IN RESPONSE TO "FROM THE PICKET LINE TO THE COURTROOM: A LABOR ORGANIZING PRIVILEGE TO PROTECT WORKERS" BY NICOLE HALLET

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For years now, many in the labor movement have seen the National Labor Relations Board (NLRB) as a largely well-intentioned federal agency with a mission that it cannot adequately fulfill.[1] Due to the extreme political shifts at the Board,[2] the weak procedures and remedies available,[3] the constant threats of defunding,[4] and the massive task of promoting labor peace through a mid-size federal agency,[5] the NLRB cannot provide the full protections that workers need in exercising their labor rights. As a result, more and more workers' struggles end up litigated in the courts--whether through alt-labor groups or by utilizing FLSA protections.[6] Indeed, two of the major labor law reform efforts currently in Congress--the Employee Empowerment Act and the Workplace Action for a Growing Economy Act--include the creation of a private right of action for labor violations.[7]

Though the courts may hold more promise for workers in the forms of broader damages, attorney fees, and stronger enforcement,[8] they also hold important pitfalls. As Nicole Hallett makes clear in her article *From the Picket Line to the Courtroom: A Labor Organizing Privilege to Protect Workers*, the evidentiary privilege that exists at the NLRB, which protects workers in certain confidential communications, needs to be expanded to the courts.[9] Currently, a variety of evidentiary privileges that create a zone of privacy exist in courts, from doctor-patient to priest-penitent,[10] but federal courts and most state courts have not yet recognized a "labor organizing privilege."[11] As Hallett describes it, such a privilege "would be held by the worker and would protect communications concerning organizing or collective bargaining

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[1] Richard Kahlenberg & Moshe Marvit, *"Architects of Democracy": Labor Organizing as a Civil Right*, 9 STAN. J.C.R. & C.L. 213, 215-217 (2013).

[2] William B. Gould IV, *Politics and the Effect on the National Labor Relations Board's Adjudicative and Rulemaking Processes*, 64 EMORY L.J. 1501 (2015).

[3] Kahlenberg & Marvit, Architects of Democracy, supra note 1 at 239, 242.

[4] Melanie Trottman, *NLRB Defunding Fails, But Agency Remains GOP Target*, WALL ST. J., Feb. 17, 2011.

[5] BEST PLACES TO WORK AGENCY RANKINGS, http://bestplacestowork.org/BPTW/rankings/overall/mid (last visited Apr. 15, 2016).

[6] Josh Eidelson, *Alt-Labor*, THE AMERICAN PROSPECT (Jan. 29, 2013), http://prospect.org/article/alt-labor.

[7] WAGE Act, H.R. 3514 § 4(d) & S. 2042 § 4(d), 114th Cong. (2015); Employee Empowerment Act, H.R. 3837, 114th Cong. (2015).

[8] RICHARD KAHLENBERG & MOSHE MARVIT, WHY LABOR ORGANIZING SHOULD BE A CIVIL RIGHT (2012).

[9] Nicole Hallet, *From the Picket Line to the Courtroom: A Labor Organizing Privilege to Protect Workers*, 39 N.Y.U. REV. L. & SOC. CHANGE 475, 479-80 (2015).

[10] *Id.* at 499.

[11] *Id.* at 496.

between two or more workers, or between workers and their representatives."[12]

The benefits of having such an evidentiary privilege cannot be overstated. Workers who get involved in workplace organizing are regularly retaliated against for taking part in this lawful activity.[13] The ability to keep one's communications with other workers and organizers confidential is often necessary in order to allow workers to organize according to their own terms, without fear of reprisal.

However, too often, workers face the possibility of "strategic lawsuits against public participation," otherwise known as "SLAPP."[14] These SLAPP suits serve no other purpose than to improperly use the judicial system to silence people and dissuade them from taking various actions.[15] They are actions used by those with superior economic or other power to silence others through litigation and its often burdensome procedures.[16] And they work, so they have been employed increasingly in recent years.[17]

Workers who have tried to push back against wage theft or organize a union have found themselves the subjects of such SLAPP suits. Indeed, two student editors of this very law journal received federal subpoenas requiring them to produce any and all electronic or other communication related to their support for a labor union and its workers, after they circulated a letter supporting a worker strike against Daniel E. Straus's nursing homes in order to oppose his sick day cuts and repeated unfair labor practices.[18] To anyone paying attention, the purpose of such a discovery request against two law students, who were trying to help organize workers whose struggle they supported, was clear: it was to use overwhelming force to dissuade anyone from doing so in the future.

An evidentiary privilege such as the one that Hallett is proposing would likely have protected these two law students, as well as countless workers that are forced into silence from fear of litigation. Though such a privilege would be exceptionally beneficial to workers, it is unlikely to be passed anytime soon, at least on the federal level where labor, discrimination, and wage theft violations are litigated. Beyond the general disfavored nature of evidentiary privileges, the process of passing an amendment to the Federal Rules of Evidence is not conducive to liberal reform, as it is controlled by the Chief Justice of the Supreme Court and an increasingly conservative Advisory Committee.[19] Conservative Chief Justices since Warren Burger have used their positions at the center of the Rules process to retrench rights, rather than to expand them.[20] Even if such evidence rule changes were to get through

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[12] *Id.* at 480.
[13] *Id.* at 502-03.
[14] *Id.* at 479.
[15] *Id.*
[16] *Id.* at 478.
[17] *Id.* at 479.
[18] Michael Powell, *2 Law Students Get a Lesson on the First Amendment, Complete with Subpoenas*, N.Y. TIMES (April 30, 2014), http://www.nytimes.com/2014/05/01/nyregion/2-law-students-get-a-lesson-on-the-first-amendment-complete-with-subpoenas.html.
[19] Stephen Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, Forthcoming 15 NEVADA L.J. ___.
[20] Marvit, forthcoming article in Summer issue of The American Prospect. Indeed, just three months ago, discovery rules were amended in a way that may hurt the claims of countless of employment discrimination and civil rights litigants. http://www.wsj.com/articles/businesses-win-lawsuit-curbs-

the courts, Congress would have to allow them to stand, and in this increasingly conservative Congress, there is a good chance that such amendments would not survive.[21]

Commenting on the difficulty of ultimately passing such rules should not be confused with discouraging the attempt. Though SLAPP suits and other abuses of litigation have become all too common, they are still removed from the experiences of many. Reform efforts to amend the rules and create a labor organizing privilege would help bring attention to these practices and the need to curb them. Ultimately, the effort to create such a privilege should merge with labor law reform efforts, such as the WAGE Act, which are unfortunately also still a longshot.

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[21] Congress would likely deem such an amendment substantive in violation of the Rules Enabling Act, 28 USC 2072.