

NATIONAL LABOR RELATIONS BOARD**29 CFR Part 103**

RIN 3142-AA16

Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships**AGENCY:** National Labor Relations Board**ACTION:** Notice of proposed rulemaking; request for comments.

SUMMARY: As part of its ongoing efforts to more effectively administer the National Labor Relations Act (the Act or the NLRA) and to further the purposes of the Act, the National Labor Relations Board (the Board) proposes to amend its rules and regulations governing the filing and processing of petitions for a Board-conducted representation election while unfair labor practice charges are pending or following an employer's voluntary recognition of a union as the majority-supported collective-bargaining representative of the employer's employees. The Board also proposes an amendment redefining the evidence required to prove that an employer and labor organization in the construction industry have established a voluntary majority-supported collective-bargaining relationship. The Board believes, subject to comments, that the proposed amendments will better protect employees' statutory right of free choice on questions concerning representation by removing unnecessary barriers to the fair and expeditious resolution of such questions through the preferred means of a Board-conducted secret ballot election.

DATES: Comments regarding this proposed rule must be received by the Board on or before October 11, 2019. Comments replying to comments submitted during the initial comment period must be received by the Board on or before October 25, 2019. Reply comments should be limited to replying to comments previously filed by other parties. No late comments will be accepted.

ADDRESSES:

Internet—Federal eRulemaking Portal. Electronic comments may be submitted through <http://www.regulations.gov>.

Delivery—Comments should be sent by mail or hand delivery to: Roxanne Rothschild, Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. Because of security precautions, the Board continues to experience delays in U.S. mail delivery. You should

take this into consideration when preparing to meet the deadline for submitting comments. The Board encourages electronic filing. It is not necessary to send comments if they have been filed electronically with www.regulations.gov. If you send comments, the Board recommends that you confirm receipt of your delivered comments by contacting (202) 273-1940 (this is not a toll-free number). Individuals with hearing impairments may call 1-866-315-6572 (TTY/TDD).

Only comments submitted through <http://www.regulations.gov>, hand delivered, or mailed will be accepted; ex parte communications received by the Board will be made part of the rulemaking record and will be treated as comments only insofar as appropriate. Comments will be available for public inspection at <http://www.regulations.gov> and during normal business hours (8:30 a.m. to 5 p.m. EST) at the above address.

The Board will post, as soon as practicable, all comments received on <http://www.regulations.gov> without making any changes to the comments, including any personal information provided. The website <http://www.regulations.gov> is the Federal eRulemaking portal, and all comments posted there are available and accessible to the public. The Board requests that comments include full citations or internet links to any authority relied upon. The Board cautions commenters not to include personal information such as Social Security numbers, personal addresses, telephone numbers, and email addresses in their comments, as such submitted information will become viewable by the public via the <http://www.regulations.gov> website. It is the commenter's responsibility to safeguard his or her information. Comments submitted through <http://www.regulations.gov> will not include the commenter's email address unless the commenter chooses to include that information as part of his or her comment.

FOR FURTHER INFORMATION CONTACT:

Roxanne Rothschild, Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, (202) 273-1940 (this is not a toll-free number), 1-866-315-6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION: The National Labor Relations Board is proposing three amendments to its current rules and regulations governing the filing and processing of petitions relating to a labor organization's exclusive representation of employees for purposes of collective bargaining

with their employer. The first amendment would modify the Board's election blocking charge policy—not currently set forth in the rules and regulations—by establishing a vote and impound procedure for processing representation petitions when a party has requested blocking the election based on a pending unfair labor practice charge. The second amendment would modify the current recognition bar policy—also not currently set forth in the rules and regulations—by reestablishing a notice requirement and 45-day open period for filing an election petition following an employer's voluntary recognition of a labor organization as employees' majority-supported exclusive collective-bargaining representative under Section 9(a) of the Act. The third amendment would overrule current Board law—also not currently set forth in the rules and regulations—holding that contract language, standing alone, can establish the existence of a Section 9(a) majority-based bargaining relationship for parties in the construction industry, rather than a relationship under Section 8(f), the second proviso of which prohibits any election bar. To prove the establishment of a Section 9(a) relationship in the construction industry and the existence of a contract bar to an election, the proposed amendment would require extrinsic evidence, in the form of employee signatures on union authorization cards or a petition, that recognition was based on a contemporaneous showing of majority employee support.

The Board believes, subject to comments, that the current blocking charge policy, the immediate imposition of a voluntary recognition election bar, and the establishment of a Section 9(a) relationship in the construction industry based solely on contract recognition language constitute an overbroad and inappropriate limitation on the ability of employees to exercise their fundamental statutory right to the timely resolution of questions concerning representation through the preferred means of a Board-conducted secret ballot election.

I. Background

Section 9(c) of the Act provides that the Board “shall direct an election by secret ballot” if the Board finds that a question of representation exists. The Supreme Court has repeatedly recognized that Congress granted the Board wide discretion under the Act to ensure that employees are freely and fairly able to choose whether to have a bargaining representative. E.g., *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767

(1969). The Court has noted that “[t]he control of the election proceedings, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone.” *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 226 (1940). In *NLRB v. A.J. Tower Co.*, the Court stated that “the Board must act so as to give effect to the principle of majority rule set forth in [Section] 9(a), a rule that ‘is sanctioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions.’” 329 U.S. 324, 331 (1946) (quoting S. Rep. No. 74–573, at 13). The Court continued, “It is within this democratic framework that the Board must adopt policies and promulgate rules and regulations in order that employees’ votes may be recorded accurately, efficiently and speedily.” *Id.*

Representation case procedures are set forth in the statute, in Board regulations, and in Board caselaw. In addition, the Board’s General Counsel has prepared a non-binding Casehandling Manual describing representation case procedures in detail.¹ The Act itself contains only one express limitation on the timing of otherwise valid election petitions. Section 9(c)(3) provides that “[n]o election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.” The Board instituted through adjudication a parallel limitation precluding, with limited exceptions, an electoral challenge to a union’s representative status for one year from the date of a certification based on an employee majority vote for exclusive representation in a valid Board election. The Supreme Court approved this certification year election bar in *Brooks v. NLRB*, 348 U.S. 96 (1954).

The proposed rulemaking does not implicate either the statutory election year bar or the certification year bar. As fully described below, however, the Board has also created through adjudication several additional discretionary bars to the timely processing of a validly supported election petition,² three of which—the blocking charge policy, the voluntary recognition election bar policy, and the

contract bar—are the subject of this proposed rulemaking proceeding.³

A. Blocking Charge Policy

The blocking charge policy dates from shortly after the Act went into effect. See *United States Coal & Coke Co.*, 3 NLRB 398 (1937). A product of adjudication,⁴ the policy permits a party—almost invariably a union and most often in response to an RD petition—to block an election indefinitely by filing unfair labor practice charges that allegedly create doubt as to the validity of the election petition or as to the ability of employees to make a free and fair choice concerning representation while the charges remain unresolved. This policy can preclude holding the petitioned-for election for months, or even years, if at all. See, e.g., *Cablevision Systems Corp.*, 367 NLRB No. 59 (2018) (blocking charge followed by Regional Director’s misapplication of settlement bar doctrine delayed processing until December 19, 2018, of valid RD petition filed on October 16, 2014; employee petitioner thereafter withdrew petition).

Statistical studies indicate that the blocking charge delay in *Cablevision* is

³ Other discretionary election bar policies established through adjudication, all of which preclude electoral challenges to an incumbent union bargaining representative for some period of time, include the contract bar, *General Cable Corp.*, 139 NLRB 1123, 1125 (1962) (precluding election for up to first 3 years of contract term); the affirmative remedial bargaining order bar, *Lee Lumber & Building Material Corp.*, 334 NLRB 399, 402 (2001) (precluding election for at least six months and up to one year from the first bargaining session following Board finding of unlawful refusal to bargain and issuance of bargaining-order remedy), *enfd.* 310 F.3d 209 (D.C. Cir. 2002); the successor bar, *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011) (precluding election for at least six months and up to one year from the first post-succession bargaining session); and the settlement bar, *Poole Foundry & Machine Co.*, 95 NLRB 34, 36 (1950) (precluding election for a reasonable period of time following settlement of certain unfair labor practice charges), *enfd.* 192 F.2d 740 (4th Cir. 1951), *cert. denied* 342 U.S. 954 (1952). The proposed rule modifying current law with respect to proof of majority-based recognition in the construction industry necessarily involves the issue of when a contract bar will apply. Otherwise, this proposed rulemaking is not intended to address other election bar policies. The Board may choose to address one or more of these policies in future proceedings.

⁴ Except for certain evidentiary requirements, discussed below, that are set forth in Section 103.20 of the Board’s Rules and Regulations, the current blocking charge policy is not codified. A detailed description of the policy appears in the non-binding NLRB Casehandling Manual (Part Two) Representation, Sections 11730 to 11734. In brief, the policy affords regional directors administrative discretion to hold election petitions in abeyance or to dismiss them based on the request of a charging party alleging either unfair labor practice conduct that “only interferes with employee free choice” (a Type I charge) or conduct that “not only interferes with employee free choice but also is inherently inconsistent with the petition itself” (a Type II charge). Section 11730.1.

not an anomaly. It is instead representative of a systemic problem in blocking charge cases, which have been identified as the likely cause of what has been characterized as “the long tail” of delay in the Board’s processing of representation cases.⁵ In a study conducted by Professor Samuel Estreicher of petitions processed to elections in 2008, statistics provided to him by the Board indicated that the filing of blocking charges substantially increased the median processing time to an election.⁶ Specifically, the study showed that “in 284 of the 2,024 petitions that proceeded to election in 2008, allegations of employer violations triggered the filing of a ‘blocking charge’ by a labor organization, delaying the holding of the election. The median for this subset was 139 days compared to thirty-eight days overall [for unblocked cases].” *Id.* at 370.

The adverse impact on employee RD petitions resulting from the Board’s blocking charge policy, and the potential for abuse and manipulation of that policy by incumbent unions seeking to avoid a challenge to their representative status, have drawn criticism from courts of appeals on several occasions. See *Pacemaker Corp. v. NLRB*, 260 F.2d 880, 882 (7th Cir. 1958) (“The practice adopted by the Board is subject to abuse as is shown in the instant case. After due notice both parties proceeded with the representation hearing. Possibly for some reasons of strategy near the close of the hearing, the [u]nion asked for an adjournment. Thereafter it filed a second amended charge of unfair labor practice. By such strategy the [u]nion was able to and did stall and postpone indefinitely the representation hearing.”); *NLRB v. Minute Maid Corp.*,

⁵ See John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999–2004*, 62 Indus. & Lab. Rel. Rev. 3, 10 fn. 9 (Oct. 2008). The Ferguson study of Board representation case statistics for this 5-year period indicated that elections in 95% of cases were held within 75 days of the filing of a petition. “The tail, however, is quite long; the maximum delay before election recorded in the data is 1,705 days.” *Id.*

⁶ Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 5 FIU L. Rev. 361, 369–370 (2010). The Estreicher study focused only on those cases actually processed to an election in 2008. An earlier review of Board representation case statistics from 1977 indicated that, as in the recent *Cablevision* case, more than half of the RD petitions filed with the Board never resulted in an election. William Krupman and Gregory Rasin, *Decertification: Removing the Shroud*, 30 Lab. L.J. 231, 231 (1979). The authors suggested two explanations for this result: “First, many unions faced with the prospect of losing a decertification election choose to withdraw rather than risk defeat. Second, many petitions are ‘blocked’ from further processing as a result of unfair labor practice charges filed by the union.” *Id.* at 231–232.

¹ NLRB Casehandling Manual (Part Two) Representation Proceedings.

² In Board terminology, representation election petitions filed by labor organizations are classified as RC petitions and those filed by employers are RM petitions; decertification petitions filed by an individual employee are classified as RD petitions.

283 F.2d 705, 710 (5th Cir. 1960) (“Nor is the Board relieved of its duty to consider and act upon an application for decertification for the sole reason that an unproved charge of an unfair practice has been made against the employer. To hold otherwise would put the union in a position where it could effectively thwart the statutory provisions permitting a decertification when a majority is no longer represented.”); *NLRB v. Midtown Service Co.*, 425 F.2d 665, 672 (2d Cir. 1970) (“[I]f the charges were filed by the union, adherence to the [blocking charge] policy in the present case would permit the union, as the beneficiary of the [e]mployer’s misconduct, merely by filing charges to achieve an indefinite stalemate designed to perpetuate the union in power. If, on the other hand, the charges were filed by others claiming improper conduct on the part of the [e]mployer, we believe that the risk of another election (which might be required if the union prevailed but the charges against the Employer were later upheld) is preferable to a three-year delay.”); *Templeton v. Dixie Color Printing Co.*, 444 F.2d 1064, 1069 (5th Cir. 1971) (“The short of the matter is that the Board has refused to take any notice of the petition filed by appellees and by interposing an arbitrary blocking charge practice, applicable generally to employers, has held it in abeyance for over 3 years. As a consequence, the appellees have been deprived during all this time of their statutory right to a representative ‘of their own choosing’ to bargain collectively for them, 29 U.S.C. 157, despite the fact that the employees have not been charged with any wrongdoing. Such practice and result are intolerable under the Act and cannot be countenanced.”); *NLRB v. Hart Beverage Co.*, 445 F.2d 415, 420 (8th Cir. 1971) (“[I]t appears clearly inferable to us that one of the purposes of the [u]nion in filing the unfair practices charge was to abort [r]espondent’s petition for an election, if indeed, that was not its only purpose.”).

The potential for delay is the same when employees, instead of filing an RD petition, have expressed to their employer a desire to decertify an incumbent union representative. In that circumstance, the blocking charge policy can prevent the employer from being able to seek a timely Board-conducted election to resolve the question concerning representation raised by evidence of good-faith uncertainty as to the union’s continuing majority support. Thus, the supposed “safe harbor” of filing an RM election petition that the Board majority referenced in *Levitz Furniture Co. of the*

Pacific, 333 NLRB 717, 726 (2001), as an alternative to the option of withdrawing recognition (which the employer selects at its peril) is often illusory. As Judge Henderson stated in her concurring opinion in *Scomas of Sausalito, LLC v. NLRB*, it is no “cure-all” for an employer with a good-faith doubt about a union’s majority status to simply seek an election because “[a] union can and often does file a ULP charge—a ‘blocking charge’—to forestall or delay the election.” 849 F.3d 1147, 1159 (D.C. Cir. 2017) (quoting from Member Hurtgen’s concurring opinion in *Levitz*, 333 NLRB at 732).

Concerns have also been raised about the Agency’s regional directors not applying the blocking charge policy consistently, thereby creating uncertainty and confusion about when, if ever, parties can expect an election to occur. See Zev J. Eigen & Sandro Garofalo, *Less Is More: A Case for Structural Reform of the National Labor Relations Board*, 98 Minn. L. Rev. 1879, 1896–1897 (2014) (“Regional directors have wide discretion in allowing elections to be blocked, and this sometimes results in the delay of an election for months and in some cases for years—especially when the union resorts to the tactic of filing consecutive unmeritorious charges over a long period of time. This is contrary to the central policy of the Act, which is to allow employees to freely choose their bargaining representative, or to choose not to be represented at all.”).

In 2014, the Board engaged in a broad notice-and-comment rulemaking review of the then-current rules governing the representation election process. In the Notice of Proposed Rulemaking (NPRM) issued on February 6, 2014, a Board majority proposed numerous specific changes to that process. 79 FR 7318. The overarching purpose of these proposed changes was “to better insure ‘that employees’ votes may be recorded accurately, efficiently and speedily’ and to further ‘the Act’s policy of expeditiously resolving questions concerning representation.’”⁷ Many, if not most, of the proposed changes focused on shortening the time between the filing of a union’s RC petition for initial certification as an exclusive bargaining representative and the date of an election. With relatively few variations, the final Election Rule published on December 15, 2014, adopted 25 changes proposed in the NPRM. 79 FR 74308 (2014). The final

Election Rule went into effect on April 14, 2015.

The 2014 NPRM included a “Request for Comment Regarding Blocking Charges” that did not propose a change in the current blocking charge policy but invited public comment on whether any of nine possible changes should be made as part of a final rule or through means other than amendment of the Board’s rules.⁸ Extensive commentary was received both in favor of retaining the existing policy and of revising or abandoning the policy. The final Election Rule, however, made only minimal revisions in this respect. The majority incorporated, in new Section 103.20, provisions requiring that a party requesting the blocking of an election based on an unfair labor practice charge make a simultaneous offer of proof, provide a witness list, and promptly make those witnesses available. These revisions were viewed as facilitating the General Counsel’s existing practice of conducting expedited investigations in blocking charge cases. The majority declined to make any other changes in the existing policy, expressing the view that the policy was critical to protecting employees’ exercise of free choice,⁹ and that “[i]t advances no policy of the Act for the agency to conduct an election unless employees can vote without unlawful interference.”¹⁰

Dissenting Board Members
Miscimarra and Johnson criticized the majority’s failure to make more significant revisions in the blocking charge policy, contrasting the majority’s concern with impact on employee free choice of election delays in initial representation RC elections with a perceived willingness to accept prolonged delay in blocking charge cases that predominantly involve RD or RM petitions challenging an incumbent union’s continuing representative status. In the dissenters’ opinion, it was incumbent on the Board to undertake more substantial reform of a policy that was responsible for a major part of the “long tail” of cases where an election was delayed for more than 100 days beyond the average petition processing time.¹¹

⁸ 79 FR 7334–7335.

⁹ 79 FR at 74418–74420, 74428–74429.

¹⁰ 79 FR 74429.

¹¹ See discussion at 79 FR 74455–74456. The dissenters advocated “a 3-year trial period in which petitions will be routinely processed and elections conducted in Type I blocking charge cases, with the votes thereafter impounded, even in cases where a regional director finds that there is probable cause to believe an unfair labor practice was committed that would require the processing of the petition to be held in abeyance under current policy.” 79 FR 74456.

⁷ 79 FR 7323, quoting from *NLRB v. A.J. Tower Co.*, 329 U.S. at 331, and *Northeastern University*, 261 NLRB 1001, 1002 (1982).

A 2015 review of the Election Rule by Professor Jeffrey M. Hirsch excepted the majority's treatment of the blocking charge policy from a generally favorable analysis of the rule revisions. Noting the persistent problems with delay and abuse, Professor Hirsch observed that "[t]he Board's new rules indirectly affected the blocking charge policy by requiring parties to file an offer of proof to support a request for a stay, but that requirement is unlikely to change much, if anything. Instead, the Board should have explored new rules such as lowering the presumption that favors staying elections in most circumstances or setting a cap on the length of stays, either of which might have satisfied the blocking charge policy's main purpose while reducing abuse."¹²

Statistics provided by the General Counsel for years postdating the 2015 implementation of the Final Rule confirm Professor Hirsch's observation that the rule did not change much.¹³ Those statistics do indicate a drop in the number of blocked cases that have been processed to an election for Fiscal Years (FY) 2016, 2017, and 2018, possibly indicating that the new evidentiary requirements have facilitated quick elimination of obviously baseless blocking charges. On the other hand, the statistics indicate the same or greater disparity between blocked and unblocked cases in petition-to-election processing time, when compared to the 2008 statistics analyzed in the Estreicher study.¹⁴ Even more concerning is the information that on December 31, 2018, there were 118 blocked petitions pending; those cases had been pending for an average of 893 days; and the oldest case had been pending for 4,491 days, i.e., more than 12 years.¹⁵ See Majority Appendix B.

On December 12, 2017, the Board issued a Request for Information that generally invited the public to respond with information about whether the

2014 Election Rule should be retained without change, retained with modifications, or rescinded. 82 FR 58783. Relatively few responders addressed the change made with respect to requirements of proof in support of a blocking charge request. A number of responders, however, used this occasion to ask the Board to rescind or substantially modify the blocking charge policy. The reasons articulated for rescinding the policy are essentially the same as those offered in response to the 2014 NPRM. Among commenters that proposed revision of the blocking charge policy rather than complete rescission, the Board's General Counsel has proposed that the Board adopt a vote-and-impound procedure whereby an election would be held regardless of whether a blocking charge and blocking request are pending. If the merits of the charge have not been resolved prior to the election, the ballots would be impounded.

B. The Voluntary Recognition Bar

Longstanding precedent holds that a "Board election is not the only method by which an employer may satisfy itself as to the union's majority status [under Section 9(a) of the Act]." *United Mine Workers v. Arkansas Flooring Co.*, 351 U.S. 62, 72 fn. 8 (1956). Voluntary recognition agreements based on a union's showing of majority support are undisputedly lawful. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 595–600 (1969). However, it was not until *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966), that the Board addressed the issue of whether a Section 9(a) bargaining relationship established by voluntary recognition can be disrupted by the recognized union's subsequent loss of majority status. Although the union in *Keller Plastics* had lost majority support by the time the parties executed a contract little more than 3 weeks after voluntary recognition, the Board rejected the General Counsel's claim that the employer was violating the Act by continuing to recognize a nonmajority union as the employees' representative. The Board reasoned that "like situations involving certifications, Board orders, and settlement agreements, the parties must be afforded a reasonable time to bargain and to execute the contracts resulting from such bargaining. Such negotiations can succeed, however, and the policies of the Act can thereby be effectuated, only if the parties can normally rely on the continuing representative status of the lawfully recognized union for a reasonable period of time." *Id.* at 586. Soon thereafter, the Board extended this recognition bar policy to representation

cases and held that an employer's voluntary recognition of a union would immediately bar the filing of an election petition for a reasonable amount of time following recognition. *Sound Contractors*, 162 NLRB 364 (1966).

From 1966 until 2007, the Board tailored the duration of the immediate recognition bar to the circumstances of each case, stating that what constitutes a reasonable period of time "does not depend upon either the passage of time or the number of calendar days on which the parties met. Rather, the issue turns on what transpired during those meetings and what was accomplished therein." *Brennan's Cadillac, Inc.*, 231 NLRB 225, 226 (1977). In some cases, a few months of bargaining were deemed enough to give the recognized union a fair chance to succeed, whereas in other cases substantially more time was deemed warranted. Compare *Brennan's Cadillac* (employer entitled to withdraw recognition after 4 months) with *MGM Grand Hotel*, 329 NLRB 464, 466 (1999) (more than 11 months was reasonable considering the large size of the unit, the complexity of the bargaining structure and issues, the parties' frequent meetings and diligent efforts, and the substantial progress made).

In *Dana Corp.*, 351 NLRB 434 (2007), a Board majority reviewed the development of the immediate recognition bar policy and concluded "that the current recognition bar policy should be modified to provide greater protection for employees' statutory right of free choice and to give proper effect to the court- and Board-recognized statutory preference for resolving questions concerning representation through a Board secret-ballot election." *Id.* at 437.¹⁶

Drawing on the General Counsel's suggestion in his amicus brief of a modified voluntary recognition election bar, the *Dana* majority held that "[t]here will be no bar to an election following a grant of voluntary recognition unless (a) affected unit employees receive adequate notice of the recognition and of their opportunity to file a Board election petition within 45 days, and (b) 45 days pass from the date of notice without the filing of a validly-supported petition. These rules apply notwithstanding the execution of a collective-bargaining agreement

¹² Jeffrey M. Hirsch, *NLRB Elections: Ambush or Anticlimax?*, 64 Emory L.J. 1647, 1664 (2015).

¹³ See Majority Appendix B, available at <https://www.nlr.gov>.

¹⁴ See Majority Appendix A, available at <https://www.nlr.gov>. The median number of days from petition to election from 2016 through 2018 was 23 days in unblocked cases. The median number of days from petition to election in the same period for blocked cases ranged from 122 to 145 days.

¹⁵ We note that our dissenting colleague takes a different view of the breadth of the current blocking charge policy's impact, based on her preliminary review of statistics provided to us and her by the General Counsel. However, she acknowledges that in FY 2016 and FY 2017, about 20 percent of decertification petitions filed were blocked. She views this number as either inconsequential slight or justifiable on policy grounds. That is her opinion. We welcome the opinions of others, including their statistical analyses, in comments responsive to the NPRM.

¹⁶ The 2007 *Dana* decision followed a decision granting review, consolidating two cases, and inviting briefing by the parties and amici on the voluntary recognition bar issue. *Dana Corp.*, 341 NLRB 1283 (2004). In response, the Board received 24 amicus briefs, including one from the Board's General Counsel, in addition to briefs on review and reply briefs from the parties. *Dana Corp.*, 351 NLRB at 434 fn. 2.

following voluntary recognition. In other words, if the notice and window-period requirements have not been met, any postrecognition contract will not bar an election.”¹⁷

The *Dana* majority emphasized “the greater reliability of Board elections” as a principal reason for the announced modification. In this respect, while a majority card showing has been recognized as a reliable basis for the establishment of a Section 9(a) bargaining relationship, authorization cards are “admittedly inferior to the election process.”¹⁸ Several reasons were offered in support of this conclusion. “First, unlike votes cast in privacy by secret Board election ballots, card signings are public actions, susceptible to group pressure exerted at the moment of choice.”¹⁹ This is in contrast to a secret ballot vote cast in the “laboratory conditions” of a Board election, held “under the watchful eye of a neutral Board agent and observers from the parties,”²⁰ and free from immediate observation, persuasion, or coercion by opposing parties or their supporters. “Second, union card-solicitation campaigns have been accompanied by misinformation or a lack of information about employees’ representational options.”²¹ Particularly in circumstances where voluntary recognition is preceded by an employer entering into a neutrality agreement with the union, including an agreement to provide union access for organizational purposes, employees may not understand they even have an electoral option or an alternative to representation by the organizing union. “Third, like a political election, a Board election presents a clear picture of employee voter preference at a single moment. On the other hand, card signings take place over a protracted period of time.”²² A statistical study cited in several briefs and by the *Dana* majority indicated a significant disparity between union card showings of support obtained over a period of time and ensuing Board election results.²³ Lastly, the Board election process provides for a post-election review of impermissible electioneering and other objectionable conduct that

may result in Board invalidation of the election results and the conduct of a second election. “There are no guarantees of comparable safeguards in the voluntary recognition process.”²⁴

In *Lamons Gasket Company*, 357 NLRB 739 (2011),²⁵ a new Board majority overruled *Dana Corp.* and reinstated the immediate voluntary recognition election bar. The majority emphasized the validity of voluntary recognition as a basis for establishing a Section 9(a) majority-based recognition. Further, citing Board statistical evidence that employees had decertified the voluntarily recognized union in only 1.2 percent of the total cases in which a *Dana* notice was requested,²⁶ the majority concluded that the *Dana* modifications to the voluntary recognition bar were unnecessary and that the *Dana* majority’s concerns about the reliability of voluntary recognition as an accurate indicator of employee choice were unfounded. The *Lamons Gasket* majority criticized the *Dana* notice procedure as compromising Board neutrality by “suggest[ing] to employees that the Board considers their choice to be represented suspect and signal[ing] to employees that their choice should be reconsidered.” Id. at 744. The majority opinion also defended the voluntary recognition bar as consistent with other election bars that are based on a policy of assuring that “‘a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.’” Id. (quoting *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944)). The majority viewed the *Dana* 45-day open period as contrary to this policy by creating a period of post-recognition uncertainty during which an employer has little incentive to bargain, even though technically required to do so. Id. at 747. Finally, having

²⁴ Id.

²⁵ Similar to the *Dana* proceeding, the 2011 *Lamons Gasket* decision followed a decision granting review, consolidating two cases, and inviting briefing by the parties and amici on the voluntary recognition bar issue. *Rite Aid Store #6473*, 355 NLRB 763 (2010). In response, the Board received 17 amicus briefs, in addition to briefs on review and reply briefs from the parties. *Lamons Gasket*, 357 NLRB at 740 fn.1.

²⁶ “As of May 13, 2011, the Board had received 1,333 requests for *Dana* notices. In those cases, 102 election petitions were subsequently filed and 62 elections were held. In 17 of those elections, the employees voted against continued representation by the voluntarily recognized union, including 2 instances in which a petitioning union was selected over the recognized union and 1 instance in which the petition was withdrawn after objections were filed. Thus, employees decertified the voluntarily recognized union under the *Dana* procedures in only 1.2 percent of the total cases in which *Dana* notices were requested.” Id. at 742.

determined to return to the immediate recognition bar policy, the *Lamons Gasket* majority applied its holding retroactively and, based on the Board’s decision in *Lee Lumber & Building Material Corp.*, 334 NLRB at 399, the majority defined the reasonable period of time during which a voluntary recognition would bar an election as no less than six months after the date of the parties’ first bargaining session and no more than one year after that date. Id. at 748.

Member Hayes dissented in *Lamons Gasket*,²⁷ arguing that *Dana* was correctly decided for the policy reasons stated there, most importantly the statutory preference for a secret ballot Board election to resolve questions of representation under Section 9 of the Act. He noted that the *Lamons Gasket* majority’s efforts to secure empirical evidence of *Dana*’s shortcomings by inviting briefs from the parties and amici “yielded a goose egg.”²⁸ Consequently, the only meaningful empirical evidence came from the Board’s own election statistics. In this regard, he disagreed with the majority’s view that the minimal number of elections held and votes cast against the recognized union proved the *Dana* modifications were unnecessary. In his view, the statistics showed that in one of every four elections held, an employee majority voted against representation by the incumbent recognized union. While that 25-percent rejection rate was below the recent annual rejection rate for all decertification elections, it was nevertheless substantial and supported retention of a notice requirement and brief open period.²⁹

At least since *Lamons Gasket*, the imposition of the immediate recognition bar, followed by the execution of a collective-bargaining agreement, can preclude the possibility of conducting a Board election contesting the initial non-electoral recognition of a union as a majority-supported exclusive bargaining representative for as many as four years. The 2014 Election Rule did not include substantive discussion of the reimposition of the immediate voluntary recognition election bar in *Lamons Gasket*. A few respondents to the 2017 Request for Information contended that the Board should eliminate this and other discretionary election bars, or in the alternative,

²⁷ Id. at 748–754.

²⁸ Id. at 750 (“Only five respondents sought to overturn *Dana*, and only two of them supported their arguments for doing so with the barest of anecdotal evidence.”) (footnotes omitted).

²⁹ Id. at 751.

¹⁷ 351 NLRB at 441. The recognition bar modifications did not affect the obligation of an employer to bargain with the recognized union during the post-recognition open period, even if a decertification or rival petition was filed. Id. at 442.

¹⁸ *NLRB v. Gissel Packing Co.*, 395 U.S. at 603.

¹⁹ *Dana Corp.*, 351 NLRB at 438.

²⁰ Id. at 439.

²¹ Id.

²² Id.

²³ Id., citing McCulloch, *A Tale of Two Cities: Or Law in Action*, Proceedings of ABA Section of Labor Relations Law 14, 17 (1962).

should reinstate the *Dana* notice and open period requirements.

C. Proof of Majority-Based Recognition Under Section 9(a) in the Construction Industry

In 1959, Congress enacted Section 8(f) of the Act to address unique characteristics of employment and bargaining practices in the construction industry. Section 8(f) permits an employer and labor organization in the construction industry to establish a collective-bargaining relationship in the absence of majority support, an exception to the majority-based requirements for establishing a collective-bargaining relationship under Section 9(a). While the impetus for this exception to majoritarian principles stemmed primarily from the fact that construction industry employers often executed pre-hire agreements with a labor organization in order to assure a reliable, cost-certain source of labor referred from a union hiring hall for a specific job, the exception applies as well to voluntary recognition and collective-bargaining agreements executed by a construction industry employer that has employees. However, the second proviso to Section 8(f) states that any agreement that is lawful only because of that section's nonmajority exception cannot bar a petition for a Board election. Accordingly, there cannot be a contract bar or voluntary recognition bar to an election among employees covered by an 8(f) agreement.

Board precedent has varied with respect to the test of whether a bargaining relationship and a collective-bargaining agreement in the construction industry are governed by Section 9(a) majoritarian principles or by Section 8(f) and its exception to those principles. In 1971, the Board adopted a "conversion doctrine," under which a bargaining relationship initially established under Section 8(f) could convert into a 9(a) relationship by means other than a Board election or majority-based voluntary recognition. See *R. J. Smith Construction Co.*, 191 NLRB 693 (1971), enf. denied sub nom. *Operating Engineers Local 150 v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973); *Ruttmann Construction Co.*, 191 NLRB 701 (1971). As subsequently described in *John Deklewa & Sons*, 282 NLRB 1375, 1378 (1987), enf. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir. 1988), *R.J. Smith* and *Ruttmann* viewed a Section 8(f) agreement as "'a preliminary step that contemplates further action for the development of a full bargaining relationship'" (quoting from *Ruttmann*, 191 NLRB at 702). This preliminary 8(f)

relationship/agreement could convert to a 9(a) relationship/agreement, within a few days or years later, if the union could show that it had achieved majority support among bargaining-unit employees during a contract term. "The achievement of majority support required no notice, no simultaneous union claim of majority, and no assent by the employer to complete the conversion process." Id. Proof of majority support sufficient to trigger conversion included "the presence of an enforced union-security clause, actual union membership of a majority of unit employees, as well as referrals from an exclusive hiring hall." Id. The duration and scope of the post-conversion contract's applicability under Section 9(a) would vary, depending upon the scope of the appropriate unit (single or multiemployer) and the employer's hiring practices (project-by-project or permanent and stable workforce). Id. at 1379.

The *Deklewa* Board made fundamental changes in the law governing construction industry bargaining relationships and set forth new principles that are relevant to this rulemaking. First, it repudiated the conversion doctrine as inconsistent with statutory policy and Congressional intent expressed through the second proviso to Section 8(f) "that an 8(f) agreement may not act as a bar to, inter alia, decertification or rival union petitions." Id. at 1382. Contrary to this intent, the "extraordinary" conversion of an original 8(f) agreement into a 9(a) agreement raised "an absolute bar to employees' efforts to reject or to change their collective-bargaining representative," depriving them of the "meaningful and readily available escape hatch" assured by the second proviso. Id. Second, the Board held that 8(f) contracts and relationships are enforceable through Section 8(a)(5) and Section 8(b)(3) of the Act, but only for as long as the contract remains in effect. Upon expiration of the contract, "either party may repudiate the relationship." Id. at 1386. Further, inasmuch as Section 8(f) permits an election at any time during the contract term, "[a] vote to reject the signatory union will void the 8(f) agreement and will terminate the 8(f) relationship. In that event, the Board will prohibit the parties from reestablishing the 8(f) relationship covering unit employees for a 1-year period." Id. Third, the Board presumed that collective-bargaining agreements in the construction industry are governed by Section 8(f), so that "a party asserting the existence of a 9(a) relationship bears the burden of proving it." Id. at 1385 fn.

41. Finally, stating that "nothing in this opinion is meant to suggest that unions have less favored status with respect to construction industry employers than they possess with respect to those outside the construction industry," the Board affirmed that a construction industry union could achieve 9(a) status through "voluntary recognition accorded . . . by the employer of a stable workforce where that recognition is based on a clear showing of majority support among the union employees, e.g., a valid card majority." Id. at 1387 fn. 53.

Deklewa's presumption of 8(f) status for construction industry relationships did not preclude the possibility that a relationship undisputedly begun under Section 8(f) could become a 9(a) relationship upon the execution of a subsequent agreement. In cases applying *Deklewa*, however, the Board repeatedly stated the requirement, both for initial and subsequent agreements, that in order to prove a 9(a) relationship, a union would have to show "its express demand for, and an employer's voluntary grant of, recognition to the union as bargaining representative based on a contemporaneous showing of union support among a majority of employees in an appropriate unit." *Brannan Sand & Gravel Co.*, 289 NLRB 977, 979–980 (1988) (quoting *American Thoro-Clean, Ltd.*, 283 NLRB 1107, 1108–1109 (1987)). Further, in *J & R Tile*, 291 NLRB 1034, 1036 (1988), the Board held that, to establish voluntary recognition, there must be "positive evidence that a union unequivocally demanded recognition as the employees' 9(a) representative and that the employer unequivocally accepted it as such." ³⁰

In *Staunton Fuel & Material, Inc.*, 335 NLRB 717, 719–720 (2001), the Board for the first time held that a construction industry union could prove 9(a) recognition on the basis of contract language alone without any other "positive evidence" of a contemporaneous showing of majority support. Relying on two recent decisions by the United States Court of

³⁰ *Golden West Electric*, 307 NLRB 1494, 1495 (1992) (citing *J & R Tile*, supra). In an Advice Memorandum issued after *J & R Tile*, the General Counsel noted record evidence that the employer in that case "clearly knew that a majority of his employees belonged to the union, since he had previously been an employee and a member of the union. However, the Board found that in the absence of positive evidence indicating that the union sought, and the employer thereafter granted, recognition as the 9(a) representative, the employer's knowledge of the union's majority status was insufficient to take the relationship out of Section 8(f)." *In re Frank W. Schaefer, Inc.*, Case 9–CA–25539, 1989 WL 241614.

Appeals for the Tenth Circuit,³¹ the Board held that language in a contract was independently sufficient to prove a 9(a) relationship “where the language unequivocally indicates that (1) the union requested recognition as the majority or 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or 9(a) bargaining representative; and (3) the employer’s recognition was based on the union’s having shown, or having offered to show, evidence of its majority support.” *Id.* at 720. The Board found that this contract-based approach “properly balances Section 9(a)’s emphasis on employee choice with Section 8(f)’s recognition of the practical realities of the construction industry.” *Id.* at 719. Additionally, the Board stated that under the *Staunton Fuel* test, “[c]onstruction unions and employers will be able to establish 9(a) bargaining relationships easily and unmistakably where they seek to do so.”

On review of a subsequent Board case applying *Staunton Fuel*, the United States Court of Appeals for the District of Columbia Circuit sharply disagreed with the Board’s analysis.³² Relying heavily on the majoritarian principles emphasized by the Supreme Court in *Int’l Ladies’ Garment Workers’ Union v. NLRB*, 366 U.S. 731 (1961), the D.C. Circuit stated that “[t]he proposition that contract language standing alone can establish the existence of a section 9(a) relationship runs roughshod over the principles established in *Garment Workers*, for it completely fails to account for employee rights under sections 7 and 8(f). An agreement between an employer and union is void and unenforceable, *Garment Workers* holds, if it purports to recognize a union that actually lacks majority support as the employees’ exclusive representative. While section 8(f) creates a limited exception to this rule for pre-hire agreements in the construction industry, the statute explicitly preserves employee rights to petition for decertification or for a change in bargaining representative under such contracts. 29 U.S.C. 158(f). The Board’s ruling that contract language alone can establish the existence of a section 9(a) relationship—and thus trigger the three-year ‘contract bar’ against election petitions by employees and other parties—creates an opportunity for construction companies and unions to

circumvent both section 8(f) protections and *Garment Workers’* holding by colluding at the expense of employees and rival unions. By focusing exclusively on employer and union intent, the Board has neglected its fundamental obligation to protect employee section 7 rights, opening the door to even more egregious violations than the good faith mistake at issue in *Garment Workers*.” 330 F.3d at 536–537.

Notwithstanding the court’s criticism in *Nova Plumbing*, and that of a dissenting Board member subsequently agreeing with the court,³³ the Board has adhered to *Staunton Fuel*’s holding that certain contract language, standing alone, can establish an 9(a) relationship in the construction industry. The D.C. Circuit has adhered as well to the contrary view. In *Colorado Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031 (2018), the court granted review and vacated a Board order premised on the finding that a bargaining relationship founded under Section 8(f) became a 9(a) relationship solely as a consequence of recognition language in a successor bargaining agreement executed by the parties. The court reemphasized its position in *Nova Plumbing* that the *Staunton Fuel* test could not be squared either with *Garment Workers’* majoritarian principles or with the employee free choice principles represented by Section 8(f)’s second proviso. It also focused more sharply on the centrality of employee free choice in determining when a Section 9(a) relationship has been established. The court observed that “[t]he *raison d’être* of the National Labor Relations Act’s protections for union representation is to vindicate the employees’ right to engage in collective activity and to empower employees to freely choose their own labor representatives.”³⁴ Further, the court emphasized that “[t]he unusual Section 8(f) exception is meant not to cede all employee choice to the employer or union, but to provide employees in the inconstant and fluid construction and building industries some opportunity for collective representation. . . . [I]t is not meant to force the employees’ choices any further than the statutory scheme allows.”³⁵ Accordingly, “[b]ecause the statutory objective is to ensure that only unions chosen by a majority of employees enjoy Section 9(a)’s enhanced protections, the Board must faithfully police the presumption

of Section 8(f) status and the strict burden of proof to overcome it. Specifically, the Board must demand clear evidence that the employees—not the union and not the employer—have independently chosen to transition away from a Section 8(f) pre-hire arrangement by affirmatively choosing a union as their Section 9(a) representative.”³⁶ Pursuant to that strict evidentiary standard, the court found that it would not do for the Board to rely under *Staunton Fuel* solely on contract language “indicating that the employer’s recognition was based on the union’s having shown, or having offered to show, an evidentiary basis of its majority support.”³⁷ Such reliance “would reduce the requirement of affirmative employee support to a word game controlled entirely by the union and employer. Which is precisely what the law forbids.”³⁸

II. Statutory Authority and Desirability of Rulemaking

Section 6 of the Act provides that “[t]he Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by subchapter II of chapter 5 of Title 5 [the Administrative Procedure Act], such rules and regulations as may be necessary to carry out the provisions of this Act.” The Board interprets Section 6 as authorizing the proposed rules and invites comments on this issue. Although the Board historically has made most substantive policy determinations through case adjudication, the Board has, with Supreme Court approval, engaged in substantive rulemaking. *American Hospital Assn. v. NLRB*, 499 U.S. 606 (1991) (upholding Board’s rulemaking on appropriate bargaining units in the healthcare industry); see also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (“[T]he choice between rulemaking and adjudication lies in the first instance within the Board’s discretion.”).

The Board finds that informal notice-and-comment rulemaking with respect to the election bar policies at issue here is desirable for three important reasons.

First, rulemaking presents the opportunity to solicit broad public comment on, and to address in a single proceeding, three related election bar issues that would not likely arise in the adjudication of a single case. By engaging in rulemaking after receiving public comment on the issues

³¹ *NLRB v. Triple C Maintenance, Inc.*, 219 F.3d 1147 (10th Cir. 2000), and *NLRB v. Oklahoma Installation Co.*, 219 F.3d 1160 (10th Cir. 2000).

³² *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003), granting review and denying enforcement of *Nova Plumbing, Inc.*, 336 NLRB 633 (2001).

³³ *King’s Fire Protection, Inc.*, 362 NLRB 1056, 1058–1063 (2015) (Member Miscimarra, dissenting).

³⁴ *Id.* at 1038 (emphasis in original).

³⁵ *Id.* at 1039.

³⁶ *Id.*

³⁷ *Staunton Fuel*, 335 NLRB at 717.

³⁸ *Colorado Fire Sprinkler, Inc. v. NLRB*, 891 F.3d at 1040.

presented, the Board will be better able to make an informed judgment as to the impact the current bar policies have had on employee free choice.

Second, rulemaking does not depend on the participation and argument by parties in a specific case, and it cannot be mooted by developments in a pending case. For example, in *Loshaw Thermal Technology, LLC*, Case 05–CA–158650, the Board recently sought public input on the issue of what proof should be required to establish a majority-supported Section 9(a) bargaining relationship in the construction industry by issuing a notice and invitation to file briefs. 2018 WL 4357198 (September 11, 2018). The Charging Party Union in that case thereafter filed a request to withdraw its charge. The Board granted the request by unpublished order issued on December 14, 2018, 2018 WL 6616458, thus precluding the possibility of addressing the issue presented through adjudication until such unforeseen time as it might be raised in a new case.

Third, by establishing the new election bar standards in the Board's Rules & Regulations, employers, unions, and employees will be able to plan their affairs free of the uncertainty that the legal regime may change on a moment's notice (and possibly retroactively) through the adjudication process. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 777 (1969) ("The rule-making procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that is forthcoming.") (Douglas, J., dissenting).

III. The Proposed Rule Amendments

Substitution of a Vote and Impound Procedure for Current Blocking Charge Policy

The Board is inclined to believe, subject to comments, that the current blocking charge policy impedes, rather than protects, employee free choice. In a significant number of cases, the policy denies employees the right to have their votes, in a Board-conducted election on questions concerning representation, "recorded accurately, efficiently, and speedily."³⁹ In particular, statistical evidence over several decades of Board elections undisputedly shows that the blocking charge policy causes substantial delays in the conduct of elections in which employees seek the opportunity to freely express their choice with respect to whether they wish to continue being represented by their incumbent union.

As the United States Court of Appeals for the D.C. Circuit has stated, "a decertification bar, whatever its duration, also prevents employees from exercising their right to dislodge the union however their sentiments about it may change. Decertification bars thus touch at the very heart of employees' rights under the National Labor Relations Act."⁴⁰ Although the court made this observation when criticizing the Board's rote issuance of a remedial affirmative bargaining order for an employer's unlawful withdrawal of recognition from an incumbent union, it applies with equal force to the effect of a rote application of the current blocking charge policy on RD petitions, as well as RM petitions and rival union RC petitions seeking an electoral referendum on an incumbent union's continuing majority support.

The breadth of the current blocking charge policy and the significant length of delay in processing these otherwise valid election petitions raise several serious concerns. First, employees who support those petitions are just as adversely affected by delay as employees who support a union's initial petition to become an exclusive bargaining representative. Delay robs the petition effort of momentum and, if an election is delayed for months or years—as is often the case when elections are blocked—many of the employees ultimately voting on the issue of representation may not even be the same as those in the workforce when the petition was filed. Second, the blocking charge policy rests on a presumption that an *unlitigated and unproven* allegation of any of a broad range of unfair labor practices justifies indefinite delay because of a discretionary administrative determination of the *potential* impact of the *alleged* misconduct on employees' ability to cast a free and uncoerced vote on the question of representation. This presumption goes well beyond the presumption underlying the Board's affirmative remedial bargaining order policy of barring an election for a reasonable period of time until the lingering effects of certain *proven* and more narrowly defined unfair labor practices can be abated.⁴¹ Third, as the dissenters to the Election Rule observed,

the current policy of holding petitions in abeyance for certain pre-petition Type I blocking charges "represents an anomalous situation in which some conduct that would not be found to interfere with employee free choice if alleged in objections, because it occurs outside the critical election period, would nevertheless be the basis for substantially delaying holding any election at all."⁴²

For the foregoing reasons, and in light of the various criticisms voiced by courts, academicians, commenters to the 2014 NPRM, dissenters to the 2014 Final Rule, and responders to the 2017 Request for Information, the Board believes, subject to comments, that the current blocking charge policy should not be maintained. Although the 2014 Election Rule addition of Section 103.20 made some effort to address concerns about unmeritorious charges needlessly delaying Board-conducted elections, the Board is inclined, subject to comments, to institute more substantial measures to protect employee free choice and ensure that employees are able to realize their right to have their votes "recorded accurately, efficiently, and speedily."⁴³

Having preliminarily reviewed numerous suggestions for revision or elimination of this policy, the Board proposes to adopt the vote and impound procedure suggested by the General Counsel in response to the 2017 Request for Information. Under this new policy, as set forth in an amended Section 103.20 of the Rules, regional directors will continue to process a representation petition and will conduct an election even when an unfair labor practice charge and blocking request have been filed. If the charge has not been resolved prior to the election, the ballots will remain impounded until the Board makes a final determination regarding the charge. As further explained by the General Counsel: "Adoption of a vote-and-impound protocol while the region investigates a charge would allow for balloting when

³⁹ 79 FR 74456, citing *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961) (to be found objectionable, alleged conduct must occur during critical period between petition and election dates).

⁴⁰ *NLRB v. A.J. Tower Co.*, 329 U.S. at 331. As indicated in fn. 4 above, the Board disagrees with observations by both the majority and dissent in their respective discussions of the 2014 Election Rule that the blocking charge policy was incorporated into or embedded in that rule. Sec. 103.20 incorporates only certain evidentiary procedures to be applied to blocking charges. Although the majority clearly endorsed the current blocking charge policy, determination of whether and when a blocking charge policy should apply is not addressed in the 2014 Election Rule. It remains a product of adjudication outside the Board's Rules, details of which are summarized in the General Counsel's nonbinding Casehandling Manual.

⁴¹ *Caterair International v. NLRB*, 22 F.3d 1114, 1122 (1994).

⁴² Even that remedial presumption of taint is not without its critics. See *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring) ("To presume that employees are such fools and sheep that they have lost all power of free choice based on the acts of their employer, bespeaks the same sort of elitist Big Brotherism that underlies the imposition of the invalid bargaining order in this case.")

³⁹ *NLRB v. A.J. Tower Co.*, 329 U.S. at 331.

the parties' respective arguments are fresh in the mind of unit employees. Balloting would occur with the understanding that allegations have been proffered, regardless of whether probable cause has been found; thus, neither the charging party nor the charged party would be in control of the narrative underlying the election campaign. Should the director find that the ULP charge is without merit, the count and resulting tally of ballots could occur immediately, rather than after a further delay while the petition is unblocked, an election is either negotiated or directed, the mechanics of the pre-election period dispensed with, and balloting take place. Moreover, any burden in conducting elections created where the ballots may never be counted is more than offset by the benefit of preserving employees' free choice. Indeed, the preservation of employee free choice through a vote and impound procedure far outweighs any other concerns."⁴⁴

The Board believes, subject to comment, that the proposed vote-and-impound rule best satisfies the goal of protecting employee free choice in cases where, under existing policy, the election would be blocked by assuring that petitions will be processed to an election in the same timely manner as in unblocked petition cases. The concern for protection of that choice from coercion by unfair labor practices will still be met by holding the counting of ballots and certification of results until a final determination has been made as to the merits of the unfair labor practice allegations and the effects on the election of any violations found to have been committed.

Modification To Current Immediate Voluntary Recognition Bar

The Board proposes, subject to comments, to overrule *Lamons Gasket*, to reinstate the *Dana* notice and open period procedures following voluntary recognition under Section 9(a), and to incorporate those procedures in the Rules as a new Section 103.21(a). This modification to the current immediate voluntary recognition bar is not intended to and should not have the effect of discouraging parties from entering into collective-bargaining relationships and agreements through the undisputedly valid procedure of voluntary recognition based on a contemporaneous showing of majority

support. However, the Board believes, subject to comments, that the justifications expressed in the *Dana* Board majority and *Lamons Gasket* dissenting opinions for the limited post-recognition notice and open period requirements are more persuasive than those expressed by the *Lamons Gasket* Board majority in support of an immediate voluntary recognition bar.

It is undisputed that "secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." *NLRB v. Gissel Packing Co.*, 395 U.S. at 602. Although voluntary recognition is a valid method of obtaining recognition, authorization cards used in a card-check recognition process are "admittedly inferior to the election process." *Id.* at 603. The Board believes that the *Lamons Gasket* majority failed to accept this distinction or the several reasons, summarized above, articulated by the *Dana* majority supporting it. Further, the Board believes that the *Lamons Gasket* majority failed to address at all the cumulative effect of an immediate recognition bar and a subsequent contract bar that would apply if parties execute a collective-bargaining agreement during the six-month to one-year reasonable bargaining period following the first bargaining session following voluntary recognition. In this circumstance, employees denied an initial opportunity to vote in a secret-ballot Board election on the question of representation could be denied that opportunity for as many as four years.⁴⁵

The Board also believes, in agreement with the *Lamons Gasket* dissent, that the Board election statistics cited by the *Lamons Gasket* majority with respect to the limited number of elections held under *Dana* procedures support, rather than detract from, the need for a notice and brief open period following voluntary recognition. "In sum, here is what we really know from the *Dana* experience: (1) *Dana* has served the intended purpose of assuring employee free choice in those cases where the choice made in the preferred Board electoral process contradicted the showing on which voluntary recognition was granted; (2) in those cases where the recognized union's majority status was affirmed in a *Dana*

election, the union gained the additional benefits of 9(a) certification, including a 1-year bar to further electoral challenge; (3) there is no substantial evidence that *Dana* has had any discernible impact on the number of union voluntary recognition campaigns, or on the success rate of such campaigns; and (4) there is no substantial evidence that *Dana* has had any discernible impact on the negotiation of bargaining agreements during the open period or on the rate at which agreements are reached after voluntary recognition."⁴⁶

In conclusion, the Board believes, subject to comments, that it is necessary and appropriate to modify the current voluntary recognition bar doctrine by reestablishing through rulemaking a post-recognition period in which employees and rival unions are permitted to file an election petition before the imposition of an election bar. This modification does not diminish the role that voluntary recognition plays in the creation of bargaining relationships but ensures that employee free choice has not been impaired by a process that is less reliable than Board elections.

Modified Requirements for Proof of Section 9(a) Relationships in the Construction Industry

The Board proposes, subject to comments, to overrule *Staunton Fuel*, to adopt the D.C. Circuit's position that contract language alone cannot create a 9(a) bargaining relationship in the construction industry, and to incorporate the requirement of extrinsic proof of contemporaneous majority support in a new Section 103.21(b) of the Board's Rules. The Board believes that several reasons support this change. First, as emphasized by the D.C. Circuit opinion in *Colorado Fire Sprinkler*, the *Staunton Fuel* test literally permits an employer and union to "paper over" the *Deklewa* presumption that collective-bargaining relationships in the construction industry are governed by Section 8(f), under the second proviso to which a Board election cannot be barred at any time. Second, the *Staunton Fuel* test goes one step beyond the problems described above with respect to the current voluntary recognition election bar. At least under the recognition bar policy as applied outside the construction industry, there is undisputed proof of employee majority support, through union authorization cards or a pro-union petition, when the union and employer enter into a bargaining relationship. Under *Staunton Fuel*, an initial bargaining relationship

⁴⁴ General Counsel's April 18, 2018 response to the Board's Request for Information regarding the 2014 Election Rule, p. 2, available for viewing on the Board's public website at <https://www.nlrb.gov/reports-guidance/public-notice/request-information/submissions>.

⁴⁵ Indeed, because the reasonable period for bargaining runs from the date of the first bargaining session following voluntary recognition, and because parties often need time following voluntary recognition to formulate their positions before they meet and bargain, the combination of immediate voluntary recognition bar followed by contract bar could deny employees a vote on the question of representation for more than four years.

⁴⁶ *Lamons Gasket*, 357 NLRB at 751.

under Section 8(f) may become a Section 9(a) relationship at any time after the hiring of employees if the employer and union execute a contract with the prescribed Section 9(a) recognition language. Thus, without any extrinsic proof that a majority of those employees ever supported the recognized union, the current contract bar policy will prevent them, or a rival union, from filing a Board election petition to challenge the union's representative status for up to three years of the contract's duration. Third, the 8(f) to 9(a) "conversion" permitted under *Staunton Fuel* is similar to the flawed "conversion doctrine" that *Deklewa* repudiated. Finally, and most importantly, the Board believes, subject to comments, that the repeated criticisms voiced by the D.C. Circuit raise a legitimate concern that the current *Staunton Fuel* test conflicts with statutory majoritarian principles and represents an impermissible restriction on employee free choice, particularly in light of the protections intended by the second proviso of Section 8(f).

The Board believes, subject to comments, that the proposed rule requiring positive evidence, apart from contract language, that a union unequivocally demanded recognition as the Section 9(a) exclusive bargaining representative of employees in an appropriate bargaining unit, and that the employer unequivocally accepted it as such, based on a contemporaneous showing of support from a majority of employees in an appropriate unit, will restore the protections of employee free choice in the construction industry that Congress intended, that *Deklewa* sought to secure, and that the D.C. Circuit insists must be restored.

IV. Response to the Dissent

Here, in a nutshell, is our colleague's dissent: She likes the present state of law on the issues raised, particularly because it accords with the views of a prior Board majority that had no hesitation about overruling numerous Board precedents on their own initiative on issues where the results were not to their liking.⁴⁷ She has chastised the

current Board on innumerable occasions for failing to seek public input prior to overruling precedent, yet she claims we have no right to seek that input on the three issues for which we here seek broad comment. She contends, quite incorrectly, that the well-established standard for determining whether rulemaking is reasoned or arbitrary should be applied at the beginning of the process, prior to the issuance of an NPRM, rather than in judicial review of the end result of the process, after issuance of a Final Rule based on results from the notice-and-comment process. Moreover, she treats each proposal we make in the NPRM as *sui generis*, lacking any basis in the prior academic, judicial, or internal Board criticisms that we have cited, which she either ignores or summarily rejects.

We need go no further in discussing the details of the dissent, other than to note that we already have her predetermined opinion about the proposals, regardless of what comments or further analysis may ensue.

V. Dissenting View of Member Lauren McFerran

The majority today presents a wide-ranging proposal to radically remake three longstanding Board policies via rulemaking: (1) The blocking charge doctrine, which protects employee free choice by permitting the Board to delay a union-representation election in the face of unfair labor practice allegations; (2) the voluntary recognition bar doctrine, which encourages collective bargaining and promotes industrial stability by allowing a union—after being voluntarily recognized by an employer—to represent employees for a certain period without being subject to challenge; and (3) the *Staunton Fuel* doctrine, which both preserves and encourages collective-bargaining relationships by permitting a union in the construction industry to establish its majority status by pointing to certain language in its collective-bargaining agreement with the employer. Each of the majority's proposed changes would make it harder for employees to get, or to keep, union representation. It is common knowledge that the Board's limited resources are severely taxed by undertaking a rulemaking process, instead of deciding cases already

waiting for Board action.⁴⁸ And while rulemaking can potentially be a useful tool in appropriate circumstances,⁴⁹ the Board should not undertake this arduous process without proper justification. Finally, of course, the rules it adopts should actually further the goals of the National Labor Relations Act, not undermine them.

The impetus for the majority's project is difficult to discern. Certainly, today's proposal—though purporting to address representation case procedures—is not responsive to the Board's 2014 Election Rule, which included only modest revisions to the Board's blocking charge policy and did not implicate the other two issues raised here. Tellingly, only a very small number of responses to the Board's 2017 Request for Information regarding election regulations even touched on the subjects of this Notice. Nor are there rulemaking petitions pending on any of these issues. Indeed, it appears that this initiative—which pieces together three seemingly unconnected proposals—exists primarily as a vehicle for the majority to alter precedents that have not presented themselves for the Board's attention in the normal course of adjudication (or at least not as quickly as the majority would like).⁵⁰

More questionable than the proposal's origin, however, is the majority's thin justification for revisiting the law. Quite simply, the majority cannot change the law in these three areas just because it wants to. As the Supreme Court has long recognized, "A 'settled course of [agency] behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress.'" *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 41–42 (1983) (quoting *Atchison*,

⁴⁸ See, e.g., Jeffrey M. Hirsch, *Defending the NLRB: Improving the Agency's Success in the Federal Courts of Appeals*, 5 FIU L. Rev. 437, 457 (2010) (explaining that rulemaking at the Board would consume significant resources, especially "given that the NLRB is banned from hiring economic analysts").

⁴⁹ For example, in my dissent in *The Boeing Company*, 365 NLRB No. 154, slip op. at 43 (2017) (dissenting opinion), I suggested that the Board should have considered formulating model rules rather than using adjudication to making sweeping categorical determinations about the lawfulness of rules not presented in the case at hand.

⁵⁰ Notably, in *Loshaw Thermal Technology, LLC*, 05–CA–158650, the Board requested public briefing on one of the issues presented here—namely, whether Section 9(a) bargaining relationships in the construction industry may be established by contract language alone. That request for briefing was suspended and ultimately rescinded after the charging party union withdrew the underlying unfair labor practice charge. The Board has not been presented with another case addressing the issue.

⁴⁷ In addition to *Lamons Gasket*, supra, see *United States Postal Service*, 364 NLRB No. 116 (2016); *E.I. Du Pont de Nemours*, 364 NLRB No. 113 (2016); *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016); *Trustees of Columbia University*, 364 NLRB No. 90 (2016); *Miller & Anderson, Inc.*, 364 NLRB No. 39 (2016); *Graymont PA, Inc.*, 364 NLRB No. 37 (2016); *Loomis Armored US, Inc.*, 364 NLRB No. 23 (2016); *Guardsmark, LLC*, 363 NLRB No. 103 (2016); *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015); *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB 1599 (2015); *Piedmont Gardens*, 362 NLRB 1135 (2015); *Babcock & Wilcox*

Construction Co., Inc., 361 NLRB 1127 (2014); *Purple Communications, Inc.*, 361 NLRB 1050 (2014); *Pressroom Cleaners*, 361 NLRB 643 (2014); *FedEx Home Delivery*, 361 NLRB 610 (2014); and *UGL–UNICCO Service Co.*, 357 NLRB 801 (2011). The 2014 Election Rule also overruled precedent previously established in case adjudication.

T. & S. F. Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 807 (1973). It follows, therefore, that when an agency seeks to change its policy—particularly long-settled policy—the agency must provide a “reasoned explanation” for why it is changing the policy and “must show that there are good reasons for the new policy.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–515 (2009). Such an explanation must address the agency’s reasons for “disregarding facts and circumstances . . . that underlay . . . the prior policy.”⁵¹

The majority’s proposal, at least at this stage of the proceedings, fails to meet even minimal standards of reasoned decisionmaking. The proposal relies on faulty premises, fails to ask critical questions, and fails to analyze the relevant data and agency experience.

First, the majority proposes to eliminate the Board’s blocking charge policy—an 80-year old doctrine under which the Board may decline to process election petitions over party objections when there are pending unfair labor practice charges that would potentially taint the election environment. In its place, the majority would implement a vote-and-impound procedure that would require regional directors to process all election petitions and hold elections no matter how serious the pending unfair labor practice charges and no matter how powerful the indicia of their merit. The admitted result of the new policy would be to require regional directors to run—and employees, unions, and employers to participate in—elections conducted under coercive conditions that interfere with employee free choice.

Unfortunately, it does not appear that the majority has done any of the rigorous analytical work that should be involved in pursuing such a dramatic change in Board law. My colleagues have not asked critical questions about blocked petitions, and they have failed to analyze relevant, available data about how the blocking charge policy works in practice and the effect of the proposed vote-and-impound procedure if adopted. The result is an unjustified policy change that would unacceptably undermine employee free choice and the policies of the Act.

Second, the majority proposes to radically alter the Board’s voluntary recognition bar doctrine, which currently provides that an employer’s voluntary recognition of a union insulates the union from an election

challenge for a reasonable period of time, to permit collective bargaining. Instead, the majority would reinstate the Board’s discredited and short-lived *Dana* approach, establishing a 45-day “window period” after voluntary recognition during which employees may file a decertification petition supported by a 30-percent showing of interest. Here, the majority again seeks to upend a well-established Board doctrine—supported by over 50 years of caselaw—without presenting any new policy justifications, legal grounds, or evidentiary support on the side of its position. In its place, the majority would implement an approach that the Board had previously repudiated in a carefully-considered, evidence-based decision. The result of the majority’s proposal is contrary to the policies of the Act—discouraging the establishment of stable collective bargaining relationships by creating unnecessary procedural hurdles undermining a union that has already lawfully secured recognition.⁵²

Finally, the majority proposes to discard the 18-year-old *Staunton Fuel* doctrine and instead adopt a rule providing that, in the construction industry, neither voluntary recognition of the union by the employer nor a collective-bargaining agreement between the parties will bar election petitions filed under Section 9(c) or 9(e) of the Act “absent positive evidence” (as detailed in the rule) that the collective-bargaining relationship was established under the majority-support requirement of Section 9(a) of the Act. As I will explain, the majority’s proposal—which runs counter to well-established Board law in unfair labor practice cases—purports to solve a non-existent problem, while failing adequately to acknowledge the actual problem that *Staunton Fuel* was intended to address.

Almost everything about today’s initiative—from the lack of justification for rulemaking, to the near-random grouping of unrelated topics, to the poorly conceptualized proposals—seems arbitrary. Moreover, all of the majority’s proposals, if implemented, would run contrary to the stated goals of the Act, which is intended to “encourag[e] the practice and procedure

of collective bargaining” and to “protect[] the exercise by workers of . . . designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment” (in the words of Section 1). For all of these reasons, I dissent from the majority’s decision to issue the notice of proposed rulemaking (NPRM).

A. Blocking Charge Policy

It is a foundational principle of United States labor law that when a petition is filed with the Board seeking an election to enable employees to decide whether they wish to be represented by a union, the Board’s paramount role in overseeing the process is to protect employee free choice. By definition, a critical part of protecting employee free choice is ensuring that employees are able to vote in an atmosphere free of coercion, so that the results of the election accurately reflect the employees’ true desires concerning representation.

There is general agreement that, under ordinary circumstances, the Board should conduct elections expeditiously. However, as anyone remotely familiar with the history of the National Labor Relations Act is aware, Board volumes are filled with cases describing unlawful conduct that interferes with the ability of employees to make a free choice about union representation in an election. Accordingly, for more than 80 years, the Board has maintained a “blocking charge policy” whereby the Board may (at least temporarily) decline to process election petitions over party objections when there are pending unfair labor practice charges alleging conduct that would interfere with employee free choice until the merits of those charges are resolved.

In cases where the charges prove meritorious and there has been conduct that would interfere with employee free choice in an election, the blocking charge policy protects employee free choice by delaying the election until those unfair labor practices have been remedied and employees can register a free and untrammelled choice for or against union representation. At the same time, the blocking charge policy also respects the rights of employees in the subset of cases where the charges are subsequently found to lack merit, because the policy provides for regional directors to resume processing those petitions to elections.

Today, the majority abruptly proposes to jettison the blocking charge policy adhered to by Boards of differing perspectives for more than 8 decades. The majority proposes to replace the

⁵¹ *Encino Motorcars, LLC v. Navarro*, —U.S.—, 136 S. Ct. 2117 at 2126 (2016), quoting *FCC*, 556 U.S. at 515–516.

⁵² This is not the first time the current majority has made changes—or signaled its intent to make changes—the primary effect of which is to make it easier to oust lawfully-recognized unions. See, e.g., *Silvan Industries*, 367 NLRB No. 28 (2018) (undermining the Board’s contract bar doctrine); see also *Bay at North Ridge Health and Rehabilitation Center, LLC*, 18–RD–208565 (Feb. 14, 2018) and *Apple Bus Co.*, 19–RD–203378 (Dec. 14, 2017) (noting current majority members’ disagreement with the successor bar doctrine).

blocking charge policy with a vote-and-impound procedure that will require regional directors to process *all* petitions to elections—no matter how serious the pending unfair labor practice charges, and even if a regional director and an administrative law judge have determined those charges to have merit—unless there has been a “final determination by the Board” itself. In other words, as my colleagues implicitly concede, the proposed vote-and-impound procedure will require regional directors to run—and employees, unions, and employers to participate in—elections conducted under coercive conditions that interfere with employee free choice. This would be a shocking abdication of the Board’s statutory duties.

As currently drafted and justified, the majority’s proposal to replace the blocking charge policy with a vote-and-impound procedure reflects a failure to engage in the sort of reasoned decision-making demanded of the Board and other administrative agencies. My colleagues have not laid even the basic foundation for a rulemaking supported by substantial evidence. They have assumed the existence of a problem and rushed to a solution without doing any of the rigorous analytical work that should be involved in the rulemaking process. They have not asked critical questions about blocked petitions, and they have failed to analyze relevant, available data about how the blocking charge policy has worked in practice and how the proposed vote-and-impound procedure would work if adopted.

Not surprisingly, from this flawed process a flawed proposal has emerged. The Board’s experience and data shows that the predictable outcome of the majority’s proposal would be to require regional directors to run, and employees, unions, and employers to participate in, an unacceptably high proportion of elections conducted under coercive conditions, undermining employee rights and the policies of the Act, while imposing unnecessary costs on the parties and the Board.

1.

Section 7 of the Act grants employees “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 purposes of collective bargaining or other mutual aid or protection[.]” 29 U.S.C. 157. The most commonly travelled route for employees to union representation is through the Board’s election processes. Indeed, it

has been said—and the majority repeats today—that a secret-ballot election is the Board’s preferred route, because a secret-ballot election conducted under the Board’s safeguards is normally the most reliable means of determining whether employees truly desire union representation.

Section 7 also grants employees the right to refrain from union activity, and previously represented employees may become unrepresented in a variety of ways. For example, when presented with evidence that an incumbent union no longer has majority backing, an employer sometimes may withdraw recognition from the union and refuse to bargain. See *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 361 (1998). However, a secret-ballot election conducted under the Board’s safeguards is also the “preferred” means of determining whether employees truly desire to rid themselves of their incumbent representative. See, e.g., *Scomas of Sausalito, LLC v. NLRB*, 849 F.3d 1147, 1152 (D.C. Cir. 2017) (quoting *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 723, 725–727 (2001) (“*Levitz*”)).⁵³

Because the Act calls for freedom of choice by employees as to whether to obtain, or retain, union representation, the Board has long recognized that “[i]n election proceedings, it is the Board’s function 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.” *General Shoe Corp.*, 77 NLRB 124, 126–127 (1948) (a Board conducted election “can serve its true purpose only if the surrounding conditions enable employees to resister a free and untrammelled choice for or against a bargaining representative.”). Indeed, as the Supreme Court has recognized, it is the “duty of the Board . . . to establish ‘the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.’” *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 276 (1973) (emphasis added) (citation omitted).

Since the earliest days of the Act, the Board has had a policy—commonly referred to as the blocking charge policy—of generally declining to process a petition to an election over party objections when unfair labor practice charges allege conduct that, if

⁵³ The Act permits employees to petition for an election to decertify an incumbent collective-bargaining representative. 29 U.S.C. 159(c)(1)(A)(ii). And employers who doubt the majority support of incumbent unions may themselves petition for elections at an appropriate time as well. See *Levitz*, 333 NLRB at 720–721 & n.24.

proven, would interfere with employee free choice in an election.⁵⁴ The rationale for the blocking charge policy is straightforward: It is “premised solely on the [Board’s] intention to protect the free choice of employees in the election process.” NLRB Casehandling Manual (Part Two), Representation Proceedings Section 11730 (2017). “The Board’s policy of holding the petition in abeyance in the face of pending unfair labor practices is designed to preserve the laboratory conditions that the Board requires for all elections and to ensure that a free and fair election can be held in an atmosphere free of any type of coercive behavior.” *Mark Burnett Productions*, 349 NLRB 706, 706 (2007). Indeed, the ability of regional directors to hold petitions in abeyance when unfair labor practice charges allege conduct that would interfere with employee free choice is one of the safeguards that renders Board-conducted elections the preferred means of determining whether employees wish to obtain, or retain, union representation.

It is important to understand that, contrary to the majority’s suggestion, the mere filing of an unfair labor practice charge does not automatically cause a petition to be held in abeyance under the blocking charge policy. Casehandling Manual Sections 11730, 11731.⁵⁵ Indeed, a regional director may

⁵⁴ See *United States Coal & Coke Co.*, 3 NLRB 398, 399 (1937). See generally, *The Developing Labor Law* 561–63 (John E. Higgins, Jr., ed., 5th edition 2006); 3d NLRB Ann. Rep. 143 (1938) (“The Board has often provided that an election be held at such time as the Board would thereafter direct in cases where the employer has been found to have engaged in unfair labor practices and the Board has felt that the election should be delayed until there has been sufficient compliance with the Board’s order to dissipate the effects of the unfair labor practices and to permit an election uninfluenced by the employer’s conduct. Similarly, where charges have been filed alleging that the employer has engaged in unfair labor practices, the Board has frequently postponed the election indefinitely pending the investigation and determination of the charges.”); 13th NLRB Ann. Rep. 34 & fn. 90 (1948) (“Unremedied unfair labor practices constituting coercion of employees are generally regarded by the Board as grounds for vacating an election[.] For this reason, the Board ordinarily declines to conduct an election if unfair labor practice charges are pending or if unfair labor practices previously found by the Board have not yet been remedied[.]”).

⁵⁵ See *Veritas Health Services, Inc. v. NLRB*, 895 F.3d 69, 88 (D.C. Cir. 2018) (noting that pending unfair labor practice charges do not necessarily preclude processing a representation petition). For example, the Board has long declined to hold a petition in abeyance if the pending unfair labor practice charge does not allege conduct that would interfere with employee free choice in an election. See, e.g., *Holt Bros*, 146 NLRB 383, 384 (1964) (rejecting party’s request that its charge block an election because even if the charge in question were meritorious, it would not interfere with employee free choice in the election).

not block an election if a party has not first submitted an offer of proof describing evidence that, if proven, would interfere with employee free choice in an election. Section 103.20 of the Board's Rules and Regulations provides that if the regional director determines that the party's offer of proof "does not describe evidence that, if proven, would interfere with employee free choice in an election [. . .], the regional director shall continue to process the petition and conduct the election[.]" In addition, the Board can decline to block an immediate election despite a party's request that it do so when the surrounding circumstances suggest that the party is using the filing of charges as a tactic to delay an election without cause. See *Columbia Pictures Corp.*, 81 NLRB 1313, 1314–1315 fn. 9 (1949).⁵⁶

Blocking charges fall into two broad categories. The first, called Type I charges, encompasses charges that allege conduct that merely interferes with employee free choice. Casehandling Manual at Section 11730.1. Examples of Type I charges include allegations of employer threats to retaliate against employees if they vote in favor of union representation or promises of benefits if employees vote against union representation. Under the policy, when (1) a party to the representation case requests that its unfair labor practice charge block processing the petition, (2) the charge alleges conduct that, if proven, would interfere with employee free choice in an election were one to be conducted *and* is accompanied by a sufficient offer of proof, and (3) the charging party promptly makes it witnesses available, the charge should be investigated and either dismissed, withdrawn, or remedied before the petition is processed to an election (unless, of course, an exception is applicable). Id. at Sections 11730; 11730.2; 11733.1.

If upon completion of the investigation of the charge, the regional director determines that the charge lacks merit and should be dismissed absent withdrawal, the regional director resumes processing the petition and conducts an election where appropriate.

⁵⁶ The Board has also directed an immediate election, despite pending charges, in order to hold the election within 12 months of the beginning of an economic strike so as not to disenfranchise economic strikers, *American Metal Products Co.*, 139 NLRB 601, 604–605 (1962), or in order to prevent harm caused to the economy by a strike resulting from an unresolved question of representation, *New York Shipping Association*, 107 NLRB 364, 375–376 (1953). The Casehandling Manual sets forth other circumstances when regional directors may decline to block petitions. Casehandling Manual Section 11731.

Id. at Section 11732. If the regional director determines that the Type I charge has merit, the director refrains from conducting an election until the charged party has taken all the remedial action required by the settlement agreement, administrative law judge's decision, Board order, or court judgment. Id. at Sections 11730.2; 11734.

The second broad category of blocking charges, called Type II charges, encompasses charges that allege conduct that not only interferes with employee free choice, but that also is inherently inconsistent with the petition itself. Id. at Section 11730.1. Such charges may block a related petition during the investigation of the charges, because a determination of the merit of the charges may also result in the dismissal of the petition. Id. at Section 11730.3. Examples of Type II charges include allegations that an employer's representative was directly involved in the initiation of a decertification petition, or allegations of an employer's refusal to bargain, for which the remedy is an affirmative bargaining order. *Ibid.*

If the regional director determines that the Type II charge has merit, then the director may dismiss the petition, subject to a request for reinstatement by the petitioner after final disposition of the unfair labor practice case. A petition is subject to reinstatement if the allegations in the unfair labor practice case, which caused the petition to be dismissed, are ultimately found to be without merit. See *id.* at Section 11733.2.⁵⁷

Although the Board's application of the blocking charge policy in a particular case has occasionally been set aside, no court has invalidated the policy itself despite its long vintage. To the contrary, the courts have recognized that the salutary reasons for the blocking charge policy "do not long elude comprehension," and that the policy has "long-since [been] legitimized by experience." *Bishop v. NLRB*, 502 F.2d 1024, 1028, 1032 (5th Cir. 1974).⁵⁸

⁵⁷ For either Type I or II charges, parties have the right to request Board review of regional director determinations to hold petitions in abeyance or to dismiss the petitions altogether. See 29 CFR 102.71(b); Casehandling Manual Sections 11730.7, 11733.2(b).

⁵⁸ *Accord Blanco v. NLRB*, 641 F.Supp. 415, 417–418, 419 (D.D.C. 1986) (rejecting claim that Section 9 imposes on the Board a mandatory duty to proceed to an election whenever a petition is filed notwithstanding the pendency of unfair labor practice charges alleging conduct that would interfere with employee free choice in an election, and holding that the use of the blocking charge rule was "in accord with the Board's policy to preserve the 'laboratory conditions' necessary to permit employees to cast their ballots freely and without restraint or coercion."). See also *Remington Lodging*

As the Fifth Circuit explained in *Bishop*, 502 F.2d at 1028–1029:

It would be particularly anomalous, and disruptive of industrial peace, to allow the employer's (unfair labor practices) to dissipate the union's strength, and then to require a new election which 'would not be likely to demonstrate the employees' true, undistorted desires,' since employee disaffection with the union in such cases is in all likelihood prompted by (the situation resulting from the unfair labor practices).

If the employer has in fact committed unfair labor practices and has thereby succeeded in undermining union sentiment, it would surely controvert the spirit of the Act to allow the employer to profit by his own wrongdoing. In the absence of the 'blocking charge' rule, many of the NLRB's sanctions against employers who are guilty of misconduct would lose all meaning. Nothing would be more pitiful than a bargaining order where there is no longer a union with which to bargain.

Nor is the situation necessarily different where the decertification petition is submitted by employees instead of the employer or a rival union. Where a majority of the employees in a unit genuinely desire to rid themselves of the certified union, this desire may well be the result of the employer's unfair labor practices. In such a case, the employer's conduct may have so affected employee attitudes as to make a fair election impossible.

If the employees' dissatisfaction with the certified union should continue even after the union has had an opportunity to operate free from the employer's unfair labor practices, the employees may at that later date submit another decertification petition.

2.

Today, however, the majority seeks to jettison this 80-year old policy. The majority proposes that the Board no longer block any petition because of pending unfair labor practice charges. No matter how serious the charge (even if it alleges conduct that if proven would require the petition's dismissal); no matter how powerful the indicia of the charge's merit (even if a regional director has issued a complaint or a judge has issued a remedial order); no matter how persistent the employer's coercive actions (even in the face of repeated unfair labor practices over multiple campaigns), the Board will always process petitions to elections

& *Hospitality, LLC v. Ahearn*, 749 F.Supp.2d 951, 960–961 (D. Alaska 2010) ("where a petition to decertify the union is related to the ULP charges, the 'blocking charge rule' prioritizes the agency's consideration of the ULP charges to ensure that any decertification proceedings are handled in an uncoerced environment."). Cf. *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 591–592, 594, 597, 600–602, 610–611 (1969) (Board properly withholds an election when employer has committed serious unfair labor practices disruptive of the election process).

and impound the ballots pending Board resolution of the charges.⁵⁹

One searches the majority's NPRM in vain for any reasoned explanation for this sea change. The majority certainly points to nothing that has changed in the representation case arena that would justify jettisoning the policy. Congress has not amended the Act in such a way that calls the blocking charge policy into question. No court has invalidated the policy. And significantly, the Agency's career regional directors—the nonpolitical officials who are charged with administering the policy in the first instance, and whose opinions were explicitly sought and received by the Board—have publicly endorsed the policy.⁶⁰

The majority's policy concerns about the blocking charge policy do not provide persuasive reasons to abandon a longstanding doctrine that protects core statutory interests.

First, the majority repeatedly emphasizes the obvious: That the blocking charge policy causes delays in conducting elections. From this, the majority argues that the blocking charge policy impedes employee free choice. However, the majority's conclusion does not necessarily follow from its premise. To the contrary, as one Board after another has recognized for more than 8 decades, the blocking charge policy protects employee free choice notwithstanding the delay that the policy necessarily entails. Thus, "it is immaterial that elections may be delayed or prevented by blocking charges, because when charges have merit, elections *should be* [delayed or] prevented." *Levitz*, 333 NLRB at 728 n.57. Indeed, as the Board noted when it codified the decades old blocking charge policy, "Unfair labor practice charges that warrant blocking an election involve conduct that is inconsistent with a free and fair election: It advances no policy of the Act for the agency to conduct an election unless employees can vote without unlawful interference." 79 FR 74429. Put simply, if the circumstances surrounding an election interfere with

employee free choice, then, contrary to the majority, it most certainly is *not* "efficient" to permit employees to cast ballots "speedily" because the ballots cast in such an election cannot be deemed to "accurately" reflect employees' true, undistorted desires. The majority plainly errs in suggesting that elections conducted under coercive circumstances actually resolve the question of representation.

Second, the majority complains that there is a potential for incumbent unions to abuse the blocking charge policy by deliberately filing nonmeritorious unfair labor practice charges in the hopes of delaying the decertification elections that may result in their ouster. But the majority makes no effort to determine how often decertification petitions are blocked by meritorious charges, as compared to nonmeritorious charges, or how much delay is attributable to nonmeritorious charges (which still may well have been filed in good faith, and not for purposes of obstruction).⁶¹

Recent blocking charge data undercuts the majority's unsupported concern.⁶² My preliminary review of the

relevant data for Fiscal Years 2016 and 2017 indicates that the overwhelming majority of decertification petitions are never blocked.⁶³ Approximately 80

that was only because of the highly unusual circumstances presented there, where the employer's unlawful acts were actually designed to support the incumbent union against the decertification petition. See *id.* at 667, 669, 672 ("If ever there were special circumstances warranting the holding of [a rerun] election, they existed here" because the union was the "beneficiary of the Employer's misconduct," and thus the union was using the charges to achieve an indefinite stalemate "designed to perpetuate [itself] in power."). Although the Court also opined, *ibid.*, that a rerun election should not have been blocked even if the charges had been filed by the decertification petitioner, the blocking charge policy as it exists today would not have blocked the election in such circumstances, because, as shown, a petition is not blocked unless, among other things, the charging party requests that its charge block the petition.

Meanwhile, the Seventh Circuit's conclusion that the union abused the blocking charge policy in *Pacemaker Corp. v. NLRB*, is mystifying. 260 F.2d 880, 882 (7th Cir. 1958). The court appeared to blame the union first of all for seeking an adjournment of the representation case hearing so that it could file an amended unfair labor practice charge. But the facts as found by the court bely any such conclusion; the discharge that was a subject of the amended unfair labor practice charge in question occurred after the adjournment, not before. Thus, the union could not have filed that amended charge before the hearing. 260 F.2d at 882. Moreover, the court ultimately agreed with the Board that the union's amended charge—alleging that the employer had discharged a union supporter—had merit. *Id.* at 882–883. The court also appeared to blame the union for seeking to delay the representation proceeding by filing a *post*-petition amended unfair labor practice charge, because the union had chosen to file a petition despite its other *pre*-petition unfair labor practice charges. But such criticism was also unwarranted. Thus, the court ignored that, as the employer itself argued to the administrative law judge, while the union would not waive the amended unfair labor practice charge, the union was *not* requesting a delay based on the *post*-petition amended unfair labor practice allegations. See *Pacemaker Corp.*, 120 NLRB 987, 995 (1958). In any event, by filing a petition despite *pre*-petition misconduct, a union certainly cannot be deemed to have waived its right to request that the petition be held in abeyance if the employer commits additional unfair labor practices *post*-petition that would interfere with employee free choice.

And *NLRB v. Hart Beverage Co.*, was not even a blocking charge case, but instead arose at a time in the distant past when an employer had no right to decline a union's demand for recognition (and no right to demand that the union seeking 9(a) status win an election), unless the employer had a good faith doubt of the union's majority status. 445 F.2d 415, 417–418 (8th Cir. 1971). It was in that context that the union business agent made the statement that the court relied on in concluding that the union was not even interested in obtaining a free and fair election, and therefore had filed the charges to abort the employer's petitioned-for election and obtain a bargaining order. See *id.* at 417, 420.

⁶³ See Dissent Appendix, available at <https://www.nlr.gov> (The Dissent Appendix includes my attempt to assemble and analyze a reliable list of the FY 2016- and FY 2017-filed RD, RC, and employer-filed RM petitions that were blocked pursuant to the blocking charge policy, independent of the data relied upon by my colleagues or provided to the public in the past. It also includes charts from the agency's website

Continued

⁵⁹ The majority's proposal is thus is even more radical than the position unsuccessfully advocated in 2014 by dissenting Members Miscimarra and Johnson, who proposed a vote-and-impound procedure merely for cases involving Type I blocking charges. 79 FR 74308, 74456 (Dec. 15, 2014). The majority never explains whether it considered this alternative, and, if so, why it was rejected.

⁶⁰ See April 13, 2018 Regional Director Committee's Response and Comments to the Board's Request for Information on the Representation-Case Procedures p.1 (reporting that directors "do not see a need to change" blocking charge Section 103.20).

⁶¹ Nor does the majority explain why it is proposing to jettison the blocking charge policy in the context of initial organizing campaigns to select union representation (involving "RC" petitions), based merely on alleged abuse in the context of decertification campaigns to remove incumbent unions (involving "RD" petitions).

⁶² Compared to the countless examples of cases where employers engage in coercive behavior—such as instigating decertification petitions, committing unfair labor practices that inevitably cause disaffection from incumbent unions, and engaging in unfair labor practices after a decertification petition is filed—in an effort to oust incumbent unions, or engage in coercive behavior to sway employee votes in the context of initial organizing campaigns, see Board Volumes 1–368, the majority cites only a few isolated cases arising during the 80-plus year history of the blocking charge policy to support its claim that unions abuse the policy. And the cited cases hardly constitute persuasive authority for jettisoning the blocking charge policy. Two of the cited cases—*Templeton v. Dixie Color Printing Co., Inc.*, 444 F.2d 1064 (5th Cir. 1971) and *NLRB v. Minute Maid Corp.*, 283 F.2d 705 (5th Cir. 1960)—arose in the Fifth Circuit, which in fact has subsequently and repeatedly *approved* of the blocking charge policy, recognizing that that the policy has been "legitimized by experience." See *Bishop v. NLRB*, 502 F.2d at 1028–1029 (and cases cited therein); *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 228 fn. 9 (5th Cir. 2016). "[T]ime and again" the Fifth Circuit has taken pains to note that cases such as *Templeton* do not constitute a broad indictment of the blocking charge policy, but merely reflect the "most unusual" circumstances presented there. See *Bishop v. NLRB*, 502 F.2d at 1030–1031.

Similarly, in *NLRB v. Midtown Service Co., Inc.*, the court wholeheartedly endorsed the notion that the Act requires the Board "to insure . . . employees a free and unfettered choice of bargaining representatives." 425 F.2d 665, 672 (2d Cir. 1970). While the court criticized the Board for declining to conduct a rerun election before the employer's unfair labor practices were remedied,

percent of the decertification petitions filed in FY 2016 and FY 2017 were not impacted by the blocking charge policy because only about 20 percent (131 out of 641) of the decertification petitions filed in FY 2016 and FY 2017 were blocked as a result of the policy. See Dissent Appendix. Even in the minority of instances when decertification petitions are blocked, most of these petitions are blocked by meritorious charges. Approximately 66% (86 out of 131) of the decertification petitions that were blocked in FY 2016 and FY 2017 were blocked by meritorious charges. See Dissent Appendix, Section 1.⁶⁴

The majority also fails to show that its proposed vote-and-impound procedure will be less likely to precipitate the (seemingly uncommon) filing of frivolous charges. To be sure, under the majority's proposal, a union cannot postpone an election by filing an unfair labor practice charge. But a union can still delay its potential ouster under the majority's proposed vote-and-impound procedure by filing a charge. Under the majority's proposal, the regional director will not be able to open and count the ballots cast in the impounded election until the unfair labor practice case is decided and the charge(s) found to be lacking in merit. Presumably, a union hellbent on postponing its ouster will still have reason to file unfair labor practice charges to cause the ballots cast in the decertification election to be impounded, thereby delaying the tally of ballots and the certification of results under the proposed vote-and-impound procedure.

Third, the majority finds fault with the blocking charge policy because it permits a mere discretionary "administrative determination" as to the merits of unfair labor practice charges to delay employees' ability to vote whether

showing the numbers of petitions filed during those two fiscal years.)

⁶⁴ In determining whether a petition was blocked by a meritorious charge, I applied the Office of the General Counsel's long-standing merit definition contained in OM 02-102 available at <https://www.nlr.gov/news-publications/nlr-memoranda/operations-management-memos>. Accordingly, a petition was deemed blocked by a meritorious charge if the petition was blocked by a charge that resulted in a complaint, a pre-complaint Board settlement, a pre-complaint adjusted withdrawal, or a pre-complaint adjusted dismissal. *Id.* at p.4. I note in this regard that the new Chairman and new General Counsel used the same merit definition in their Strategic Plan for FY 2019-FY 2022. See, e.g., Strategic Plan p. 5 attached to GC Memorandum 19-02, available at <https://www.nlr.gov/news-publications/nlr-memoranda/general-counsel-memos>.

Notably, the merit rate for all unfair labor practice charges in FYs 2016 and 2017 merely ranged from 37.1% to 38.6%. See NLRB Performance and Accountability Report FY 2016 and 2017, available at <https://www.nlr.gov/reports-guidance/reports/performance-and-accountability>.

they wish to obtain, or retain, union representation. But the majority ignores that regional directors and the General Counsel make all sorts of administrative determinations that impact the ability of employees to obtain an election. For example, employees, unions, and employers are denied an election if the regional director makes an administrative determination that the petitioner lacks an adequate showing of interest. See 79 FR 74391, 74421 (the adequacy of the showing of interest is a matter for administrative determination and is non-litigable). Regional directors may also deny employer and union requests for second elections based on an administrative determination that no misconduct occurred or that any misconduct that occurred did not interfere with employee free choice. See 79 FR 74412, 74416 (parties have no entitlement to a post-election hearing on election objections or determinative challenges, and regional directors have discretion to dispose of such matters administratively).⁶⁵ Indeed, the majority's disrespect for regional director administrative determinations in this context is in considerable tension with Congress' authorizing (in Section 3(b)) regional directors to administratively decide when elections should be conducted in the first place and when the results of elections should be certified. See also 79 FR 74332-74334 (observing that Congress expressed confidence in the regional directors' abilities when it enacted Section 3(b)).⁶⁶

⁶⁵ The courts have also rejected claims that administrative settlements of *Gissel* complaints are insufficient to demonstrate 9(a) status. See, e.g., *Allied Mechanical Services, Inc. v. NLRB*, 668 F.3d 758, 761, 771, 773 (D.C. Cir. 2012) ("It is . . . unlikely—and even illogical—to suppose that the Board's General Counsel would have asserted that a majority of Allied's unit employees had designated the Union as their representative through authorization cards, and that a *Gissel* bargaining order was necessary to remedy the Company's unfair labor practices, without first investigating the Union's claim of majority status and satisfying itself that a *Gissel* bargaining order was appropriate.").

⁶⁶ And despite criticizing the blocking charge policy for permitting a mere administrative determination to delay or deprive employees of the ability to go to the polls to resolve their representational status, the majority has left unchanged Board law permitting an employer to withdraw recognition from an incumbent union based merely on the General Counsel's administrative determination that a majority of the unit no longer desire union representation. And that administrative determination—unlike the administrative determination to hold a petition in abeyance under the blocking charge policy—is not even reviewable by the Board, because the General Counsel has unreviewable discretion to decline to issue a complaint challenging an employer's unilateral withdrawal of recognition from an incumbent union. See *NLRB v. United Food & Commercial Workers Union, Local 23, AFL-CIO*,

Fourth, the majority laments that employees who support decertification petitions are adversely affected by blocking charges because delay robs the petition effort of momentum and thus threatens employee free choice. While I wish the majority shared the same concern about the potential impacts of delay on the momentum of a union organizing drive,⁶⁷ the majority's objection misapprehends the core statutory concerns underlying the blocking charge policy. If a party has committed unfair labor practices that interfere with employee free choice, then elections in those contexts will not accurately reflect the employees' unimpeded desires and therefore should not be conducted. Indeed, the momentum that the majority seeks to preserve may be entirely illegitimate, as in cases where the employer unlawfully initiates the decertification petition, or the momentum may be infected by unlawful conduct, as in cases where after a decertification petition is filed, the employer promises to reward employees who vote against continued representation, or threatens adverse consequences for employees who continue to support the incumbent union.

Finally, the majority claims that the blocking charge policy creates "an anomalous situation" whereby conduct that (under *Ideal Electric*, 134 NLRB 1275 (1961)) cannot be found to interfere with employee free choice if alleged in election objections (because it occurred pre-petition), nevertheless can be the basis for delaying or denying an election. But the supposed anomaly is more apparent than real. Contrary to the majority, *Ideal Electric* does not preclude the Board from considering pre-petition misconduct as a basis for setting aside an election. As the Board has explained, "*Ideal Electric* notwithstanding, the Board will consider prepetition conduct that is sufficiently serious to have affected the results of the election." *Harborside*

484 U.S. 112, 118-119 (1987) (a charging party may appeal a regional director's dismissal of an unfair labor practice charge to the General Counsel, but not to the Board); *Williams v. NLRB*, 105 F.3d 787, 790-791 n.3 (2d Cir. 1996) ("General Counsel's prosecutorial decisions are not subject to review by the Board," and courts may not pass judgment on the merits of a matter never put in issue or passed upon by the Board) (citation omitted). Indeed, if any issue cries out for rulemaking based on the majority's professed neutral preference for speedy secret ballot elections to determine representational rights, it is current law that permits employers to withdraw recognition—without an election—from unions that previously won Board-conducted elections.

⁶⁷ See *Volkswagen Group of America Chattanooga Operations, LLC*, 367 NLRB No.138, slip op. at 3-4, 6-7 (2019).

Healthcare, Inc., 343 NLRB 906, 912 fn. 21 (2004). Accord *Madison Square Garden, CT, LLC*, 350 NLRB 117, 122 (2017). Further, as the Majority implicitly concedes, under its own proposed vote-and-impound procedure, it is equally the case that ballots will “never be counted” in some cases based on serious pre-petition misconduct, namely Type II misconduct, such as where the employer instigates the petition. Moreover, contrary to the majority’s suggestion, under the blocking charge policy, regional directors have discretion to reject blocking requests and proceed straight to an election when they conclude that, under the circumstances, employees will be able to exercise free choice notwithstanding a pending unfair labor practice charge (because, for example, the charge merely alleges minor and isolated pre-petition unfair labor conduct).⁶⁸

3.

The majority proposes to replace the blocking charge policy with a vote-and-impound procedure that will require regional directors to process *all* petitions to elections, no matter how serious the pending unfair labor practice charges and no matter how powerful the indicia of their merit, unless there has been a “final determination” by the Board itself that unfair labor practices have been committed. As my colleagues implicitly concede, the proposed vote-and-impound procedure will undoubtedly require regional directors to run—and employees, unions, and employers to participate in—elections conducted under coercive conditions. Because my colleagues pledge that the ballots cast in impounded elections will “never be counted,” in cases where the elections were conducted under coercive conditions, it cannot be denied that under the majority’s proposed vote-and-impound procedure, regional directors will be required to run—and employees, unions, and employers will be required to participate in—many elections that will not resolve the question of representation.

The majority nevertheless summarily concludes that the costs of conducting tainted elections in which the impounded ballots will never be

counted is “more than offset by the benefit of preserving employees’ free choice” in those cases where the blocking charges are ultimately found to lack merit. But asserting this does not make it so. That’s not how reasoned decisionmaking works. The majority has proceeded from faulty premises, failed to ask critical questions, failed to analyze the relevant data, and failed to reasonably consider the financial and statutory costs of conducting elections under coercive conditions. See, e.g., *Motor Vehicle Manufacturers Assn of the United States, Inc. v. State Farm Mutual Automotive Insurance Co.*, 463 U.S. 29, 43 (1983) (agency acts arbitrarily if it fails to examine the relevant data or failed to consider an important aspect of the problem). Without significant additional effort (or a total revamping) before the rule is finalized, the majority’s proposal seems unlikely to survive even minimal judicial scrutiny.

a.

As an initial matter, the majority operates from the fundamentally flawed premise that switching to a vote-and-impound procedure is necessary to preserve employee free choice because the blocking charge policy deprives employees of free choice in those cases where petitions are blocked by nonmeritorious charges. The majority ignores that the blocking charge policy already preserves employee free choice in *all* representation cases in which petitions are blocked because of concurrent unfair labor practice charges. Because, as shown, the blocking charge policy provides for the regional director to resume processing the representation petition to an election if the charge is ultimately determined to lack merit, the unit employees in those cases *will* be afforded the opportunity to vote whether they wish to be represented, and thus employee free choice is preserved. However, unlike the majority’s proposed vote-and-impound procedure, the blocking charge policy protects employee free choice in cases involving meritorious charges, by delaying elections until the unfair labor practices are remedied, thus shielding employees from having to vote under coercive conditions. In short, it is the 80-year old blocking charge policy, not the majority’s proposed vote-and-impound procedure, that best protects employee free choice in the election process.⁶⁹

⁶⁹ The majority is also simply wrong in suggesting that the blocking charge policy can prevent employees from ever obtaining an election if they continue to desire an election after the merits of the

The majority likewise relies on a series of faulty premises in touting the other supposed advantages of its proposed vote-and-impound procedure. Indeed, the other supposed benefits of the majority’s proposed vote-and-impound procedure are either illusory or greatly overstated. The majority claims that a vote-and-impound procedure will allow the balloting to occur when the parties’ respective arguments are “fresh in the mind[s] of unit employees.” But this argument ignores that under the long-established blocking charge policy, balloting also occurs when the parties’ respective arguments are “fresh in the minds” of unit employees, because parties have an

charge are determined. As shown, if the petition is held in abeyance, the regional director resumes processing the petition once the charge is ultimately found to lack merit or the unfair labor practice conduct is remedied. Casehandling Manual Sections 11732, 11733.1, 11734. If, on the other hand, the petition is dismissed because of a Type II charge, it is subject to reinstatement if the charge is found nonmeritorious. *Id.* at Section 11733.2. And, as the courts have recognized, even if the petition is dismissed because of a meritorious Type II blocking charge, employees may, if they so choose, file a new petition after the unfair labor practice conduct that caused the petition to be dismissed is remedied. See *Bishop v. NLRB*, 502 F.2d 1024, 1028–1029 (5th Cir. 1974) (“If the employees’ dissatisfaction with the certified union should continue even after the union has had an opportunity to operate free from the employer’s unfair labor practices, the employees may at that later date submit another decertification petition”); *Albertson’s Inc. v. NLRB*, 161 F.3d 1231, 1239 (10th Cir. 1998) (“any harm to employees seeking decertification resulting from the blocking of the petition is slight in that employees are free to file a new petition so long as it is circulated and signed in an environment free of unfair labor practices.”). Even if the petitioner withdraws his or her petition, another employee is free to file a new petition. To be sure, as the majority notes, a blocked decertification petition may never proceed to an election if the incumbent union disclaims interest in representing the unit. However, there plainly is no need to hold a decertification election to afford employees the opportunity to oust the incumbent union if that union has voluntarily withdrawn from the scene. Accordingly, it cannot fairly be concluded that employee free choice is impeded in such cases either.

The majority also cries wolf in suggesting that the blocking charge policy renders illusory the possibility of employer-filed (“RM”) election petitions. Once again, if an RM petition is blocked, the regional director resumes processing it once the unfair labor practice charges are remedied or the charges are determined to lack merit. Moreover, my preliminary analysis of the relevant data indicates that the overwhelming majority of RM petitions are never blocked, and that even in the minority of instances when RM petitions are blocked, most of these petitions are blocked by meritorious charges. Indeed, my review of the relevant data indicates that approximately 82 percent of the RM petitions filed during FY 2016 and FY 2017 were not blocked, leaving only about 18 percent (18 out of 99) of the RM petitions filed during FY 2016 and FY 2017 as blocked under the policy. See Dissent Appendix, available at <https://www.nlr.gov>. And most pointedly, nearly 89 percent (16 out of 18) of the RM petitions blocked during FY 2016 and FY 2017 were blocked by meritorious charges. See Dissent Appendix, Sec. 1.

⁶⁸ See Casehandling Manual Section 11731.2 Exception 2: Free Choice Possible Notwithstanding Charge (“There may be situations where, in the presence of a request to block (Secs. 11731.1(a)), the regional director is of the opinion that the employees could under the circumstances, exercise their free choice in an election and that the R case should proceed notwithstanding the existence of a concurrent Type I or Type II unfair labor practice case. In such circumstances, the regional director should deny the request to block.”).

opportunity to campaign after the director resumes processing a petition (once either the unfair labor practice conduct has been remedied or the director determines that the charge lacks merit). Put simply, all the majority's proposed vote-and-impound procedure ensures is that balloting will occur when the unremedied *coercive conduct* is fresh in the minds of unit employees, which plainly undermines the Act's policy of protecting employee free choice in the election process and contravenes the Board's duty to conduct fair elections.⁷⁰

⁷⁰ The majority also mistakenly argues that neither party will be able to control the preelection narrative under its proposed vote-and-impound procedure, whereas the blocking charge policy enables the party filing the unfair labor practice charge to control the narrative that the Board has blocked the petition because it has found "probable cause" that a party has committed unfair labor practices. The majority is wrong on both counts. Thus, under the blocking charge policy, neither the Board nor the regional director notifies unit employees that the petition is being held in abeyance because there is "probable cause" to believe that a party has committed unfair labor practices.

The Board, of course, has no contact at all with the unit employees. And when before an election is scheduled, a regional director decides to hold a case in abeyance because of blocking charges, the regional director communicates his or her decision only to the parties and does not even request that the employer post the abeyance letter for unit employees to read. In any event, the regional director's letter typically makes no reference to the sufficiency of the evidence in support of the charge. See, e.g., October 27, 2016 abeyance letter in *Graymont Western Lime, Inc.* Case 18-RD-186636 ("This is to notify you that the petition in the above-captioned case will be held in abeyance pending the investigation of the unfair labor practice charges in Case 18-CA-186811.") Even when a regional director issues an order postponing or cancelling a scheduled election because of a blocking charge, and requests that the employer post the order so that employees will know that the election will not be held as scheduled, the regional director's order often merely states that the election is being postponed or cancelled because of a pending unfair labor practice charge, with no reference to the merits of the charge. See, e.g., February 10, 2017 order postponing election in *Xanterra Parks & Resorts, Inc.* Case 08-RD-191774 ("This is to advise that the election scheduled for Friday, February 17, 2017 is indefinitely postponed pending the investigation of the unfair labor practice charge in Case No. 08-CA-192771, filed by United Food and Commercial Workers Union Local 880. Further processing of the petition is hereby blocked. The Employer should immediately remove all election notices and post a copy of this letter so that employees are advised that no election will be held.").

To be sure, under the blocking charge policy, a party is free to exercise its First Amendment rights and tell unit employees that the regional director has blocked action on the petition because a party stands accused of committing unfair labor practices that would interfere with employee free choice in an election. (And the charged party is free to exercise its First Amendment rights and tell the unit employees that it is innocent of any wrongdoing and that the charging party is responsible for the delaying the employees' opportunity to vote.)

But under the majority's proposed vote-and-impound procedure, parties will similarly be free to

The majority also mistakenly argues that its proposed vote-and-impound procedure will reduce significant delays in representation cases resulting from the blocking charge policy by enabling the count and resulting tally of ballots to occur "almost immediately," in those cases in which the unfair labor practice charges lack merit. The majority insists that this is so because elections will not have to be scheduled in those cases where the charges lack merit (because the elections will have already been run).

However, the majority greatly overestimates the time savings. By definition, the majority's proposed vote-and-impound procedure will not result in any time savings whatsoever in those cases where the charges have merit, because, as the majority admits, the ballots cast in those cases will "never be counted." In other words, in cases where the blocking charges are ultimately determined to be meritorious, elections will have to be (re)scheduled because the impounded elections will have to be rerun. And, as will be shown below, my preliminary analysis of the relevant data indicates that those are the *majority* of cases, for a majority of the petitions that are blocked are blocked by *meritorious* unfair labor practice charges. Moreover, the majority greatly overstates the time savings in the subset of cases where petitions are blocked by charges that are ultimately found to be nonmeritorious. Put simply, under the majority's proposed vote-and-impound procedure, the regional director will not be able to open and count the impounded ballots, and therefore will not be able to certify the results of the election, until after the unfair labor practice case is decided. And it takes the same amount of time to investigate and decide an unfair labor practice charge whether the charge is investigated before the election or the charge is investigated after the election. Thus, the majority ignores the reality that under its proposed vote-and-impound procedure, the outcome of the

exercise their First Amendment rights and inform unit employees in advance of the election that the regional director will impound the ballots cast in the election—rather than immediately open and count the ballots following the election—because a party stands accused of committing unfair labor practices that would interfere with employee free choice. (And the charged party will be free to exercise its First Amendment rights and inform unit employees that it is innocent of any wrongdoing and that the charging party is responsible for the delay in opening and counting the ballots). Unless the majority plans on muzzling parties' free speech rights, parties will continue to be as free to present their own narratives to the unit employees under the Majority's proposed vote-and-impound procedure as they are under the blocking charge policy.

representation case will still have to await the outcome of the unfair labor practice case, precisely the same result that obtains under the long-established blocking charge policy. While the majority cites a study of blocking charges causing a 100-day delay in holding elections,⁷¹ virtually all that

⁷¹ See Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 5 FIU L.Rev. 361, 369–370 (2010). The Majority contends that "not much" has changed during FY 2016 through FY 2018 in the sense that a similar delay continues to exist: "The median number of days from petition to election from 2016 through 2018 was 23 days in unblocked cases. The median number of days from petition to election in the same period for blocked cases ranged from 122 to 145 days."

While the majority contends that the median number of days from petition to election in blocked cases is no more than 145 days for FY 2016 through 2018, it also states that on December 31, 2018, there were 118 blocked petitions that had been pending an average of 893 days, with the oldest cases having been pending for 4,491 days, i.e. more than 12 years. See Majority Appendices A and B, available at <https://www.nlr.gov>. Although I would agree with my colleagues that such delay is regrettable, there are reasons to doubt the reliability of their limited data. To begin, the list of pending cases on December 31, 2018, and associated days blocked assembled by my colleagues appears to inappropriately aggregate multiple blocking periods for the same case, even when those periods run concurrently. This has the rather bizarre effect of listing a case such as *Piedmont Gardens, Grand Lake Gardens*, 32-RC-087995, as having been blocked for more than 12 years—an impossibly high estimate considering that the case was less than 7 years old as of December 31, 2018 (with a petition-filing date of August 24, 2012). See Majority Appendix B Tab 4. My colleagues not only err by artificially inflating the length of time periods that their cited cases were blocked, they also err by artificially inflating the number of "blocked petitions pending" by including in their list cases such as *VT Hackney, Inc.*, 06-RC-198567, and *National Hot Rod Association (NHRA)*, 22-RC-186622, neither of which were blocked due to the blocking charge policy.

But even if I were to assume the accuracy of the majority's figures, those 118 cases would represent less than half of one percent (0.37%) of the 31,410 total RC, RD, and RM petitions filed during the 12-year period they cite. See Dissent Appendix, Sec. 4, available at <https://www.nlr.gov>. Indeed, the blocking charge policy causes no delays whatsoever in the overwhelming majority of cases because the overwhelming majority of petitions are never blocked. For example, less than 5 percent (217 out of 4,623) of the RC, RD, and RM petitions filed during Fiscal Years 2016 and 2017 were blocked as a result of the blocking charge policy. See *id.* Moreover, it stands to reason that the oldest cases are the fully litigated cases resulting in Board remedial orders that go all the way to the Circuit Courts, rather than the cases involving nonmeritorious charges that can be weeded out at the regional level. Indeed, the oldest cases referenced by the majority—*Pine Brook Care Center*, 22-RC-012742, and *Pavillion at Forrestal*, 22-RC-012743 (see Majority Appendix B Tab 4)—each involved employers found by the Board and the D.C. Circuit to have bargained in bad faith and made unlawful unilateral changes in lieu of bargaining with their incumbent unions (with one employer's intransigence prompting the initiation of contempt proceedings that further delayed the representation case). Given the employers' unlawful acts and litigiousness in the face of Board and Court Orders, it would appear that even if the majority's

time is due to the time it takes to resolve the unfair labor practice issues, which, as shown, will still have to be resolved before the ballots can be counted and the results certified under the majority's vote-and-impound procedure.⁷²

b.

Just as the majority fails to engage in a reasoned analysis of the supposed benefits of its proposed vote-and-impound procedure, so too does the majority fail to engage in a reasoned analysis of the costs of its proposed vote-and-impound procedure. As a result, it has failed to justify its current conclusion that the cost of conducting coercive elections in which the impounded ballots will never be counted is more than offset by the benefit of letting employees vote sooner in those cases where the blocking charges are subsequently determined to lack merit.

The majority's first mistake here is that it fails to ask a critical question—namely, what percentage of blocked petitions are blocked by meritorious charges. After all, if every blocked petition were blocked by a meritorious charge, my colleagues would have to concede that there would be no reason to change the policy. There would no

proposed vote-and-impound procedure been in effect during the last 12 years, the ballots in those cases would have never been counted.

⁷² It is notable that the majority has seemingly failed to consider other actions outside the context of this rulemaking that might address unnecessary delays in the processing of blocking charges. For example, the current General Counsel has terminated the practice of requiring regional directors to adhere to the Impact Analysis system for prioritizing the processing of unfair labor practice charges (See GC Memorandum 19–02 p. 3), which had placed blocking charges in Category III, the category of charges to be afforded highest priority, because those charges involve allegations “most central to achievement of the Agency’s mission.” See Casehandling Manual Sections 11740, 11740.1. If anything, I would think that in its role of supervising delegated authority under Section 3(b), the Board Majority would want to look into this change and take steps to ensure that blocking charges are afforded the highest priority in terms of case processing.

The majority's failure to consider such an obvious alternative to address delay evidences the arbitrary nature of the Majority's approach. The majority also should have analyzed the impact the mandatory-offer-of-proof and prompt-furnishing-of-witness requirements have had on the time it takes for regional directors to determine that a blocking charge lacks merit and the impact those requirements have had on the merit rates of blocking charges. See *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 228 (5th Cir. 2016) (citing amended Section 103.20's offer of proof requirement, and concluding that the Board “considered the delays caused by blocking charges, and modified current policy in accordance with those considerations.”). Yet it appears that the majority has short circuited the process by prematurely deciding that more robust measures are necessary to deal with the problem of delay caused by nonmeritorious blocking charges.

point in holding elections and impounding ballots if the Board knew in advance that those ballots would never be opened because parties had committed unfair labor practices interfering with employee free choice or that were inherently inconsistent with the petition itself. To be sure, there is no way to be certain whether a particular charge is meritorious when it is filed, though, as the majority implicitly concedes, the Board's simultaneous offer-of-proof requirement does provide a tool for regional directors to weed out plainly nonmeritorious blocking charges. But it would be reasonable to expect that before proposing to jettison the blocking charge policy in favor of a vote-and-impound procedure, rational Board Members would analyze the relevant data to determine the percentage of petitions that are blocked by meritorious charges. Yet, the majority inexplicably fails to analyze the data.

If the majority wanted to proceed in a rational manner, it could have determined the percentage of petitions blocked by meritorious charges. The data necessary to reach that determination is available using the Agency's electronic case tracking system (“NxGen”), into which regional employees enter notations as a case is processed and upload relevant documents. For example, NxGen entries reflect not only when a petition is filed or when an election is held, but also if a party requests that its charge block an election, and if the petition is dismissed, withdrawn, or blocked for any reason.⁷³ Similarly, NxGen entries reflect when an unfair labor practice charge is filed, and whether the charge is settled, results in a complaint, or is withdrawn or dismissed. NxGen also contains codes reflecting the representation and unfair labor practice case closing reasons and links to relevant documents. The majority plainly could have run queries to determine which petitions were filed during a given fiscal year, whether any of those petitions were blocked, and if so, which unfair labor practice charges blocked them. And then the majority could have verified whether those petitions were blocked by meritorious charges by examining the underlying NxGen case files.

Instead, all the majority purports to have done is tally the number of petitions blocked during FY 2016 through FY 2018 that eventually went to an election, and compare the longer median number of days from petition to

election in blocked versus unblocked cases. But that only proves the obvious—that the blocking charge policy results in some petitions being blocked with attendant election delays. The majority's paltry statistics tell us nothing about whether the petitions at issue deserved to be blocked, nor do they indicate whether, if the majority's proposed vote-and-impound procedure had been in place, the ballots cast in those cases would ever have been counted.

Moreover, by purporting to tally only petitions that proceeded to election during those fiscal years, the majority plainly undercounted the number of petitions blocked by the blocking charge policy. See Majority Appendices A and B.⁷⁴ Thus, the majority failed to consider blocked petitions that never proceeded to an election. Examining such petitions is an obviously relevant line of inquiry. For if a decertification petition that is blocked never proceeds to an election—either because the director dismisses the petition due to

⁷⁴ Ironically, the limited data relied upon by the majority simultaneously overcounts by some two dozen the number of petitions in FYs 2016 and 2017 allegedly blocked by the blocking charge policy. For example, the majority incorrectly counts petitions for which there were no associated charges. See, e.g., the nine separate petitions associated with *Yale University*, 1–RC–183014 et al. The majority also mistakenly counts petitions that were held up because of internal union constitutional provisions governing raiding situations. See, e.g., *Carullo Construction*, 29–RC–196404; *NBC Sports Network*, 18–RC–196593. See also NLRB Casehandling Manual Sections 11017, 11018.1, 11019 (noting that Board procedures accommodate established programs for handling representational disputes (raiding) between and among affiliates of the AFL–CIO). In other instances, the majority errs by counting certain petitions as being blocked by the blocking charge policy when the petitioner affirmatively indicated that it wished to proceed to the election (see, e.g., *VT Hackney*, 06–RC–198567) or where the regional director rejected a request to delay the election and the charging party then withdrew its request to block (see, e.g., *Dignity Health*, 32–RC–179906). Further, the majority's faulty tally of allegedly blocked petitions incorrectly includes petitions that proceeded to an immediate election but later became the subject of overlapping objections/determinative challenges and unfair labor practice charges, and for which the charging party did not make a request to block the petition. See, e.g., *Fred Emich*, 27–RC–195781; *Awesome Transportation*, 29–RC–175858. See 29 C.F.R. § 103.20; GC Memorandum 15–06 p.35 (“[U]nder the final rule, the regional office will no longer block a representation case unless the party filing the unfair labor practice charge requests that the petition be blocked. . . .”). Indeed, it makes no sense to fault the blocking charge policy for the delay in resolving such post-election matters given that regional directors would also have been unable to immediately certify those election results until the objections or determinative challenges were resolved even if the Board had never adopted the blocking charge policy 80 years ago. (While similar flaws are likely present in the majority's FY 2018 cases as well, I did not have sufficient time prior to the publication of this NPRM to review the relevant data for FY 2018.)

⁷³ A petition may be deemed blocked in NxGen for a variety of reasons having nothing to do with the blocking charge policy.

meritorious Type II blocking charges or because the petitioner decides to withdraw the petition after the unfair labor practice conduct has been remedied—that strikes me as a statutory success, not a failure. After all, the Board should not conduct elections if the employer unlawfully instigated the petition or if the petitioner has a change of heart after the unfair labor practice conduct has been remedied and no longer wishes to proceed to an election.⁷⁵ By failing to ask critical questions and to analyze the relevant data, the Majority has acted arbitrarily and capriciously. See *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automotive Insurance Co.*, 463 U.S. 29, 43 (1983) (agency acts arbitrarily if it fails to examine the relevant data or failed to consider an important aspect of the problem).

The majority's failure to consider the relevant data leads it to underestimate the unnecessary financial costs its proposal will impose on the parties and the Board. Assuming that the number of representation cases resulting in ballot impoundment under the proposed vote-and-impound procedure is comparable to the number of representation cases that were blocked during FY 2016 and FY 2017, and assuming that the merit factor for the concurrent unfair labor practice charges filed under the Majority's vote-and-impound procedure remains comparable to the merit factor for blocking charges filed in FY 2016 and FY 2017, then my preliminary analysis of the relevant data indicates that, under the majority's proposal, the ballots will never be counted in approximately 67 percent of the RD, RM, and RC elections in which ballots are impounded, because the elections will have been conducted under coercive conditions.⁷⁶ In other words, under the majority's proposal, regional directors will be forced to conduct, and the parties forced to participate in, dozens of unnecessary elections that will not resolve the question of representation. It therefore cannot be denied that the majority's proposed vote-and-impound procedure will impose unnecessary financial costs on the parties and the Board. Yet, my colleagues do not even acknowledge these costs in any serious way, let alone attempt to quantify them in either the

NPRM's substantive preamble or its Initial Regulatory Flexibility Analysis.

Worse still, the majority likewise gives no serious consideration to the damage its proposed vote-and-impound procedure will inflict on employee rights and the policies of the Act. By requiring the Board to conduct elections under coercive circumstances, the majority's proposal plainly contravenes the Board's heavy responsibility to conduct free and fair elections and undermines the Act's policy of protecting employee free choice in the election process. Indeed, by forcing employees to go to elections that will not count, the majority's vote-and-impound proposal additionally threatens to create a sense among the employees that attempting to exercise their Section 7 rights is futile. Moreover, by requiring the Board to conduct elections that will have to be rerun, the majority's proposed vote-and-impound procedure inevitably disrupts industrial peace.

The relevant data also demonstrates that in most cases, the proposed vote-and-impound procedure will not put the parties in the position that most closely approximates the position they would have been in had no party committed unfair labor practices interfering with employee free choice. Had no party committed unfair labor practices, employees would not be forced to vote in an atmosphere of coercion. But employees inevitably will be forced to vote in an atmosphere of coercion under the proposed vote-and-impound procedure because the majority's proposal requires regional directors to conduct elections in all cases where there are concurrent unfair labor practice charges, save those where the Board itself has already issued a decision and remedial order. Although under the majority's vote-and-impound procedure, ballots will never be tallied in cases where the concurrent unfair labor practice charges are ultimately found to be meritorious, each employee will still know how he or she voted in the impounded election. Accordingly, when a new election is conducted after the unfair labor practice is remedied, the union will have to convince each employee who voted against it under coercive conditions to switch his or her vote, something the union normally would not have had to do under the blocking charge policy because the regional director would not have held an election until the unfair labor practice was remedied. And, as the Board previously concluded (79 FR 74418–74419), there is a substantial risk that the tainted election will compound the effects of the unfair labor practices,

because employees who voted against union representation under the influence of the employer's coercion are unlikely to change their votes in the rerun election. See *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 277–78 (1973.) Thus, it is the blocking charge policy—rather than the majority's vote-and-impound proposal—that puts the parties and employees in a position that more closely approximates what would have happened had no party committed unfair labor practices and best protects employee free choice.

The majority's proposed vote-and-impound procedure also creates perverse incentives for employers to commit unfair labor practices. The Board's vast experience conducting elections and deciding unfair labor practice and objections cases confirms that it remains part of the playbook for some employers to commit unfair labor practices to interfere with their employees' ability to freely choose whether they wish to be represented. By requiring the Board to conduct elections in all cases where Type I or Type II unfair labor practice charges are filed even over the objections of the charging party union, the majority's proposal creates a perverse incentive for unscrupulous employers to commit unfair labor practices because the predictable results will be: (1) To force unions to expend resources in connection with elections that will not count; and (2) to create a sense among employees that seeking to exercise their Section 7 rights is futile.⁷⁷ And under the majority's proposal, unscrupulous employers can add insult to injury by telling their employees that the union is to blame for preventing the regional office from counting the ballots the employees took the time and trouble to cast. This possibility may well induce unions to forego the Board's electoral machinery in favor of recognitional picketing and other forms of economic pressure, thereby exacerbating industrial strife.

The proposed regulatory text implementing the majority's proposed

⁷⁷ Indeed, it seems impossible to square the majority's proposal—of requiring elections in all cases no matter the severity of the employer's unfair labor practices—with the Supreme Court's approval in *Gissel* of the Board's practice of withholding an election and issuing a bargaining order when the employer has committed serious unfair labor practice conduct disruptive of the election machinery and where the Board concludes that “the possibility of erasing the effects of [the employer's] past [unfair labor] practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through [union authorization] cards would, on balance, be better protected by a bargaining order” *Gissel*, 395 U.S. at 591–592, 610–611, 614.

⁷⁵ And, as shown, there also is no need to conduct a decertification election if the incumbent union disclaims interest in representing the unit.

⁷⁶ Thus, my analysis indicates that out of the 217 RC, RD, and RM petitions that were blocked in Fiscal Years 2016 and 2017, 146 (or 2 out of every 3) of them, were blocked by meritorious charges. See Dissent Appendix, Sec. 1.

vote-and-impound procedure further impairs employee free choice and contravenes the Board's responsibility to conduct free and fair elections. Thus, the majority's proposed regulatory text set forth in the final sentence of proposed section 103.20 indicates both that an election will be conducted and that the ballots will *not* be impounded if a case settles prior to the conclusion of the election. Incredibly, this means that an election will be held and the ballots will be counted *if* the parties sign a settlement agreement before the conclusion of the election, even if the employer has not fully remedied the unfair labor practice conduct as provided for in the agreement. Previously, the Board—including members of today's majority—would not have considered the ballots cast in such an election to reflect employees' unimpeded desires, given that ballots were cast before the alleged unfair labor conduct was fully remedied. See *Cablevision Systems Corp.*, 367 NLRB No. 59, slip op. at 1, 3 (2018) (citing with approval *Truserv Corp.*, 349 NLRB 227, 227 (2007) ("we hold that . . . the decertification petition can be processed and an election can be held *after the completion of the remedial period* associated with the settlement of the unfair labor practice charge.")) (emphasis added).⁷⁸

At the same time, the majority's proposed vote-and-impound procedure likewise will dramatically increase the number of employers who face uncertainty about whether they may unilaterally change their employees' working conditions. Under *Mike O'Connor Chevrolet*, an employer acts at its peril in making changes in terms and conditions of employment during the period between an election and the certification of the results. 209 NLRB 701, 703 (1974), enf. denied on other grounds, 512 F.2d 684 (8th Cir. 1975). Thus, if the union is ultimately certified as the employees' representative following the election, the employer will have to rescind any unilateral changes it made during that period and make employees whole for losses resulting from any such changes.

By definition, the majority's proposed vote-and-impound procedure will increase the number of cases where employers face that uncertainty. Under the majority's proposal, if the regional director or the Board ultimately determines in a given case that the impounded ballots should be opened

and counted—because the unfair labor practice charge was ultimately determined to be lacking in merit—and the union turns out to win the election, then the employer will need to rescind, and make employees whole for any losses resulting from, any unilateral changes it made between the date of the election and the certification. And, as shown, that certification will have to await the outcome of the unfair labor practice case. The majority certainly offers no explanation for subjecting employers to that risk of uncertainty in cases where labor organizations would have preferred that no election be held.

4.

Two years ago, in considering the proposed Request for Information that purportedly forms part of the impetus for this rulemaking, I explained in my dissent the majority's faulty process in approaching possible changes to its existing rules. Unfortunately, these same criticisms are equally applicable to the majority's faulty approach in issuing today's blocking charge NPRM:

The Supreme Court has made clear that, when an agency is considering modifying or rescinding a valid existing rule, it must treat the governing rule as the status quo and must provide "good reasons" to justify a departure from it. See *Federal Communications Commission v. Fox Television*, 556 U.S. 502, 515 (2009). Obviously, determining whether there are "good reasons" for departing from an existing policy requires an agency to have a reasonable understanding of the policy and how it is functioning. Only with such an understanding can the agency recognize whether there is a good basis for taking a new approach and explain why. *Id.* at 515–516. Indeed, even when an agency is only beginning to explore possible revisions to an existing rule, the principles of reasoned decision-making demand a deliberative approach, informed by the agency's own experience administering the existing rule. * * * [T]he majority's reticence to focus this inquiry on the agency's own data—the most straightforward source of information about how the Rule is working—is puzzling. The majority's failure to take this basic step suggests that they would rather not let objective facts get in the way of an effort to find some basis to justify reopening the Rule.

82 FR 58789.

Indeed, now more than a year-and-a-half later, the Board is issuing an NPRM proposing to jettison the decades old blocking charge policy that was codified in that rule, and it *still* has not analyzed the relevant data.

Moreover, the majority offers no reasoned explanation for jettisoning the blocking charge policy that plainly advances the Act's policy of protecting employee free choice in elections, and has been adhered to consistently for 80 years. Worse still, the majority's

proposed vote-and-impound procedure inevitably will undermine employee rights and the policies of the Act, while imposing unnecessary costs on the parties and the Board, by requiring regional directors to run, and employees, unions, and employers to participate in, elections conducted under coercive conditions that interfere with the ability of employees to freely cast their ballots for or against representation.

B. The Voluntary Recognition Bar

The majority today also continues its effort to upend extant Board precedent⁷⁹—here in the form of a proposed rule targeting the Board's voluntary recognition bar doctrine. Consistent with nearly 50 years of caselaw, the Board currently bars an election petition for a reasonable period of time after the voluntary recognition of a representative designated by a majority of employees. *Lamons Gasket Company*, 357 NLRB 739 (2011). Now the majority signals its intent to revive the *Dana* framework, which would establish a 45-day "window period" after voluntary recognition during which employees may file a decertification petition supported by a 30-percent showing of interest.⁸⁰ The majority would also require that, in order to start the 45-day window period after voluntary recognition, employers must post an official Board notice informing employees of their right to seek an election within the 45-day period to oust the lawfully-recognized union.⁸¹ As I will explain, there is simply no good reason for the majority to revisit this issue, much less to resurrect an approach that, in the Board's own assessment, was "flawed,

⁷⁹ See *Johnson Controls*, 368 NLRB No. 20 (2019) (Member McFerran, dissenting); *UPMC*, 368 NLRB No. 2, slip op. at 15 & fn. 56 (2019) (Member McFerran, dissenting); *SuperShuttle DFW, Inc.*, 367 NLRB No. 75, slip op. at 15 & fn. 2 (2019) (Member McFerran, dissenting); *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 12 & fn. 18 (2019) (Member McFerran, dissenting); *E.I. Du Pont de Nemours, Louisville Works*, 367 NLRB No. 12, slip op. at 3–4 (2018) (Member McFerran, dissenting); *Boeing Co.*, 366 NLRB No. 128, slip op. at 9–10 (2018) (Members Pearce and McFerran, dissenting); *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 22 (2017) (Members Pearce and McFerran, dissenting); *PCC Structural, Inc.*, supra, slip op. at 14, 16 (Members Pearce and McFerran, dissenting); *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, 365 NLRB No. 156, slip op. at 36, 38 (2017) (Members Pearce and McFerran, dissenting), vacated 366 NLRB No. 26 (2018); *Boeing Co.*, 365 NLRB No. 154, slip op. at 30–31 (2017) (Member McFerran, dissenting); *UPMC*, 365 NLRB No. 153, slip op. at 17–19 (2017) (Member McFerran, dissenting).

⁸⁰ See *Dana Corp.*, 351 NLRB 434, 441 (2007).

⁸¹ *Id.*

⁷⁸ For all these reasons, the majority's contention—that its proposed vote-and-impound procedure meets "[t]he concern for protection of [employee free] choice from coercion by unfair labor practices"—is simply untenable.

factually, legally, and as a matter of policy.”⁸²

1.

As the Board has previously established, federal labor law “not only permits, but expressly recognizes two paths employees may travel to obtain representation for the purpose of collective bargaining with their employer”—a Board election or voluntary recognition.⁸³ As the Supreme Court has held, a “Board election is not the only method by which an employer may satisfy itself as to the union’s majority status.” *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 72 fn. 8 (1956). And as the Board recognized in *Dana*, “Voluntary recognition itself predates the National Labor Relations Act and is undisputedly lawful under it.” 351 NLRB at 436.

Indeed, Congress was well aware of the practice of voluntary recognition when it adopted the Act in 1935.⁸⁴ In Section 9(c)(1)(A)(i) of the Act, Congress provided that employees could file a petition for an election, alleging that a substantial number of employees wish to be represented and “that their employer declines to recognize their representative.” This language makes clear that Congress recognized the practice of voluntary recognition and strongly suggests that Congress believed Board supervised elections were necessary only where an employer had declined to recognize its employees chosen representative.⁸⁵ In addition, Section 8(a)(5) of the Act requires that an employer bargain collectively “with the chosen representatives of his employees,” but does not specify that such representatives must be chosen in a Board-supervised election.⁸⁶ Accordingly, voluntary recognition “has been woven into the very fabric of the Act since its inception and has . . . been understood to be a legitimate means of giving effect to the uncoerced choice of a majority of employees.”⁸⁷

To give substance to this policy, the Board held that, when an employer voluntarily recognizes a union in good faith based on a demonstrated showing of majority support, the parties are permitted a reasonable time to bargain without challenge to the union’s majority status. *Keller Plastics*, 157 NLRB 583, 586 (1966). This doctrine—

known as the recognition bar—remained the Board’s approach for decades. But in *Dana Corp.*, 351 NLRB 434 (2007), the Board introduced a 45-day “window period” after voluntary recognition during which employees could file a decertification petition supported by a 30-percent showing of interest. This is the approach that the majority seeks to reinstitute in today’s proposal.

2.

In *Lamons*, which overruled *Dana*, the Board—with the benefit of briefing from the litigants and various amici curiae⁸⁸—produced a carefully-considered decision that explicated the statutory and doctrinal bases for voluntary recognition and the recognition bar, and evaluated the empirical evidence from the 4 years during which *Dana* was in effect.

To begin, the *Lamons* Board traced the roots of voluntary recognition to the era predating the Act, and explained, via a detailed survey of the legislative debates that informed both the initial passage of the Act in 1935 and the enactment of the Taft-Hartley amendments in 1947, how that practice was codified in the text of the statute.⁸⁹ Drawing from this history, the Board concluded that *Dana* improperly characterized voluntary recognition as a “suspect and underground process.”⁹⁰

Having revisited the statutory basis for voluntary recognition, the Board next assessed whether the *Dana* majority’s guiding assertion—that “there is good reason to question whether card signings . . . accurately reflect employees’ true choice concerning union representation”⁹¹—was borne out by the actual experience under *Dana*. Significantly, the Board found that—based on its review of the 1,333 instances where *Dana* notices were requested—employees had decertified the voluntarily-recognized union in only 1.2 percent of those cases.⁹² Accordingly, the Board reasoned that “contrary to the *Dana* majority’s assumption, the proof of majority support that underlay the voluntary recognition during the past 4 years was a highly reliable measure of employee

sentiment.”⁹³ As such, the “data demonstrate[d] that the empirical assumption underlying [*Dana*] was erroneous.”⁹⁴

Finally, the *Lamons* decision explained—with reference to decades of affirmative Board and court precedent—how the traditional voluntary recognition bar, like the analogous bars in other contexts, serves the Board’s statutory interest in ensuring that “a newly created bargaining relationship . . . be given a chance to succeed before being subject to challenge.”⁹⁵ The *Dana* procedures, in contrast, imposed obstacles to bargaining. Specifically, the Board observed that by creating uncertainty over the union’s status and delaying the start of serious negotiations, the *Dana* decision undermined the parties’ nascent relationships and rendered successful collective bargaining less likely.⁹⁶ For all of these reasons, the *Lamons* Board overruled *Dana* and returned to the previously-settled rule that an employer’s voluntary recognition of a union bars an election petition for a reasonable period of time.⁹⁷

3.

Since 2011, the Board’s comprehensive, evidence-based decision in *Lamons* has facilitated a stable and predictable post-recognition course for parties. Nonetheless, the majority today proposes to overrule that approach—and to resurrect the discredited *Dana* framework—without any suggestion as to why *Lamons* suddenly requires reassessment. The majority presents no new policy justifications, legal grounds, or evidentiary support on the side of its position. There have been no intervening adverse judicial decisions, nor is there any reason to doubt the legal soundness of *Lamons*, which reinstated the Board’s longstanding, court-approved doctrine. The best the majority can muster, it seems, is to state that “the justifications expressed in the *Dana* Board majority and *Lamons Gasket* dissenting opinions . . . are more persuasive than those expressed by the *Lamons Gasket* Board majority.” In other words, the majority resolves to overrule precedent simply because it can. But as the Board has previously acknowledged, a change in the

⁸² *Lamons*, 357 NLRB at 739.

⁸³ *Id.* at 740.

⁸⁴ 357 NLRB at 741 fn. 7 (citing legislative history acknowledging the practice of voluntary recognition).

⁸⁵ *Id.* at 741.

⁸⁶ *Id.*

⁸⁷ 357 NLRB at 742.

⁸⁸ In soliciting amicus briefs, the *Lamons* Board underscored the importance of “review[ing] the briefs and consider[ing] the actual experience of employees, unions, and employers under *Dana Corp.*, before arriving at any conclusions.” 355 NLRB 763, 763 (2010). In reaching its final decision, the Board reviewed and considered briefs from various significant stakeholders, including employer advocacy groups and unions. 357 NLRB at 740 fn. 1.

⁸⁹ 357 NLRB at 740–742.

⁹⁰ *Id.*

⁹¹ 351 NLRB at 439.

⁹² 357 NLRB at 742.

⁹³ *Id.*

⁹⁴ *Id.* at 743.

⁹⁵ *Id.* at 744.

⁹⁶ *Id.* at 747.

⁹⁷ *Id.* at 748. The *Lamons Board* for the first time defined a reasonable period of time in this context to be no less than 6 months after the parties’ first bargaining session and no more than 1 year. *Id.*

composition of the Board is not a reason for revisiting precedent.⁹⁸

In another pending NPRM—one that also targets a doctrine with deep roots in Board and judicial precedent—this same majority espoused its purported preference for “predictability and consistency . . . thereby promoting labor-management stability.”⁹⁹ But today’s notice—with its disregard for precedent and its destabilizing effect on voluntary recognition agreements—seems expressly designed to have the opposite effect. The majority shows no deference toward settled law, nor does the majority articulate any cognizable basis for departing from it. The Supreme Court has held that an agency has a duty “to explain its departure from prior norms.” *Atchison, T. & S. F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800 (1973). The majority, however, makes no effort to do so. It instead proposes a reflexive reversion to an earlier policy—one that was disavowed on a legal and empirical basis—relying solely on quotations from the *Dana* majority and then-Member Hayes’ dissent in *Lamons*. Surely this does not provide a basis for the “reasoned decisionmaking” that is required of the Board.¹⁰⁰

Affecting a major policy change absent any compelling justification to do so would, on its own, be sufficient to invite judicial scrutiny. But the majority goes a step further: It seeks to enshrine that change as a permanent part of the Board’s rules. The majority’s reasoning in this regard is again uncertain. Significantly, no person has filed a petition for rulemaking on the recognition bar—the Board’s traditional prompt for initiating the rulemaking process. Nor does this proposal bear any clear relationship to the other proposed rules that the majority presents here. And although this issue has been raised by parties to Board proceedings,¹⁰¹ the majority has decided to address it via rulemaking rather than adjudication—most likely because rulemaking ensures a result that will be more difficult to undo.

Concededly, the rulemaking process does permit for the submission of public

input, which can serve an important role in evaluating the effectiveness of the Board’s actions.¹⁰² But the policy arguments supporting the *Dana* approach have already been assessed—and rejected—by the *Lamons* Board after solicitation of public input. Because the *Dana* procedures have not been in effect for 8 years, it is difficult to see what kind of new evidence might be available that would undercut the Board’s conclusion in *Lamons*—that “the proof of majority support that underlay voluntary recognition [i]s a highly reliable measure of employee sentiment.”¹⁰³ At most, what the majority will provide with their general request for comments is an opportunity for friendly parties to rehash the arguments of the *Dana* majority in support of this majority’s suggested result.

In fact, the majority’s proposal is best viewed not as a response to a legal obstacle or changed real-world circumstances, but as the latest in a series of actions that will make it easier to unseat incumbent unions—all under the guise of protecting employee free choice. In this way, it is rightly viewed as a counterpart to the Board’s recent decision in *Johnson Controls*,¹⁰⁴ in which the same majority overruled longstanding precedent to permit an employer to unilaterally withdraw recognition from an incumbent union, at the expiration of a collective-bargaining agreement, in the face of objective evidence that the union has not lost majority support of the employees it represents. Under the majority’s approach there, the incumbent union can regain its representative status—but only if it petitions for and wins an unnecessary Board election.

Today’s proposal will also facilitate the ouster of incumbent unions. And although the majority’s target here is different—voluntarily-recognized unions—its apparent objective is the same: To require unions to overcome an additional procedural hurdle or lose their lawful, extant representative status. Once again, the majority touts its ostensible interest in “ensur[ing] that employee free choice has not been impaired.” But in practice—as seen in conjunction with *Johnson Controls*—it creates another new mechanism for deposing a union that has already lawfully secured recognition.

4.

In characterizing its proposed codification of the *Dana* approach as “necessary and appropriate,” the majority attempts to frame *Lamons Gasket* as a departure from precedent that must immediately be righted. In truth, *Dana* itself was the aberration. Its application marked an ill-advised 4-year departure from what had been the Board’s sensible and unchallenged approach for 41 years. The majority now seeks to turn this temporary mistake—one that was properly recognized and corrected—into a permanent blight on the Board’s voluntary recognition jurisprudence. It does so without any cognizable legal or evidentiary justification for reviving this approach. While I will certainly consider with an open mind all comments submitted, it is difficult for me to see how—in light of statutory history, Board precedent, and available empirical evidence—the majority will be able to justify finalizing this proposal at the end of this process.

C. Modified Requirements for Proof of Section 9(a) Relationships in the Construction Industry

Finally, the majority proposes to adopt a rule providing that, in the construction industry, neither voluntary recognition of the union by the employer nor a collective-bargaining agreement between the parties will bar election petitions filed under Section 9(c) or 9(e) of the Act “absent positive evidence” (as detailed in the rule) that the collective-bargaining relationship was established under the majority-support requirement of Section 9(a) of the Act. The proposed rule states that “[c]ontract language, standing alone, will not be sufficient to prove the showing of majority support.” This approach, as the majority acknowledges, runs counter to well-established Board law in unfair labor practice cases.

Beginning with its 2001 decision in *Staunton Fuel & Material, Inc.*,¹⁰⁵ an unfair labor practice case involving the duty to bargain under Section 8(a)(5) of the Act, the Board has held that when a construction-industry employer has agreed to a collective-bargaining agreement that, by its terms, demonstrates that the parties’ bargaining relationship is governed by Section 9(a) of the Act, the employer may not treat the relationship as governed by Section 8(f) of the Act—and thus may not unilaterally withdraw recognition from the union when the agreement expires. In 18 years, the Board has never had occasion to apply the *Staunton Fuel*

⁹⁸ See *Brown & Root Power & Mfg., Inc.*, 2014 WL 4302554 (Aug. 29, 2014); *UFCW, Local No. 1996 (Visiting Nurse Health System, Inc.)*, 338 NLRB 1074 (2003) (full Board) (citing cases).

⁹⁹ Notice of Proposed Rulemaking—The Standard for Determining Joint-Employer Status, September 14, 2018.

¹⁰⁰ See, e.g., *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998); *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 638 (D.C. Cir. 2017).

¹⁰¹ See, e.g., *L&L Fabrication*, 16-RD-232491 (Unpublished Order, April 22, 2019); *Embassy Suites by Hilton*, Seattle Downtown Pioneer Square, 19-RD-223236 (Unpublished Order, January 15, 2019).

¹⁰² Request for Information—Representation-Case Procedures, December 14, 2017 (Member McFerran, dissenting) (“Of course, administrative agencies ought to evaluate the effectiveness of their actions . . . and public input can serve an important role in conducting such evaluations.”).

¹⁰³ 357 NLRB at 742.

¹⁰⁴ 368 NLRB No. 20 (2019).

¹⁰⁵ 335 NLRB 717 (2001).

principle in a *representation case* to bar an election petition, whether filed by an employee, a rival union, or an employer. Today, the majority attacks *Staunton Fuel*, but does not propose a rule that would apply in unfair labor practice cases.¹⁰⁶ As I will explain, the majority's proposal purports to solve a non-existent problem, while failing adequately to acknowledge the actual problem that *Staunton Fuel* was intended to address. But even to the extent that the majority believes it has identified flaws with the *Staunton Fuel* principle—which the United States Court of Appeals for the District of Columbia Circuit has rejected—the better way to address those flaws is through adjudication. Almost everything about the proposed rule, then, seems arbitrary.

To begin, the majority's unprecedented choice to pursue rulemaking in this area is a dubious way to proceed. My colleagues acknowledge that "the number of cases that involve a question of whether a relationship is governed by Section 8(f) or 9(a) is very small relative to the total number of construction industry employers and unions." These admittedly few cases involve highly individual circumstances that are more appropriate for case-by-case adjudication than for rulemaking, which also consumes far more of the Board's resources. Here, moreover, the majority has chosen to combine rulemaking on a narrow issue with rulemaking on two far more broadly-applicable issues; thus, the relatively few employees, unions, and employers interested in the *Staunton Fuel* issue will unfairly be required to wade through a large rulemaking record devoted overwhelmingly to *other* issues. For these reasons, the Board would be far better advised to continue doing what it has always done: Address this issue as it arises in the context of a contested case with the benefit of a full evidentiary record and briefing by interested parties. To the extent that the majority believes that Board action on this issue is compelled by the District of Columbia Circuit's rejection of *Staunton Fuel*, the Board is, of course, free to adhere to current law and seek Supreme

Court review in an appropriate case to resolve the existing Circuit split on this issue.¹⁰⁷

The majority's attack on *Staunton Fuel* is misplaced in any case. The majority asserts at length that this rulemaking is necessary to "restore the protections of employee free choice in the construction industry." But no case involving *Staunton Fuel* that has reached the Board has ever arisen from the only situation addressed by the proposed rule: The filing of an election petition by employees or a rival union. Rather, the cases have uniformly involved an *employer's* attempt to escape a bargaining obligation by unilaterally withdrawing recognition from the incumbent union and refusing to bargain, resulting in an unfair labor practice proceeding that has nothing to do with an election petition.¹⁰⁸ Notwithstanding its emphatic concern about employee free choice, the majority cites *no* cases in which any employee has been blocked from pursuing a change in representation by the application of *Staunton Fuel*.

The majority also mischaracterizes *Staunton Fuel* and the Board's aim in that decision. *Staunton Fuel* must be understood in the context of the principles established by the Board in an earlier, seminal decision involving collective-bargaining relationships in the construction industry. In *John Deklewa & Sons*,¹⁰⁹ the Board struck a proper balance between protecting employee free choice and accommodating the needs of the construction industry. Under *Deklewa*, construction industry bargaining relationships are presumed to be governed by Section 8(f)—which does not require a union to have majority support—and a party asserting the existence of a Section 9(a) relationship

bears the burden of proving it.¹¹⁰ However, as the *Deklewa* Board noted, unions in the construction industry should not be treated less favorably than unions in other industries where voluntary recognition is permissible; thus, a Section 8(f) relationship can become a Section 9(a) relationship through an employer's voluntary recognition of the union based on a clear showing of majority support.¹¹¹ Following *Deklewa*, the Board determined that a union can establish a Section 9(a) relationship by showing its express demand for (and an employer's voluntary grant of) recognition to the union as bargaining representative, based on a contemporaneous showing of union support among a majority of employees in an appropriate bargaining unit.¹¹²

There is no dispute, then, that establishing a bargaining relationship under Section 9(a) requires a proffered showing of majority support for the union. *Staunton Fuel* addressed a different problem: How the Board should determine whether that requirement had been met at some point in the past—in some cases many years before a dispute over the union's status has arisen—when a construction-industry employer attempts to escape a longstanding bargaining relationship unilaterally.¹¹³ In that retrospective setting, evidence confirming that the union had majority support when the relationship was established may no longer be easily available—witnesses and documents disappear over time. As it did in *Deklewa*—and adopting a standard previously prescribed by the Tenth Circuit¹¹⁴—the Board in *Staunton Fuel* carefully balanced the relevant interests and found that, in such cases, negotiated contract language alone could confirm that majority support had been properly

¹⁰⁶ The proposed rule does not permit a construction-industry employer to withdraw recognition where *Staunton Fuel* would prohibit it. Nor does it provide that a construction-industry employer violates Section 8(a)(2) when it recognizes a union as the majority representative (as reflected in the collective-bargaining agreement), but cannot prove by "positive evidence" that the union had majority support. Presumably, the majority's failure to address unfair labor practice issues is related to its decision to combine rulemaking on the *Staunton Fuel* issue with two other rulemakings, neither of which directly involves unfair labor practice issues.

¹⁰⁷ See *Colorado Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031 (D.C. Cir. 2018) (criticizing *Staunton Fuel*); *NLRB v. Triple C Maintenance, Inc.*, 219 F.3d 1147 (10th Cir. 2000) (applying the test adopted in *Staunton Fuel*); *NLRB v. Oklahoma Installation Co.*, 219 F.3d 1160 (10th Cir. 2000) (same); *Sheet Metal Workers Local 19 v. Herre Bros., Inc.*, 201 F.3d 231 (3d Cir. 1999) (applying the test adopted in *Staunton Fuel*). See also *Heartland Plymouth Court MI, LC v. NLRB*, 838 F.3d 16, 21–22 (D.C. Cir. 2016) (where federal appellate courts are in conflict on an issue of federal law, agency should seek Supreme Court review to resolve dispute).

¹⁰⁸ I am aware of only one Board case involving an employee-filed decertification petition in connection with a dispute over whether the parties' bargaining relationship was governed by Sec. 8(f) or Sec. 9(a). In that case the Board ordered an election, even though the parties were found to have a 9(a) relationship. See *H.Y. Floors and Gameline Painting*, 331 NLRB 304 (2000) (employee filed petition within the statute of limitations period for unfair labor practices).

¹⁰⁹ 282 NLRB 1375, 1385 fn. 40 (1987), *enfd.* sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), *cert. denied* 488 U.S. 889 (1988).

¹¹⁰ 282 NLRB at 1385 fn. 41.

¹¹¹ *Id.* at 1387 fn. 53.

¹¹² *Golden West Electric*, 307 NLRB 1494, 1495 (1992).

¹¹³ The majority cites *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961), which established that an employer violates the Act by recognizing a union that in fact lacks majority support, as authority precluding the Board's approach in *Staunton*. However, the Board has already explained why that case is distinguishable from the situation addressed by *Staunton Fuel*: "[a]n employer's failure to review a union's proffered showing of majority support when the parties executed their contract does not indicate that the union in fact lacked such support." *King's Fire Protection, Inc.*, 362 NLRB 1056 fn.2 (2015).

¹¹⁴ *NLRB v. Triple C Maintenance, Inc.*, *supra*, 219 F.3d 1147; *NLRB v. Oklahoma Installation Co.*, *supra*, 219 F.3d 1160. See also *Sheet Metal Workers Local 19 v. Herre Bros., Inc.*, *supra*, 201 F.3d 231.

established.¹¹⁵ The Board also carefully specified what that language would have to convey: (1) That the union requested recognition as majority representative; (2) that the employer recognized the union as majority representative; and (3) that the employer's recognition was based on the union's having shown, or having offered to show, an evidentiary basis of its majority support.¹¹⁶ At the same time, *Staunton Fuel* did not alter the Board's longstanding practice of considering all available relevant evidence when evaluating the nature of parties' bargaining relationship, where the contract language alone was not conclusive.¹¹⁷ Nor did *Staunton Fuel* impair the right of employees or rival unions to oppose a "collusive" Section 9(a) agreement between their construction employer and a union—the chief professed concern of the majority—by filing unfair labor practice charges against both parties with the Board.¹¹⁸ In short, by establishing that collective-bargaining relationships in the construction-industry are presumed to be governed by Section 8(f), but that the burden on unions to prove a Section

9(a) relationship is no higher in construction than outside that industry, *Staunton Fuel* is not only consistent with *Deklewa* principles—it furthers them.

The majority's proposed rule does not acknowledge the problem that *Staunton* addressed and, contrary to *Deklewa*, it would unjustifiably treat construction unions less favorably than unions in other industries. For all of the reasons offered here, I am not persuaded either that rulemaking is appropriate or that the majority's proposed rule furthers statutory purposes.

D. Conclusion

I cannot support the majority's decision to issue the proposed rule. To be sure, I will carefully consider with an open mind both the public comments that the Board receives and the views of my colleagues. But based on today's Notice, it is clear that—before finalizing any rule—the majority must fundamentally reassess its approach and its proposals if it wishes to engage in reasoned decisionmaking as required by the Administrative Procedure Act. Unfortunately, I fear that the shortcomings of the proposed rule—which fails to consider crucial empirical evidence, misconstrues Board doctrine, and pursues goals that are contrary to the Act—will inevitably result in a final rule that is arbitrary and legally deficient. Most importantly, I cannot support the majority's decision today to embark on a course that seems intended only to weaken the Act's core protections. For all these reasons, I dissent.

VI. Regulatory Procedures

The Regulatory Flexibility Act

A. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 ("RFA"), 5 U.S.C. 601, *et seq.*, ensures that agencies "review draft rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the [RFA]." ¹¹⁹ It requires agencies promulgating proposed rules to prepare an Initial Regulatory Flexibility Analysis ("IRFA") and to develop alternatives wherever possible, when drafting regulations that will have a significant impact on a substantial number of small entities.¹²⁰ However, an agency is not

required to prepare an IRFA for a proposed rule if the agency head certifies that, if promulgated, the rule will not have a significant economic impact on a substantial number of small entities.¹²¹ The RFA does not define either "significant economic impact" or "substantial number of small entities."¹²² Additionally, "[i]n the absence of statutory specificity, what is 'significant' will vary depending on the economics of the industry or sector to be regulated. The agency is in the best position to gauge the small entity impacts of its regulations."¹²³

As discussed below, the Board is uncertain as to whether its proposed rule will have a significant economic impact on a substantial number of small entities. The Board assumes for purposes of this analysis that a substantial number of small employers and small entity labor unions will be impacted by this rule because at a minimum, they will need to review and understand the effect of the substantive changes to the blocking charge policy, voluntary recognition bar doctrine, and modified requirements for proof of majority-based voluntary recognition under Section 9(a) in the construction industry. Additionally, there may be compliance costs that are unknown to the Board.

For these reasons, the Board has elected to prepare an IRFA to provide the public the fullest opportunity to comment on the proposed rule.¹²⁴ An IRFA describes why an action is being proposed; the objectives and legal basis for the proposed rule; the number of small entities to which the proposed rule would apply; any projected reporting, recordkeeping, or other compliance requirements of the proposed rule; any overlapping, duplicative, or conflicting Federal rules; and any significant alternatives to the proposed rule that would accomplish the stated objectives, consistent with applicable statutes, and that would minimize any significant adverse economic impacts of the proposed rule on small entities.¹²⁵ An IRFA also

organization," and "small governmental jurisdiction." 5 U.S.C. 601(6).

¹²¹ 5 U.S.C. 605(b).

¹²² 5 U.S.C. 601.

¹²³ Small Business Administration Office of Advocacy, "A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act" ("SBA Guide") at 18, <https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf>.

¹²⁴ After a review of the comments, the Board may elect to certify that the rule will not have a significant economic impact on a substantial number of small entities in the publication of the final rule. 5 U.S.C. 605(b).

¹²⁵ 5 U.S.C. 603(b).

¹¹⁵ Moreover, contrary to the Majority's claim, *Staunton Fuel* was not the first time the Board found a Sec. 9(a) relationship based solely on contract language. See, e.g., *Decorative Floors*, 315 NLRB 188, 189 (1994); *MFP Fire Protection*, 318 NLRB 840, (1995), *enfd.* 101 F.3d 1341 (10th Cir. 1996).

¹¹⁶ *Staunton Fuel*, *supra*, 325 NLRB at 719–720. In *J & R Tile*, 291 NLRB 1034 (1988), cited by the majority and which preceded *Staunton Fuel*, the Board found the parties' relationship to be governed by Sec. 8(f) because the collective-bargaining agreement merely required unit employees to be members of the union—which was consistent with either a Sec. 8(f) or a Sec. 9(a) relationship—and there was no indication in the contract or in any other form that the union had sought and been granted Sec. 9(a) recognition. The relationship in *J & R Tile*, in short, would have been found Sec. 8(f) under *Staunton Fuel*.

¹¹⁷ See *Staunton Fuel*, *supra* at 720. n.15 (Board would continue to consider extrinsic evidence of the parties' intent where the contract's language is not independently dispositive). See also *J.T. Thorpe and Son*, 356 NLRB 822, 824–825 (2011).

¹¹⁸ In emphasizing the risk of collusion between employers and unions to the detriment of employee choice, my colleagues incorrectly suggest that voluntary recognition outside the construction industry requires "undisputed proof of employee support, through union authorization cards or a pro-union petition[.]" That claim is refuted by the Board's decisions. See *Alpha Associates*, 344 NLRB 782, 782–783 (2005) ("whether or not the recognized union had proffered evidence demonstrating its majority status at the time of recognition is irrelevant."); *Broadmoor Lumber Co.*, 227 NLRB 1123, 1135 (1977) (finding, in non-construction context, that "no formalism is required to find voluntary recognition," and that "resolution of whether voluntary recognition has been granted turns on whether, as a factual matter, there has been an assertion of recognition by an employer," and thus concluding that "oral and written statements," or even "an employer's conduct can be a valid basis for finding voluntary recognition"), *enfd.* 578 F.2d 238 (9th Cir. 1978).

¹¹⁹ E.O. 13272, Sec. 1, 67 FR 53461 ("Proper Consideration of Small Entities in Agency Rulemaking").

¹²⁰ Under the RFA, the term "small entity" has the same meaning as "small business," "small

presents an opportunity for the public to provide comments that will shed light on potential compliance costs that are unknown to the Board or on any other part of the IRFA.

Detailed descriptions of this proposed rule, its purpose, objectives, and the legal basis are contained earlier in the **SUMMARY** and **SUPPLEMENTAL INFORMATION** sections. In brief, the proposed rule includes three provisions that aim to better protect the statutory rights of employees to express their views regarding representation. First, the proposed rule modifies the current blocking charge policy and implements a vote and impound procedure to process representation petitions where a party files or has filed an unfair labor practice charge. Next, the proposed rule modifies the voluntary recognition bar doctrine by providing employees and rival unions with a 45-day window period in which to file an election petition after an employer voluntarily recognizes a union based on demonstrated majority support. Lastly, the proposed rule modifying requirements for proof of majority-based voluntary recognition under Section 9(a) in the construction industry eliminates the possibility of establishing Section 9(a) status based solely on contract language drafted by the employer and/or union.

B. Description and Estimate of Number of Small Entities to Which the Rule Applies

To evaluate the impact of the proposed rule, the Board first identified the universe of small entities that could be impacted by changes to the blocking charge and voluntary recognition bar doctrines, as well as by elimination of the 8(f) to 9(a) conversion through contract language alone.

1. Blocking Charge and Voluntary Recognition Bar Changes

The blocking charge and voluntary recognition bar changes will apply to all entities covered by the National Labor Relations Act ("NLRA" or "the Act"). According to the United States Census Bureau, there were 5,954,684 businesses with employees in 2016.¹²⁶ Of those, 5,934,985 were small businesses with fewer than 500 employees.¹²⁷ Although

the proposed rule would only apply to employers who meet the Board's jurisdictional requirements, the Board does not have the means to calculate the number of small businesses within the Board's jurisdiction.¹²⁸ Accordingly, the Board assumes for purposes of this analysis that the great majority of the 5,934,985 small businesses could be impacted by the proposed rule.

These two changes will also will impact all labor unions, as organizations representing or seeking to represent employees. Labor unions, as defined by the NLRA, are entities "in which employees participate and which exist for the purpose . . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."¹²⁹ The Small Business Administration's ("SBA") "small business" standard for "Labor Unions and Similar Labor Organizations" is \$7.5 million in annual receipts.¹³⁰ In 2012, there were 13,740 labor unions in the U.S.¹³¹ Of these unions, 11,245 had receipts of less than \$1,000,000; 2,022 labor unions had

describe the universe of small employers. For defining small businesses among specific industries, the standards are defined by the North American Industry Classification System (NAICS).

¹²⁸ Pursuant to 29 U.S.C. 152(6) and (7), the Board has statutory jurisdiction over private sector employers whose activity in interstate commerce exceeds a minimal level. *NLRB v. Fainblatt*, 306 U.S. 601, 606–07 (1939). To this end, the Board has adopted monetary standards for the assertion of jurisdiction that are based on the volume and character of the business of the employer. In general, the Board asserts jurisdiction over employers in the retail business industry if they have a gross annual volume of business of \$500,000 or more. *Carolina Supplies & Cement Co.*, 122 NLRB 88 (1959). But shopping center and office building retailers have a lower threshold of \$100,000 per year. *Carol Management Corp.*, 133 NLRB 1126 (1961). The Board asserts jurisdiction over non-retailers generally where the value of goods and services purchased from entities in other states is at least \$50,000. *Siemons Mailing Service*, 122 NLRB 81 (1959).

The following employers are excluded from the NLRB's jurisdiction by statute:

—Federal, state and local governments, including public schools, libraries, and parks, Federal Reserve banks, and wholly-owned government corporations. 29 U.S.C. 152(2).

—employers that employ only agricultural laborers, those engaged in farming operations that cultivate or harvest agricultural commodities or prepare commodities for delivery. 29 U.S.C. 153(3).

—employers subject to the Railway Labor Act, such as interstate railroads and airlines. 29 U.S.C. 152(2).

¹²⁹ 29 U.S.C. 152(5).

¹³⁰ See 13 CFR 121.201.

¹³¹ The Census Bureau only provides data about receipts in years ending in 2 or 7. The 2017 data has not been published, so the 2012 data is the most recent available information regarding receipts. See U.S. Department of Commerce, Bureau of Census, 2012 SUBB Annual Data Tables by Establishment Industry, https://www2.census.gov/programs-surveys/subb/tables/2012/us_6digitnaics_r_2012.xlsx (Classification #813930—Labor Unions and Similar Labor Organizations).

receipts between \$1,000,000 and \$4,999,999; and 141 had receipts between \$5,000,000 and \$7,499,999. In aggregate, 13,408 labor unions (97.6% of total) are small businesses according to SBA standards.

The proposed blocking charge policy change will only be applied as a matter of law under certain circumstances in a Board proceeding, namely, when a party to a representation proceeding files an unfair labor practice charge alleging conduct that could result in setting aside the election or dismissal of the petition. Therefore, the frequency with which the issue arises is indicative of the number of small entities most directly impacted by the proposed rule. For example, in Fiscal Year 2018, 1,408 petitions were filed and proceeded to an election, of which 44 petitions were subject to a blocking charge. Thus, the current blocking charge policy directly impacted 3.125% of petitions filed in Fiscal Year 2018, which is only a de minimis amount of all small entities under the Board's jurisdiction.

Similarly, the number of small entities expected to be most directly impacted by the modified voluntary recognition bar doctrine is also low. When the modified voluntary recognition bar was previously in effect, the Board tracked the number of requests for *Dana* notices, which were used to inform employees that a voluntary recognition had taken place and of their right to file a petition for an election. These are similar to the notices that would be required under this proposed rule. From September 29, 2007, to May 13, 2011, the Board received 1,333 requests for *Dana* notices, which is an average of 372 requests per year.¹³² Assuming each request was made by a distinct employer and involved at least one distinct labor organization, at least 744 entities of various sizes were impacted each year that the modified voluntary recognition bar was in effect.¹³³

2. Elimination of Contract Language Basis for Proving 9(a) Recognition in the Construction Industry

The Board believes that the proposed elimination of the contract-language basis for proving majority-supported voluntary recognition is only relevant to construction-industry small employers and labor unions because Section 8(f) of the Act applies solely to such entities

¹³² *Lamons Gasket Co.*, 357 NLRB at 742.

¹³³ *Dana Corp.*, 351 NLRB 434 (establishing a 45-day "window period" after voluntary recognition during which employees could file an election petition supported by a 30-percent showing of interest seeking decertification or representation by an alternative union).

¹²⁶ See U.S. Department of Commerce, Bureau of Census, 2016 Statistics of U.S. Businesses ("SUBB") Annual Data Tables by Establishment Industry, <https://www.census.gov/data/tables/2016/econ/subb/2016-susb-annual.html> (from downloaded Excel Table titled "U.S., 6-digit NAICS").

¹²⁷ *Id.* The Census Bureau does not specifically define "small business" but does break down its data into firms with fewer than 500 employees and those with 500 or more employees. Consequently, the 500-employee threshold is commonly used to

engaged in the building and construction industries. These construction-industry employers are classified under the NAICS Sector 23 Construction.¹³⁴ Of the 640,951 employers included in those NAICS definitions, 633,135 are small employers that fall under the SBA “small business” standard for classifications in the NAICS Construction sector.¹³⁵ The Board has identified 3,929 small labor unions primarily operating in the building and construction trades that fall under the SBA “small business” standard for the NAICS classification “Labor Unions and Similar Labor Organizations” of annual receipts of less than \$7.5 million.¹³⁶

¹³⁴ These NAICS construction-industry classifications include the following codes: 236115: New Single-Family Housing Construction; 236116: New Multifamily Housing Construction; 236117: New Housing For-Sale Builders; 236118: Residential Remodelers; 236210: Industrial Building Construction; 236220: Commercial and Institutional Building Construction; 237110: Water and Sewer Line and Related Structures Construction; 237120: Oil and Gas Pipeline and Related Structures Construction; 237130: Power and Communication Line and Related Structures Construction; 237210: Land Subdivision; 237310: Highway, Street, and Bridge Construction; 237990: Other Heavy and Civil Engineering Construction; 238110: Poured Concrete Foundation and Structure Contractors; 238120: Structural Steel and Precast Concrete Contractors; 238130: Framing Contractors; 238140: Masonry Contractors; 238150: Glass and Glazing Contractors; 238160: Roofing Contractors; 238170: Siding Contractors; 238190: Other Foundation, Structure, and Building Exterior Contractors; 238210: Electrical Contractors and Other Wiring Installation Contractors; 238220: Plumbing, Heating, and Air-Conditioning Contractors; 238290: Other Building Equipment Contractors; 238310: Drywall and Insulation Contractors; 238320: Painting and Wall Covering Contractors; 238330: Flooring Contractors; 238340: Tile and Terrazzo Contractors; 238350: Finish Carpentry Contractors; 238390: Other Building Finishing Contractors; 238910: Site Preparation Contractors; 238990: All Other Specialty Trade Contractors. See U.S. Department of Commerce, Bureau of Census, 2012 SUSB Annual Data Tables by Establishment Industry, NAICS classification #561320, https://www2.census.gov/programs-surveys/susb/tables/2012/us_6digitnaics_r_2012.xlsx.

¹³⁵ NAICS codes 236115–237130 and 237310–237990 have a small business threshold of \$36.5 million in annual receipts; NAICS code 237210 has a threshold of \$27.5 million in annual receipts; and NAICS codes 238110–238990 have a threshold of \$15 million in annual receipts. See 13 CFR 121.201.

¹³⁶ The Department of Labor’s Office of Labor-Management Standards (OLMS) provides a searchable database of union annual financial reports. However, OLMS does not identify unions by industry, e.g., construction. Accordingly, the Board does not have the means to determine a precise number of unions primarily operating in the building and construction industries. The Board nonetheless has identified the following unions as primarily operating in these industries: The International Union of Bricklayers and Allied Craftworkers; Building and Construction Trades Department; International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers; Operative Plasterers’ and Cement Masons’ International Association; Laborers’ International Union; The United Brotherhood of Carpenters and

It is unknown how many of those small construction-industry employers elect to enter into a 9(a) bargaining relationship with a small labor union based on language in a collective-bargaining agreement. However, once again, the number of cases that involve a question of whether a relationship is governed by Section 8(f) or 9(a) is very small relative to the total number of construction industry employers and unions. For example, only one case was filed in Fiscal Year 2017 where the Board ultimately had to determine whether a collective-bargaining agreement was governed by Section 8(f) or 9(a).¹³⁷ In Fiscal Year 2016, no cases required the Board to determine whether a collective-bargaining agreement was governed by 8(f) or 9(a). One case was filed in Fiscal Year 2015 that came before the Board with the 8(f) or 9(a) collective-bargaining agreement issue.¹³⁸

The historic filing data thus suggests that construction industry employers and labor unions will only be most directly impacted in a small number of instances relative to the number of those types of small entities identified above.

C. Recordkeeping, Reporting, and Other Compliance Costs

The RFA requires agencies to consider the direct burden that compliance with a new regulation will likely impose on small entities.¹³⁹ Thus, the RFA requires the Board to determine the amount of “reporting, recordkeeping and other compliance requirements” imposed on small entities.¹⁴⁰

The Board concludes that the proposed rule imposes no capital costs

Joiners of America; International Union of Operating Engineers; International Union of Journeymen and Allied Trades; International Association of Sheet Metal, Air, Rail, and Transportation Workers; International Union of Painters and Allied Trades; International Brotherhood of Electrical Workers; United Association of Journeymen Plumbers; United Union of Roofers, Waterproofers and Allied Workers; United Building Trades; International Association of Heat and Frost Insulators and Allied Workers; and International Association of Tool Craftsmen. See U.S. Department of Labor, Office of Labor-Management Standards, Online Public Disclosure Room, Download Yearly Data for 2012, <https://olms.dol-esa.gov/olpdr/GetYearlyFileServlet?report=8H58>. Input from the public is welcome as to any labor organization not listed that primarily operates in the building and construction industries.

¹³⁷ See *AFP Specialties, Inc.*, Case 07–RD–187706 (unpublished Order dated May 18, 2017).

¹³⁸ See *Loshaw Thermal Technology, Inc.*, Case 05–CA–158650.

¹³⁹ See *Mid-Tex Elec. Co-op v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985) (“[I]t is clear that Congress envisioned that the relevant ‘economic impact’ was the impact of compliance with the proposed rule on regulated small entities.”).

¹⁴⁰ See 5 U.S.C. 603(b)(4), 604(a)(4).

for equipment needed to meet the regulatory requirements; no lost sales and profits resulting from the proposed rule; no changes in market competition as a result of the proposed rule and its impact on small entities or specific submarkets of small entities; and no costs of hiring employees dedicated to compliance with regulatory requirements.¹⁴¹

Small entities may incur some costs from reviewing the rule in order to understand the substantive changes. To become generally familiar with the new vote and impound procedure and the modified voluntary recognition bar, the Board estimates that a human resources specialist at a small employer or labor union may take at most ninety minutes to read the rule. It is also possible that a small employer or labor union may wish to consult with an attorney, which the Board estimates will require one hour. Using the Bureau of Labor Statistics’ estimated wage and benefit costs, the Board has assessed these labor costs to be \$147.12.¹⁴² The costs associated with the portion of the rule that eliminates the contract-language basis for establishing voluntary recognition under Section 9(a) are limited to small employers and unions in the construction industry. To become generally familiar with that change, in addition to the first two changes, the Board estimates that a human resources specialist at a small employer or union in the construction industry may take at most two hours to read the entire rule. Consultation with an attorney may take an additional fifteen minutes, or seventy-five minutes to consult with an attorney regarding the entire rule. Thus, the Board has assessed labor costs for small employers and unions in the construction industry to be \$189.48.

Establishment of Vote and Impound Procedure

Although the Board does not foresee any additional compliance costs related to eliminating the blocking charge policy, this policy change would cause some elections to occur sooner, and in some cases would lead to elections that previously would not have occurred

¹⁴¹ SBA Guide at 37.

¹⁴² For wage figures, see May 2017 National Occupancy Employment and Wage Estimates, found at https://www.bls.gov/oes/current/oes_nat.htm. The Board has been administratively informed that BLS estimates that fringe benefits are approximately equal to 40 percent of hourly wages. Thus, to calculate total average hourly earnings, BLS multiplies average hourly wages by 1.4. In May 2017, average hourly wages for a Human Resources Specialist (BLS #13–1071) were \$31.84. The same figure for a lawyer (BLS #23–1011) was \$57.33. Accordingly, the Board multiplied each of those wage figures by 1.4 and added them to arrive at its estimate.

under the prior policy. Arguably, the time compression of holding an election under the Board's normal election timeline may create additional costs for small businesses that do not have in-house legal departments or ready access to outside labor attorneys or consultants, and that consequently need to pay overtime costs to obtain such assistance.¹⁴³ Conversely, because the Board's current blocking charge policy appears susceptible to manipulation and abuse,¹⁴⁴ the elimination of the blocking charge policy may result in fewer unfair labor practice charges filed with the intent to forestall employees from exercising their right to vote. This would create fewer costs for small employers by eliminating the need to hire a labor attorney to defend against such charges. It could also create additional costs for small labor unions that have to prepare for an election that may have otherwise been postponed or that may subsequently be set aside. The Board is not aware of a basis for estimating any such costs and welcomes any comment or data on this topic.¹⁴⁵

The Board believes that any costs from participating in quicker elections or elections that would have not otherwise occurred are limited to very few employers, comparing the limited number of Board proceedings where an unfair labor practice charge has been filed contemporaneously with an election petition with the high number of employers that are subject to the Board's jurisdiction.

Modification of Voluntary Recognition Bar

In a case in which an employer voluntarily recognizes a union, the Board estimates that the employer will spend an estimated 1 hour and 45 minutes to comply with the rule. This includes 30 minutes for the employer or union to notify the local regional office of the Board in writing of the grant of voluntary recognition by submitting a copy of the recognition agreement, 60 minutes to open the notice sent from the Board, insert certain information specific to the parties to the voluntary recognition, and post the notice physically and electronically, depending on where and how the

employer customarily posts notices to employees, and 15 minutes to complete the certification of posting form to be returned to the Region at the close of the notice posting period. The Board assumes that these activities will be performed by a human resources specialist for a total cost of about \$78.¹⁴⁶

The Board's modified voluntary recognition bar will cause elections to be held in cases in which the election petition would have previously been dismissed, increasing costs for both employers and unions. Should a commenter provide data demonstrating the cost of having an election after an employer has granted voluntary recognition, the Board will consider that information.

Elimination of Contract-Language Basis for Proving Voluntary Recognition Under Section 9(a) in the Construction Industry

Under current Board law a construction-industry employer and union can write into their collective-bargaining agreement that the union showed or offered to show evidence of majority support and, in combination with certain other contractual language, have the bargaining relationship be governed under Section 9(a). As described above, the proposed rule eliminates the contract-language basis for establishing a 9(a) bargaining relationship but continues to allow two other methods to establish a 9(a) bargaining relationship: A Board-certified election and voluntary recognition based on demonstrated majority support. In cases where an election petition is filed, both the construction industry employer and labor union would incur the cost of participating in an election. In cases where a construction-industry employer voluntarily recognizes a union based on demonstrated majority support, the union may incur additional costs related to the retention of the evidence of majority support, *e.g.*, signed union authorization cards, for a longer period of time if it can no longer rely on contractual language.

D. Overall Economic Impacts

The Board does not find the estimated, quantifiable cost of reviewing and understanding the rule—\$189.48 for small employers and unions in the construction industry and \$147.12 for all other small employers and unions—to be significant within the meaning of the RFA. The estimated \$78 cost of complying with the modified voluntary recognition procedures, which will only

apply to the small number of employers that choose to have their voluntary recognition of a union be a bar to a future election petition, is also not significant within the meaning of the RFA.

In making this finding, one important indicator is the cost of compliance in relation to the revenue of the entity or the percentage of profits affected.¹⁴⁷ Other criteria to be considered are the following:

—Whether the rule will cause long-term insolvency, *i.e.*, regulatory costs that may reduce the ability of the firm to make future capital investment, thereby severely harming its competitive ability, particularly against larger firms;

—Whether the cost of the proposed regulation will (a) eliminate more than 10 percent of the businesses' profits; (b) exceed one percent of the gross revenues of the entities in a particular sector, or (c) exceed five percent of the labor costs of the entities in the sector.¹⁴⁸

The minimal cost to read and understand the rule will not generate any such significant economic impacts.

Since the only quantifiable impacts that the Board has identified are the \$169.41 that may be incurred in reviewing and understanding the rule and the \$78 for certain employers to comply with the modified voluntary recognition bar, the Board does not believe there will be a significant economic impact on a substantial number of small entities associated with this proposed rule. The Board welcomes input from the public regarding additional costs of compliance not identified by the Board or costs of compliance the Board identified but lacks the means to accurately estimate.

E. Duplicate, Overlapping, or Conflicting Federal Rules

Agencies are required to include in an IRFA "all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule."¹⁴⁹ The Board has not identified any such federal rules, but welcomes comments that suggest any potential conflicts not noted in this section.

F. Alternatives Considered

Pursuant to 5 U.S.C. 603(c), agencies are directed to look at "any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the

¹⁴³ Representation-Case Procedures, 79 FR 74307, 74463 (Dec. 15, 2014).

¹⁴⁴ See cases cited in the supplemental information section above.

¹⁴⁵ The RFA explains that in providing initial and final regulatory flexibility analyses, "an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable." 5 U.S.C. 607 (emphasis added).

¹⁴⁶ See note 68 for wage figures.

¹⁴⁷ See SBA Guide at 18.

¹⁴⁸ *Id.* at 19.

¹⁴⁹ 5 U.S.C. 603(b)(5).

proposed rule on small entities.” Specifically, agencies must consider establishing different compliance or reporting requirements or timetables for small entities, simplifying compliance and reporting for small entities, using performance rather than design standards, and exempting small entities from any part of the rule.¹⁵⁰

First, the Board considered taking no action. Inaction would leave in place the current blocking charge policy and immediate voluntary recognition bar and allow for continued establishment of Section 9(a) bargaining relationships in the construction industry based on contract language alone. However, for the reasons stated in Sections I through III above, the Board finds it desirable to revisit these policies and to do so through the rulemaking process. Consequently, the Board rejects maintaining the status quo.

Second, the Board considered creating exemptions for certain small entities. This was rejected as impractical, considering that exemptions for small entities would substantially undermine the purposes of the proposed rule because such a large percentage of employers and unions would be exempt under the SBA definitions. Specifically, to exempt small entities from the decision to eliminate the blocking charge policy would leave most small entities without the benefits of the superior vote-and-impound procedure. To exempt small entities from the modified voluntary recognition bar or to alter the notice posting timelines would be contrary to the purpose of the rule: Providing employees prompt notice of the employer’s voluntary recognition of a union and of employees’ right to petition to decertify that union or to support a different union. Similarly, to exempt small construction-industry entities from the elimination of the contract-language basis for establishing a Section 9(a) relationship would not serve the purpose of that change because the vast majority of employers in the construction industry are considered to be “small employers.” Further, it seems unlikely that drawing this distinction would be a permissible interpretation of the relevant statutory provisions. Also, if a large construction-industry employer entered into a bargaining relationship with a small labor union, both entities would be exempted, further undermining the policy behind this provision.

Moreover, given the very small quantifiable cost of compliance, it is possible that the burden on a small business of determining whether it fell

within a particular exempt category might exceed the burden of compliance. Congress gave the Board very broad jurisdiction, with no suggestion that it wanted to limit coverage of any part of the Act to only larger employers. As the Supreme Court has noted, “[t]he [NLRA] is federal legislation, administered by a national agency, intended to solve a national problem on a national scale.”¹⁵¹ As such, this alternative is contrary to the objectives of this rulemaking and of the NLRA.

Because no alternatives considered will accomplish the objectives of this proposed rule while minimizing costs on small businesses, the Board believes that proceeding with this rulemaking is the best regulatory course of action. The Board welcomes public comment on any facet of this IRFA, including alternatives that it has failed to consider.

Paperwork Reduction Act

The NLRB is an agency within the meaning of the Paperwork Reduction Act (“PRA”). 44 U.S.C. 3502(1) and (5). The PRA creates rules for agencies for the “collection of information,” 44 U.S.C. 3507, which is defined as “the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format,” 44 U.S.C. 3502(3)(A). Collections of information that occur “during the conduct of an administrative action or investigation involving an agency against specific individuals or entities” are exempt from the PRA. 44 U.S.C. 3518(c)(1)(B)(ii); 5 CFR 1320.4(a)(2).

As a preliminary matter, the new vote and impound procedure does not require any collection of information, so the PRA does not apply.

The two remaining changes contained in this proposed rule are exempt from the PRA because any potential collection of information would take place in the context of a representation or unfair labor practice proceeding, both of which are administrative actions within the meaning of the PRA. As the Board noted in its 2014 rulemaking, the Senate Report on the PRA makes it clear that the exemption in “Section 3518(c)(1)(B) is not limited to agency proceedings of a prosecutorial nature but also include[s] any agency proceeding involving specific adversary parties.” Representation-Case Procedures, 79 FR 74306, 74468 (Dec. 15, 2014) (quoting S. Rep. No. 96–930, at 56 (1980)). See also 5 CFR 1320.4(c)

(OMB regulation interpreting the PRA, providing that exemption applies “after a case file or equivalent is opened with respect to a particular party.”). Every representation and unfair labor practice proceeding involves specific adversary parties, and the outcome is binding on and thereby alters the legal rights of those parties. See 79 FR 74469.

Specifically, the proposed modified voluntary recognition bar change triggers a three-step proceeding specific to an employer and union: (1) An employer or a union gives the Board notice of a voluntary recognition of a union, (2) the Board provides the employer with an individualized notice to be posted for a 45-day period, and (3) the employer certifies to the Board that the notice posting occurred. The proceeding closes once the Board receives the completed certification form. Because this proceeding is an administrative action involving specific adversary parties, it falls within the PRA exemption.

The voluntary recognition will only bar a decertification petition if the employer opts to post the notice and no decertification petition is filed within the 45-day period described above. If either of those conditions is not met, a decertification petition filed by an employee or a representation petition filed by a rival labor organization could potentially trigger an election proceeding that would also fall within the PRA exemption.

The proposed elimination of establishing a Section 9(a) relationship in the construction industry based solely on contract language will require unions that wish to achieve Section 9(a) status to collect and retain proof of majority support, to the extent that the union’s majority status may be challenged in a potential unfair labor practice or representation proceeding. Both kinds of proceedings fall within the PRA exemption described above.¹⁵²

Accordingly, the proposed rules do not contain information collection requirements that require approval of the Office of Management and Budget under the PRA.

¹⁵² As acknowledged in the Initial Regulatory Flexibility Analysis above, all three of the proposed changes may lead to elections that would not have been held under the prior policies. Nonetheless, particular collections of information required during the course of an election proceeding are not attributable to the instant proposed rule; instead, such requirements flow from prior rules, including the 2014 election rule. And in any event, even if such collections of information were attributable to this proposed rule, an election is a representation proceeding and therefore exempt from the PRA.

¹⁵⁰ 5 U.S.C. 603(c).

¹⁵¹ *NLRB v. Nat. Gas Util. Dist. of Hawkins Cty.*, 402 U.S. 600, 603–04 (1971) (quotation omitted).

Text of the Proposed Rule

For the reasons discussed in the preamble, the Board proposes to amend 29 CFR part 103 as follows:

PART 103—OTHER RULES

- 1. The authority citation for part 103 continues to read as follows:

Authority: 29 U.S.C. 156, in accordance with the procedure set forth in 5 U.S.C. 553.

- 2. Revise § 103.20 to read as follows:

§ 103.20 Election procedures and blocking charges; filing of blocking charges; simultaneous filing of offer of proof; prompt furnishing of witnesses; vote and impound procedure.

Whenever any party to a representation proceeding files an unfair labor practice charge together with a request that it block the election process, or whenever any party to a representation proceeding requests that its previously filed unfair labor practice charge block the election process, the party shall simultaneously file, but not serve on any other party, a written offer of proof in support of the charge. The offer of proof shall provide the names of the witnesses who will testify in support of the charge and a summary of each witness's anticipated testimony. The party seeking to block the election process shall also promptly make

available to the regional director the witnesses identified in its offer of proof. The regional director shall continue to process the petition and conduct the election. If the charge has not been withdrawn, dismissed, or settled prior to the conclusion of the election, the ballots shall be impounded until there is a final determination regarding the charge and its effect, if any, on the election petition or fairness of the election.

- 3. Add § 103.21 to subpart B to read as follows:

§ 103.21 Processing of petitions filed after voluntary recognition under Section 9(a); proof of Section 9(a) bargaining relationship between employer and labor organization in the construction industry.

(a) An employer's voluntary recognition of a labor organization as exclusive bargaining representative of an appropriate unit of the employer's employees under Section 9(a) of the Act, and any collective-bargaining agreement executed by the parties on or after the date of voluntary recognition, will not bar the processing of an election petition unless:

- (1) The employer and labor organization notify the Regional office that recognition has been granted;
- (2) The employer posts a notice of recognition (provided by the Regional

Office) informing employees that recognition has been granted and that they have a right, during a 45-day "window period," to file a decertification or rival-union petition; and

- (3) 45 days from the posting date pass without a properly supported petition being filed.

(b) A voluntary recognition or collective-bargaining agreement between an employer primarily engaged in the building and construction industry and a labor organization will not bar any election petition filed pursuant to Section 9(c) or 9(e) of the Act absent positive evidence that the union unequivocally demanded recognition as the Section 9(a) exclusive bargaining representative of employees in an appropriate bargaining unit, and that the employer unequivocally accepted it as such, based on a contemporaneous showing of support from a majority of employees in an appropriate unit. Contract language, standing alone, will not be sufficient to prove the showing of majority support.

Dated: August 6, 2019.

Roxanne Rothschild,

Executive Secretary.

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