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Under The Radar Case Could Yield Most Significant Labor Law Case Of The Last Decade

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Last week the Supreme Court agreed to hear two important cases involving labor law. While *Noel Canning* has been getting most of the press because of the high profile political drama and all of its separation of power implications, the other case, *UNITE HERE, Local 355 v. Mulhall,* could end up as the most significant labor law decision the Supreme Court has handed down in a generation. As most labor relations practitioners know, faced with a macroeconomic shift from a manufacturing to service economy, the union movement has lost millions of members and dozens of percentage points in its private sector penetration. While nearly 35 percent of the private sector workforce was unionized in the 1950s, that percentage has shrunk to under 7 percent today. Labor unions unhappy with an NLRB election win rate that has historically hovered around 50 percent, beginning in the late 19990s unions began abandoning the NLRB's secret ballot election process in search of more of a "sure thing" when it comes to seeking more dues payers. That sure thing increasingly has been to seek certification or recognition based upon a majority showing of interest through a "card check" or other forms of employee petition. Of course, unlike an election with voter privacy and a set day of voting, card signing drives are vulnerable to peer pressure, intimidation and can be open-ended allowing a union to claim recognition if they gain majority support even for a single day during the course of a long campaign. While unions have been unsuccessful in getting such procedures be accepted as a matter of law (such as through the failed and improperly named Employee Free Choice Act), they have been increasingly successful in getting employers to agree to stand mute and accept union representation cards rather than forcing the union to a secret ballot election through equally improperly named "neutrality" agreements. While these so-called "neutrality" agreements take various forms, the essence of the agreement is that they give unions an uncontested playing field to convince employees to sign up for unionization. Frequently, in addition to an employer's agreement not to express any opposition to unionization, the agreements provide the union with lists of names and addresses of the employees and union access to the employer's facilities. Without an employer to present an opposing view point or correct any misstatements by the union, unions have an easy time to reach majority status. One recent law review article found that the union win rate in situations where they have extracted a neutrality agreement is almost 70 percent greater than if they have to go through a secret ballot election. *Eigen and Sherwyn, A Moral/Contractual Approach to Labor Law Reform,* 63 Hastings Law Review 695, 722-23 (2011-2012). The economic costs to the union are also far less in such situations as they do not have to conduct as extensive a campaign when there is no one on the other side to hold them to account. *Mulhall* deals with whether these neutrality agreements violate the anti-corruption provisions contained in Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186. Those provisions restrict financial transactions between an employer and a union or union leaders. The

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restrictions are so broad, they prohibit a union from demanding or accepting any “thing of value” from an employer subject to certain strictly construed exceptions not implicated by neutrality agreements. In the decision below, the 11th Circuit held that such agreement could violate Section 302. If the Supreme Court agrees, *Mulhall* could invalidate perhaps the most important tool the union movement has created to combat private sector employee disinterest. That makes *Mulhall* a key case to watch.