both sides cited *Sewell*, but the company advocated for a "tendency to influence the outcome" standard, while the NLRB sought a "fair election was impossible" standard.[154] The Eleventh Circuit reviewed binding Fifth Circuit precedent[155] regarding a third-party test used in cases involving employee threats, physical violence, and intimidation.[156] By analogy, the Elev-

146. *See Katz*, 701 F.2d at 708.
147. *See Clearwater*, 133 F.3d at 1011.
148. 818 F.2d 1567 (11th Cir. 1987).
149. *Id.* at 1569.
150. *Id.*
151. *Id.*
152. *See id.* at 1570.
153. *See id.* at 1570–71.
154. *See id.* at 1571.
155. The Fifth Circuit cases were binding precedent because they were decided prior to the split of the Fifth and Eleventh Circuits. *See* Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) ("[D]ecisions of the United States Court of Appeals for the Fifth Circuit . . . as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit.")
156. *See M & M*, 818 F.2d at 1572 (first citing NLRB v. Golden Age Beverage Co., 415 F.2d 26, 32 n.5 (5th Cir. 1969) (enunciating the third-party standard); then citing NLRB v. Claxton Mfg. Co., 613 F.2d 1364, 1371 (5th Cir. 1980) (applying *Golden Age* third-party standard "to employee statements about threats, physical acts of violence, and intimidation"); and then citing NLRB v. Carroll Contracting & Ready Mix, 636 F.2d 111, 113 (5th Cir. 1981) (applying *Golden Age* third-party standard to union repre-

enth Circuit held that inflammatory remarks by employees invalidate elections if the remarks "*disrupted the voting procedure* ***or*** *destroyed the atmosphere* necessary to the exercise of a free choice in the representation election."[157] The first clause of this test—disrupted the voting procedure—is closer to the company's position, while the second clause—destroyed the atmosphere—is closer to the Board's position, although the Eleventh Circuit avoided the word "impossible."[158] Using this test, the Eleventh Circuit denied enforcement of the NLRB's order, holding the employee's comments "*destroyed* the laboratory condition necessary for a free and open election."[159] On which side of the circuit split *M & M* falls is debatable, but the Ninth, Sixth, and Fourth Circuits believe *M & M* falls on their side.[160]

3. The Ninth Circuit Rejects *Katz* and Declines to Extend *Sewell* to Third Parties

In *Did Building Services, Inc. v. NLRB*,[161] an employee—a third party[162]—said during a heated discussion with a supervisor in front of three other employees "that the Union was supporting the Mexicans, that the Mexicans should get together and that the Union would protect them against gringos and Jews, . . . [the owner] was a Jew, . . . and he's like all the other gringos who doesn't give a damn about the poor Mexicans."[163]

The Ninth Circuit noted that it had not previously applied *Sewell*—not even in a primary-party case—before analyzing whether "prejudiced remarks by an employee who is not a [primary] party's agent require

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sentation elections and finding that third-party actions could warrant an election set-aside)).

157. *M & M*, 818 F.2d at 1574 (emphasis added) (quoting *Claxton*, 613 F.2d at 1371).

158. Notably, other circuits citing *M & M*'s holding have glossed over the distinction between these two clauses, quoting the latter clause only. *See* Ashland Facility Operations, LLC v. NLRB, 701 F.3d 983, 993 (4th Cir. 2012); NLRB v. Foundry Div. of Alcon Indus., Inc., 260 F.3d 631, 635 n.6 (6th Cir. 2001).

159. *M & M*, 818 F.2d at 1573 (emphasis added).

160. One author viewed the Eleventh Circuit's *M & M* decision and the Seventh Circuit's *Katz* decision as one side of the circuit split with the Fourth Circuit's *Herbert Halperin* decision, 826 F.2d 287 (4th Cir. 1987), on the other side. *See* LeMoyne, *supra* note 12, at 105–06. LeMoyne did not analyze the Ninth Circuit's *Did Building* decision, *see* case cited *infra* note 161, but she likely would have found it in accord with *Herbert Halperin*. Conversely, in *Ashland* itself, the Fourth Circuit viewed *Ashland*, *M & M*, and *Did Building* as being on one side of the split with *Katz* on the other side. *See Ashland*, 701 F.3d at 992–93. Likewise, in *Alcon*, the Sixth Circuit viewed *M & M* as being in accord with *Did Building*. *See Alcon*, 260 F.3d at 635 n.6.

161. 915 F.2d 490 (9th Cir. 1990).

162. *See id.* at 495–97 (employee was not union's agent).

163. *Id.* at 491. There was witness testimony that the employee made similar derogatory comments on other occasions and also promised to waive an employee's union initiation fees. *Id.* at 495. The Ninth Circuit upheld the NLRB hearing officer's decision to discredit this testimony and thus considered only one isolated instance of inflammatory statements. *Id.* at 494–95.

election invalidation."[164] The Ninth Circuit considered *M & M*, observing that "the Eleventh Circuit stated the following test: acts not attributable to a [primary] party require election invalidation if they '*destroyed* the atmosphere necessary to the exercise of a free choice in the representation election.'"[165] It also reviewed the Seventh Circuit's *Katz* test: "[W]hether the statement *could have impaired* the employees' freedom of choice in the subsequent election."[166] The Ninth Circuit rejected *Katz*[167] and agreed with the Eleventh Circuit,[168] reasoning that it makes sense to give less weight to third-party misconduct because: (1) voting employees attribute less importance to third parties; (2) practically, primary parties cannot police third parties; and (3) overturning election results because of third-party misconduct senselessly could lead to repeating elections.[169] The Ninth Circuit enunciated as its test: "To require election invalidation, an employee's appeal to prejudice must so taint the election atmosphere as to render free choice of representation *impossible*."[170] Using this standard, it refused to set aside the election because it found the employee's remarks too isolated to taint the results.[171]

Although the Ninth Circuit stated its agreement with the Eleventh Circuit's test, three factors indicate that the Ninth Circuit's test is somewhat more permissive of third-party inflammatory appeals to prejudice. First, the Ninth Circuit found the offensive remarks in *Did Building* and *M & M* "indistinguishable in tenor and tone,"[172] yet those two cases were resolved differently, and the Ninth Circuit explicitly disagreed with *M & M*'s holding that the offensive remarks in that case "destroyed free choice."[173] Second, the Ninth Circuit held the issue of whether misconduct requires election invalidation is a question of fact, while the Eleventh Circuit held it ultimately a question of law.[174] Questions of fact require greater deference to the Board

164. *Id.* at 497.

165. *Id.* at 498 (emphasis added) (quoting M & M Supermarkets, Inc. v. NLRB 818 F.2d 1567, 1573 (11th Cir. 1987)).

166. *Id.* at 498 n.9 (emphasis added) (citing NLRB v. Katz, 701 F.2d 703, 707 (7th Cir. 1983).

167. *See id.*

168. *See id.* at 498.

169. *See id.*

170. *Id.* (emphasis added).

171. *Id.* at 499–500.

172. *See id.* at 499.

173. *Id.* at 499–500. ("Such isolated statements of a rank-and-file employee, at least under the instant facts, do not so taint an election atmosphere as to undermine free choice.").

174. *Compare id.* at 494 n.3 ("The Board's finding that misconduct does not so taint an election as to require invalidation is one of fact."), *with* M & M Supermarkets, Inc. v. NLRB, 818 F.2d 1567, 1573 (11th Cir. 1987) ("The Board has wide discretion in determining whether an election has been fairly conducted . . . . However, the issue whether the

than questions of law.[175] Third, *Did Building* supports the proposition that racial appeals that "attempt to raise the consciousness of a disadvantaged minority electorate" might be permissible.[176]

4. The Sixth Circuit Analyzes *Sewell* and Third Parties, but Sidesteps a Decision

In *NLRB v. Foundry Division of Alcon Industries, Inc.*,[177] while employees—in a predominantly black workforce[178]—were waiting in line to vote in the union election, one black employee used the racial slur "nigger" while encouraging another black employee to vote for the union.[179] Other employees in line used language such as "nigger," "bitch," and "whore,"[180] terms that were commonplace within the company and not viewed as objectionable by employees.[181]

Although the Sixth Circuit analyzed the law regarding third-party appeals to prejudice, it is unclear precisely which test the Sixth Circuit applied or would apply. The court articulated general principles for weighing third-party conduct to decide whether to invalidate an election:

> [First,] courts place more weight on misconduct by the employer or the union than on conduct by third parties. . . . [Second,] when the conduct of third parties is the basis of an election challenge the appropriate test is "whether the actions of a mere Union 'adherent' were 'sufficiently substantial in nature to create a general environment of fear and reprisal such as to render a free choice of representation impossible . . . .'" [Third,] when the conduct is attributable to the union or the employer the test is whether the conduct "reasonably tend[ed] to interfere with the employee's free and uncoerced choice in the election."[182]

The Sixth Circuit also noted the circuit split between *Katz* on one side and *Did Building* and *M & M* on the other.[183] However, the court found it "unnecessary . . . to enter this debate because even assuming that the conduct had been attributable to the Union,"[184] it did not re-

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employer has made an adequate showing is a 'question of law and ultimately a question for the courts.'" (quoting NLRB v. Claxton Mfg. Co., 613 F.2d 1364, 1365 (5th Cir. 1980)).

175. *See M & M*, 818 F.2d at 1573.

176. *Cf. Did Building*, 915 F.2d at 499 (citing NLRB v. Sumter Plywood Corp., 535 F.2d 917, 929 (5th Cir. 1976)). In dicta, *Did Building* left open the possibility that comments increasing solidarity along racial lines—rather than inflaming prejudice—might be acceptable. *Id.*

177. 260 F.3d 631 (6th Cir. 2001).

178. *Id.* at 633 n.2.

179. *Id.* at 633.

180. *Id.*

181. *See id.* at 632–33.

182. *Id.* at 635–36 n.6 (last alteration in original) (citations omitted) (quoting NLRB v. Superior Coatings, Inc., 839 F.2d 1178, 1180 n.1 (6th Cir. 1988)).

183. *Id.*

184. *Id.*

quire invalidating the election because the employee's statements did not appeal to racial prejudices, unlike in *Sewell* and in Sixth Circuit precedent applying *Sewell*.[185] The court acknowledged that it is "not debatable" that the word "nigger" is a racial slur, regardless of who says it or how often it is used.[186] Nonetheless, there was no evidence that the offensive language was used in an attempt to win votes for the union *on the basis of* racial prejudice.[187] The Sixth Circuit thus merely distinguished precedent; it notably did not articulate which standard applies to third-party election misconduct.

5. The Fourth Circuit Rejects *Katz* and Declines to Extend *Sewell* to Third Parties

The most recent case considering whether and how to apply *Sewell* to third-party actions is *Ashland Facility Operations, LLC v. NLRB*[188]—the case highlighted in this Note's Introduction. In *Ashland*, the Fourth Circuit considered racial remarks made by the executive director of the Virginia NAACP at a press conference during which he made unfounded allegations about the company.[189] For example, the executive director called Ashland a "cesspool of inhumanity" and said "employees had been treated like 'chattel enslaved captives.'"[190] The Fourth Circuit held first that there was sufficient evidence to uphold the NLRB's finding that the Virginia NAACP was not the union's agent and thus was a third party.[191] Next, the court analyzed whether the executive director's comments were racially inflammatory, triggering *Sewell* analysis.[192] The court found *Sewell* "inapplicable for two reasons: (1) [the] comments were not 'inflammatory' appeals to racial prejudice, and (2) *Sewell* does not govern appeals to racial prejudice made by third-parties."[193]

Ashland noted prior "confusion" within the Fourth Circuit about the proper level of review for elections possibly influenced by inflammatory third-party appeals to prejudice,[194] citing a split decision in *NLRB v. Flambeau Airmold Corp.*, a primary-party case.[195] In *Flambeau*, the employer alleged that a rumor that a white supervisor referred to employees as "niggers" circulated on the day before the representation election, and that "the Union had 'made objectionable

185. *Id.* at 635–36 & n.6.
186. *See id.* at 635 & n.5.
187. *Id.* at 636.
188. 701 F.3d 983 (4th Cir. 2012).
189. *See supra* text accompanying notes 1–9 (describing facts and allegations in *Ashland*).
190. *Ashland*, 701 F.3d at 986.
191. *Id.* at 991.
192. *Id.*
193. *Id.*
194. *Id.* at 992.
195. 178 F.3d 705 (4th Cir. 1999).

racial appeals during the initial pre-election period.'"[196] The *Flambeau* majority refused to set aside the representation election, stating: "Although the Board strives to maintain 'laboratory conditions,' a union election 'by its nature is a heated affair . . . . In evaluating such a challenge, less weight will be afforded the comments and conduct of third parties than those of the employer or union.'"[197] The majority held that laboratory conditions "must be evaluated 'in the light of realistic standards of human conduct . . . .'"[198] The tenor of the primary-party references to race in *Flambeau* was also seemingly relevant to the majority, which noted that the union's racial appeals "could be interpreted as appeals to racial solidarity,"[199] unlike the appeals to racial subordination in *Sewell*.[200] The *Flambeau* dissent did not focus on the distinction between solidarity and subordination; it would have set aside the election because "[t]he Union's campaign leading up to the election was conscious of [the workforce's] racial makeup. Union organizers maintained a record of each member-employee's race and conducted a campaign that invoked both Christian and civil rights messages."[201]

Ashland also analyzed the circuit split on third-party inflammatory appeals. The court found that only the Seventh Circuit in *Katz* had suggested that *Sewell* extends to third parties.[202] The *Ashland* court found the Ninth and Eleventh Circuits' positions more persuasive and declined to extend *Sewell* "to inflammatory third-party appeals to racial prejudice, instead analogizing such appeals to threats and other coercive conduct by third-parties."[203] *Ashland* held *Sewell*'s burden-shifting approach was not well suited to third-party appeals because: (1) as a practical matter, primary parties are unable to prevent third-party misconduct; (2) giving third-party actions too much weight could lead to too many repeated elections; (3) primary parties could abuse the burden-shifting framework;[204] and (4) *Sewell*'s burden-shifting

196. *Id.* at 706.

197. *Id.* at 707–08 (quoting NLRB v. Herbert Halperin Distrib. Corp., 826 F.2d 287, 290 (4th Cir. 1987)).

198. *Id.* at 707 (quoting Case Farms of N.C., Inc. v. NLRB, 128 F.3d 841, 844 (4th Cir. 1997)).

199. *Id.* at 706.

200. "The campaign literature distributed by the Employer in the *Sewell Manufacturing* campaign was designed solely to inflame racial hatred and to engender a conflict between Negro and white workers in a southern plant." Archer Laundry Co., 150 N.L.R.B. 1427, 1432 (1965); *see also* notes 40–41 and accompanying text (describing the literature).

201. *Flambeau*, 178 F.3d at 709 (Niemeyer, J., dissenting).

202. Ashland Facility Operations, LLC v. NLRB, 701 F.3d 983, 992–93 (4th Cir. 2012). *Ashland* did not address the Seventh Circuit's possible retrenchment from *Katz* in *Clearwater*. *See supra* text accompanying notes 141–147.

203. *Ashland*, 701 F.3d at 992. *Ashland* found no tension between its new standard and the Ninth and Eleventh Circuits' standards. *Id.*

204. For example, if Primary Party A is worried about losing an election, Primary Party A could secretly elicit a third party to spread inflammatory rumors on behalf of Primary Party B, upsetting the election in favor of Primary Party A.

framework would force primary parties to defend the truthfulness and germaneness of unrelated third-party speech.[205] *Ashland* held that the better-balanced standard is "that an inflammatory third-party appeal to racial prejudice is the basis for invalidating a representation election only if the appeal made a rational, uncoerced expression of free choice impossible."[206] Under that standard, the Fourth Circuit upheld the election results.[207]

6. Summary of the Circuit Split

Although most circuits apply *Sewell* to primary-party conduct, many have not considered whether *Sewell* extends to third-party conduct. The Sixth Circuit acknowledged that these are two distinct issues, but has declined to decide the third-party issue.[208] Only the Seventh Circuit extends *Sewell* to third-party inflammatory remarks about race or religion.[209] The Seventh Circuit initially set a low bar, examining whether inflammatory statements *could have* impaired employees' free choice.[210] It has since raised the bar, requiring that inflammatory appeals *in fact* "had an effect" on employee free choice.[211] The Fourth, Ninth, and Eleventh Circuits have limited *Sewell*'s application to primary-party conduct only, analogizing third-party inflammatory appeals to the third-party standard for threats and coercion.[212] In *Ashland*, the most recent case to consider the issue, the Fourth Circuit agreed with the Ninth and Eleventh Circuits, holding "that an inflammatory third-party appeal to racial prejudice is the basis for invalidating a representation election only if the appeal made a rational, uncoerced expression of [employee] free choice impossible."[213] *Ashland*

205. *Ashland*, 701 F.3d at 993.

206. *Id.*

207. *Id.* ("The record includes no evidence that [the third party's] comments, made months before the election, rendered it impossible for employees to freely decide whether to certify the Union as their exclusive bargaining agent.").

208. *See* NLRB v. Foundry Div. of Alcon Indus., Inc., 260 F.3d 631, 635–36 n.6 (6th Cir. 2001).

209. *But see supra* note 160 (discussing whether the Eleventh and Seventh Circuits are in accord).

210. *See* NLRB v. Katz, 701 F.2d 703, 706–07 (7th Cir. 1983).

211. *See* Clearwater Transp., Inc. v. NLRB, 133 F.3d 1004, 1011 (7th Cir. 1998).

212. *See Ashland*, 701 F.3d at 992–93. The Eleventh Circuit tests whether inflammatory remarks "destroyed the atmosphere necessary to the [employees'] exercise of a free choice in the representation election." M & M Supermarkets, Inc. v. NLRB, 818 F.2d 1567, 1572–73 (11th Cir. 1987). The Ninth Circuit evaluates whether inflammatory remarks "so taint[ed] the election atmosphere as to render [employee] free choice of representation impossible." Did Bldg. Servs., Inc. v. NLRB, 915 F.2d 490, 498 (9th Cir. 1990). Although these standards are very similar, the Eleventh Circuit standard might limit speech more than the Ninth Circuit standard. *See id.* at 499–500 ("We disagree, however, with the Eleventh Circuit's conclusion that [the remarks at issue in *M & M*] destroyed free choice."); *see also supra* text accompanying notes 172–176.

213. *See Ashland*, 701 F.3d at 993.

may be persuasive to circuits considering whether or how to apply *Sewell* to third-party inflammatory appeals to prejudice.

III. Proposal

The NLRB and courts should give less weight to third-party inflammatory racial or religious appeals to prejudice and set aside election results only if the speech renders free choice impossible. This is appropriate for three reasons: (1) Third parties are farther removed from elections than primary parties—third parties have less influence, they are freer from the effects of election set-asides, and primary parties cannot fully control third parties;[214] (2) The NLRA skews the path to appellate review of NLRB decisions in favor of employers.[215] *Sewell*'s burden scheme equitably shifts the balance of power between primary parties, but it is an ill-fitted structure for third-party conduct;[216] and (3) Employment discrimination laws and the nature of discrimination have changed since *Sewell*, making it a less useful anti-discrimination tool. Extending *Sewell* to third-party speech would risk chilling valuable discussions of race and religion.[217]

Racial and religious issues permeate society. To permit relevant discussion about discrimination, the Board should avoid sweeping regulation of third-party speech.[218] Limiting election set-asides is consistent with the NLRB's *Midland* doctrine of refusing to examine misrepresentations in the absence of egregious conduct, such as forgery.[219] If employees can recognize misrepresentations in election propaganda, they are also able to discount irrelevant or extreme racial and religious appeals. Limiting election set-asides for third-party inflammatory comments remains consistent with *General Shoe*'s laboratory conditions requirement. When inflammatory third-party appeals truly destroy free choice or render free choice impossible, the Board and courts will and should still set aside the election.[220]

A jurisprudence that does not distinguish between varying degrees of inflammatory appeals is wooden and unworkable under *General Shoe*. To be sure, in each case, the NLRB and courts must decide whether inflammatory appeals upset laboratory conditions. In doing so, they should acknowledge that *less* inflammatory appeals cause *less* harm to laboratory conditions than *more* inflammatory appeals.

214. *See supra* Part II.C.
215. *See supra* Part II.A.
216. *See supra* Part II.C.
217. *See supra* Part II.D.
218. *See supra* notes 115–116 and accompanying text.
219. *See* Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127, 133 (1982).
220. *Compare* Gen. Shoe Corp., 77 N.L.R.B. 124, 127 (1948), *with* Ashland Facility Operations, LLC v. NLRB, 701 F.3d 983, 992–93 (4th Cir. 2012), *and* Did Bldg. Servs. v. NLRB, 915 F.2d 490, 498 (9th Cir. 1990), *and* M & M Supermarkets, Inc. v. NLRB, 818 F.2d 1567, 1572–73 (11th Cir. 1987).

Likewise, third parties farther removed from the election generally cause less harm to laboratory conditions, and third-party inflammatory statements should generally hold less weight than primary-party inflammatory statements.

In particular, the NLRB and courts should be wary of restricting speech that promotes racial or religious pride, solidarity, and concerted action as compared to speech that divides or subordinates racial or religious groups. The Board already recognizes this distinction in the context of primary-party speech, as highlighted in *Archer Laundry Co.*[221] In *Archer*, like *Sewell*, there were "appeals to racial self-consciousness . . . [and] the idea that unions support racial integration and equality was hammered home."[222] But *Archer* recognized the "vital difference between" the employer in *Sewell*, who "attempted to take advantage of the latent prejudices of his white workers" and the union's campaign in *Archer*.[223] In *Archer*, the union told employees that "Negroes have banded together in an effort to overcome their *de facto* inferiority in American society, and . . . [u]nionism . . . is [a] method of concerted action which Negroes may use to better their lot in this society."[224] The Board found that the union's racial arguments in *Archer* were acceptable as "privileged campaign propaganda"[225] because the arguments "encourage[d] racial pride and concerted action."[226] Likewise, in *Flambeau*, the Sixth Circuit majority recognized this distinction with regard to primary parties, noting that despite the employer's complaint that the union "had 'made objectionable racial appeals'" to prejudice during the representation drive, those appeals "could be interpreted as appeals to racial solidarity."[227] In *Did Building*, the Ninth Circuit recognized that the distinction may extend to third-party racial appeals.[228] The Board and courts should continue to recognize this distinction and be wary of restricting third-party speech that promotes pride, solidarity, and concerted action.

The NLRB and courts should analyze party status alongside other factors that affect laboratory conditions. Factors that increase the likelihood of tainted laboratory conditions include promises of benefits; threats of reprisals; deceptive campaign tactics, such as forgery; and racially or religiously inflammatory remarks.[229] The Board should assign a weight to each of these factors and analyze them within the

221. 150 N.L.R.B. 1427, 1432 (1965).
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.* at 1434.
226. *Id.* at 1432.
227. NLRB v. Flambeau Airmold Corp., 178 F.3d 705, 706 (4th Cir. 1999); *see also supra* notes 199–200 and accompanying text.
228. *See* Did Bldg. Servs., Inc. v. NLRB, 915 F.2d 490, 499 (9th Cir. 1990); *see also supra* note 176 and accompanying text.
229. *See* Sewell Mfg. Co., 138 N.L.R.B. 66, 70 & nn.6–11 (1962).

circumstances of the case. Racially inflammatory remarks by third parties should have a lower weight, especially if the third party is far-removed from the election. Other factors relevant to the appropriate weight include: (1) the remarks' germaneness, (2) the remarks' truthfulness, (3) whether the remarks were used to increase solidarity or divisions, (4) how inflammatory the remarks were, (5) whether the remarks were pervasive or isolated, and (6) the remarks' temporal proximity to the election. The ultimate inquiry should remain whether laboratory conditions leading up to the election were so badly tainted—for whatever reason—that the election's results do not reflect the employees' free choice.[230]

Conclusion

Under the NLRB's 1948 *General Shoe* doctrine, the Board must maintain laboratory conditions to ensure union representation elections reflect employees' true desires. The Board must set aside election results if laboratory conditions are damaged sufficiently to inhibit free choice. In 1962, the Board in *Sewell* built upon this doctrine, holding primary-party inflammatory appeals to racial prejudice require setting aside an election. The Board later extended *Sewell* to primary-party appeals to religious prejudice.

In deciding whether to set aside representation elections, the NLRB and some courts give less weight to third-party appeals to racial or religious prejudice than to primary-party appeals. This is the correct approach. Third parties are farther removed from the election process, making them less relevant and harder to control. *Sewell*'s burden-shifting scheme, which is appropriate to analyses of primary-party conduct, makes no sense in the context of third-party conduct. The shift toward less overt discrimination in the decades following Title VII's enactment reduces *Sewell*'s utility. Expanding *Sewell* to third-party inflammatory appeals could chill important and relevant third-party speech on issues of race and religion.

Conferring less weight to third-party appeals is not a retrenchment from *General Shoe* or from *Sewell*'s objective of overturning representation elections infected by non-germane, primary-party inflammatory appeals to prejudice. The NLRB and courts should set aside election results only if laboratory conditions are truly tainted and should be hesitant to overturn elections solely because of third-party appeals to racial or religious prejudice.

230. *See* Gen. Shoe Corp., 77 N.L.R.B. 124, 127 (1948).