

NATIONAL LABOR RELATIONS BOARD

29 CFR Part 103

RIN 3142-AA22

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 rescind and replace amendments that the Board made in April 2020 to its rules and regulations governing the filing and processing of petitions for a Board-conducted representation election while unfair labor practice charges are pending, and 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 to rescind an amendment governing the filing and processing of petitions for a Board-conducted representation election in the construction industry. The Board believes, subject to comments, that these proposed changes will better protect employees' statutory right to freely choose whether to be represented by a labor organization, promote industrial peace, and encourage the practice and procedure of collective bargaining.

DATES: Comments regarding this proposed rule must be received by the Board on or before January 3, 2023. Comments replying to comments submitted during the initial comment period must be received by the Board on or before January 17, 2023. 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>. Follow the instructions for submitting comments.

Delivery—Comments may be submitted by mail or hand delivery to: Roxanne L. Rothschild, Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001.

FOR FURTHER INFORMATION CONTACT:

Roxanne L. 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:

I. Submission of Comments

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. It is not necessary to mail comments if they have been filed electronically with [regulations.gov](http://www.regulations.gov). If you mail 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). Because of precautions in place due to COVID-19, the Board recommends that comments be submitted electronically or by mail rather than by hand delivery. If you feel you must hand deliver comments to the Board, hand delivery will be accepted by appointment only. Please call (202) 273-1940 to arrange for hand delivery of comments. Please note that there may be a delay in the electronic posting of hand-delivered and mail comments due to the needs for safe handling and manual scanning of the comments. The Board strongly encourages electronic filing over mail or hand delivery of comments.

Only comments submitted through <http://www.regulations.gov>, hand-delivery, or mail 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. ET) 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 their 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 their comment.

II. Summary of 2020 Rule

As described more fully below, the Board is proposing to rescind and replace the amendments to its rules and regulations adopted in 2020 governing blocking charges and the voluntary-recognition bar doctrine and to rescind the amendment governing proof of majority support for labor organizations representing employees in the construction industry. See Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships, 85 FR 18366 (April 1, 2020).

First, the April 2020 final rule substantially eliminated the Board's long-established blocking charge policy, under which regional directors had authority to delay processing election petitions in the face of pending unfair labor practice charges alleging conduct that would interfere with employee free choice in an election or conduct that is inherently inconsistent with the election petition itself. Under the final rule, regional directors generally are now required to conduct an election even when an unfair labor practice charge and blocking request have been filed. 85 FR 18370, 18375. Moreover, under the final rule, regional directors generally are further required to immediately open and count the ballots, except in a limited subset of cases where the ballots will be impounded for a maximum of 60 days (unless a complaint issues within 60 days of the election). 85 FR 18369-18370, 18376.¹

Second, the April 2020 final rule made changes to the voluntary-recognition bar doctrine, which encourages collective bargaining and promotes industrial stability by allowing a union—after being voluntarily and lawfully recognized by an employer—to represent employees for a certain period of time without being subject to challenge. The final rule abandoned *Lamons Gasket Co.*, 357

¹ However, the April 2020 final rule did not disturb the authority of regional directors to dismiss a representation petition, subject to reinstatement, under the Board's long-standing practice of "merit-determination dismissals." See *Rieth-Riley Construction Co., Inc.*, 371 NLRB No. 109 (2022).

NLRB 934 (2011), and returned to the approach taken previously by the Board in *Dana Corp.*, 351 NLRB 434 (2007). Under the final rule, neither an employer's voluntary recognition of a union, nor the first collective-bargaining agreement executed by the parties after recognition, will bar the processing of an election petition, unless: (1) the employer or the union notifies the Board's Regional Office that recognition has been granted; (2) the employer posts a notice "informing employees that recognition has been granted and that they have a right to file a petition during a 45-day 'window period' beginning on the date the notice is posted"; (3) the employer distributes the notice electronically to employees, if electronic communication is customary; and (4) 45 days from the posting date pass without a properly supported election petition being filed. 85 FR 18370.

Third, the April 2020 final rule made changes to the *Staunton Fuel & Material*, 335 NLRB 717 (2001), doctrine, which defined the minimum requirements for what must be stated in a written recognition agreement or contract clause in order for it to serve as sufficient evidence that a union representing employees in the construction industry has attained 9(a) status, and overruled the Board's decision in *Casale Industries*, 311 NLRB 951 (1993), providing that the Board would not entertain a claim that a union lacked 9(a) status when it was initially granted recognition by a construction employer if more than 6 months had elapsed. 85 FR 18369–18370.²

The effect of the instant proposed amendments would be to return the law in each of those areas to that which existed prior to the adoption of the April 1, 2020 final rule, including by rescinding and replacing the portions of the final rule that addressed the blocking charge policy and voluntary-recognition bar doctrine and rescinding the portion of the final rule that addressed proof of majority support for labor organizations representing employees in the construction industry. The Board believes, subject to comments, that these proposed changes to the April 2020 final rule will better protect employees' statutory right of free choice on questions concerning representation, further promote industrial stability, and more effectively

encourage the practice and procedure of collective bargaining.³

III. Background

Section 1 of the Act sets forth Congressional findings that the denial by some employers of the right of employees to organize and bargain collectively leads to industrial strife that adversely affects commerce. Congress has declared it to be the policy of the United States to mitigate or eliminate those adverse effects by "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. 151. Further, section 7 of the Act grants employees the right "to bargain collectively through representatives of their own choosing" 29 U.S.C. 157.

As discussed more fully below, Federal labor law recognizes that employees may seek representation for the purpose of bargaining collectively with their employer through either a Board election or by demonstrating majority support for representation. See, e.g., *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 72 fn. 8 (1956). Voluntary recognition predates the Act, and an employer's voluntary recognition of a majority union "remains 'a favored element of national labor policy.'" *NLRB v. Creative Food Design Ltd.*, 852 F.2d 1295, 1299 (D.C. Cir. 1988) (citation omitted). An employer is free to voluntarily recognize a union as the designated majority representative of a unit of its employees without insisting on the union's proving its majority status in an election. And, "once the employer recognizes the Union . . . the employer is bound by that recognition and may no longer seek an election." *Id.* at 1297 (citations omitted). Nevertheless, when employers, employees, and labor organizations are unable to agree on whether the employer should recognize (or continue to recognize) a labor organization as the representative of a unit of employees for purposes of collective bargaining, section 9 of the Act gives the Board authority to determine if a "question of

representation" exists and, if so, to resolve the question by conducting "an election by secret ballot." 29 U.S.C. 159(c).

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, 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." *Id.* at 126. 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). 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. *General Shoe Corp.*, 77 NLRB at 126–127.

The Supreme Court has repeatedly recognized that "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). "The control of the election proceeding, 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); see also *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 37 (1942).

Although the Act itself contains only one express limitation on the timing of elections,⁴ the Board has instituted

⁴ Sec. 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." 29 U.S.C. 159(c)(3).

Election petitions filed by labor organizations seeking certification as the collective-bargaining representative of employees are classified as RC petitions. Decertification election petitions filed by an individual employee seeking to oust an incumbent collective-bargaining representative are classified as RD petitions. Petitions for elections filed by employers are classified as RM petitions.

² Sec. 8(f) of the Act uses the term "engaged primarily in the building and construction industry." 29 U.S.C. 158(f). Throughout this NPRM, for convenience, and without any intent to define or alter the accepted scope of the term, we use the shorthand "construction industry" and "construction employer."

³ Upon consideration of the comments received regarding each of the proposed changes in this NPRM to the April 2020 final rule, the Board may elect to issue a single final rule or separate final rules covering each or any of the proposed amendments. We invite comments as to any advantages or disadvantages of issuing a single final rule versus separate final rules.

through adjudication several policies that affect the timing of elections in an effort to further other core goals of the Act. For example, the Board, with court approval, precludes electoral challenges to an incumbent union bargaining representative for the first 3 years of a collective-bargaining agreement (the contract bar) in the interests of stabilizing existing bargaining relationships, notwithstanding that it delays employees' ability to choose not to be represented or to select a different representative. See *General Cable Corp.*, 139 NLRB 1123, 1125 (1962); see also *Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222, 227–228 (D.C. Cir. 1996); *Leedom v. IBEW Local Union No. 108, AFL-CIO*, 278 F.2d 237, 242 (D.C. Cir. 1960) (noting that “Congress relied on the Board’s expertise to harmonize the competing goals of industrial stability and employee freedom of choice to best achieve the ultimate purposes of the Act.”).⁵

The subject of this rulemaking proceeding concerns three other policies that the Board originally created through adjudication to protect employee free choice in elections and to effectuate the Act’s policies favoring stable bargaining relationships: the blocking charge policy; the voluntary-recognition bar doctrine; and the policy governing 9(a) recognition in the construction industry. The Board’s April 2020 final rule radically altered each of those policies.

A. Blocking Charge Policy

1. The Board’s Historical Blocking Charge Policy

As the Board acknowledged in the notice of proposed rulemaking that culminated in the April 2020 final rule, see 84 FR 39930, 39931, the blocking charge policy dates back to the early days of the Act. See *United States Coal & Coke Co.*, 3 NLRB 398, 399 (1937). Indeed, prior to the April 2020 final rule, and for more than eight decades, the Board had maintained a policy of generally declining to process an election petition over party objections in the face of pending unfair labor practice charges alleging conduct that, if proven, would interfere with employee free choice in an election, until the merits of those charges could be determined.⁶

⁵ See generally *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996) (“The object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employees”).

⁶ See generally *The Developing Labor Law* 561–63 (John E. Higgins, Jr., 5th edition 2006); 3d NLRB Ann. Rep. 143 (1938) (“The Board has often provided that an election be held at such time as

The rationale for the blocking charge policy was straightforward: it was “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 (August 2007) (“Casehandling Manual (August 2007)”). “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).

Prior to the effective date of the April 2020 amendments, there were two broad categories of blocking charges. The first, called Type I charges, encompassed charges that alleged conduct that merely interferes with employee free choice. Casehandling Manual Section 11730.1 (August 2007). See also NLRB Casehandling Manual (Part Two), Representation Proceedings Section 11730.1 (January 2017) (“Casehandling Manual (January 2017)”). Examples of Type I charges included 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. For many years, the blocking charge policy provided that if the charging party in a pending unfair labor practice case was also a party to a petition, and the charge alleged conduct that, if proven, would interfere

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[.]”).

Throughout this NPRM, in discussing the blocking charge policy as it existed prior to the April 2020 rule, we often cite to editions of the *Developing Labor Law* and the NLRB Casehandling Manual that were in effect before the enactment of the 2014 rule amending representation case procedures and the subsequent enactment of the 2020 rule. This reference to sources that have been supplemented since those rules is intentional and intended to demonstrate the manner in which the blocking charge policy was interpreted and applied during the course of its long history before those rules.

with employee free choice in an election (a Type I charge), were one to be conducted, and no exception was applicable, the charge should be investigated and either dismissed or remedied before the petition was processed. Casehandling Manual Section 11730.2 (August 2007).⁷

The policy further provided that if upon completion of the investigation of the charge, the regional director determined that the Type I charge had merit and that a complaint should issue absent settlement, the regional director was to refrain from conducting an election until the charged party took all the remedial action required by the settlement agreement, administrative law judge’s decision, Board order, or court judgment. Casehandling Manual Sections 11730.2; 11733, 11734 (August 2007). On the other hand, if upon completion of the investigation of the charge, the regional director determined that the charge lacked merit and should be dismissed absent withdrawal, the regional director was to resume processing the petition and conduct an election where appropriate. Casehandling Manual Sections 11730.2; 11732 (August 2007).

In short, in cases where the Type I charges proved meritorious and there had been conduct that would interfere with employee free choice in an election, the blocking charge policy delayed the election until those unfair labor practices had been remedied and employees could register a free and untrammelled choice for or against a representative. As for the subset of cases where the charges were subsequently found to lack merit, the policy provided for regional directors to resume processing those petitions to elections.

The second broad category of blocking charges, called Type II charges, encompassed charges that alleged conduct that not only interferes with employee free choice, but that is also inherently inconsistent with the petition itself. Casehandling Manual Sections 11730.1, 11730.3 (August 2007). Under the policy, such charges could block a related petition during the investigation of the charges, because a determination of the merit of the charges could also result in the dismissal of the petition. Casehandling Manual Section 11730.3 (August 2007). Examples of Type II charges included allegations that a labor

⁷ As discussed below, under the Board’s 2014 rule amending representation case procedures, for a Type I charge to block the processing of a petition, the charging party needed to have both filed a request to block accompanied by a sufficient offer of proof and to have promptly made its witnesses available. Casehandling Manual Section 11730.2 (January 2017).

organization's showing of interest was obtained through threats or force, allegations that an employer's representatives were directly involved in the initiation of a decertification petition, and allegations of an employer's refusal to bargain, for which the remedy is an affirmative bargaining order. Casehandling Manual Sections 11730.3(a), (b) (August 2007). For many years, the blocking charge policy provided that regardless of whether the Type II charges were filed by a party to the petition or by a nonparty, and regardless of whether a request to proceed was filed, the charge should be investigated before the petition was processed unless an exception applied. Casehandling Manual Sections 11730.3, 11731, 11731.1(c) (August 2007).

The blocking charge policy further provided that if the regional director determined that the Type II charge had merit, then the regional director could dismiss the petition, subject to a request for reinstatement by the petitioner after final disposition of the unfair labor practice case. A petition was subject to reinstatement if the allegations in the unfair labor practice case which caused the petition to be dismissed were ultimately found to be without merit. Casehandling Manual Section 11733.2. (August 2007).⁸ On the other hand, if the director determined that the Type II charge lacked merit, the director was to resume processing the petition and to conduct the election where appropriate. Casehandling Manual Section 11732 (August 2007).

However, the mere filing of an unfair labor practice charge did "not automatically cause a petition to be held in abeyance" under the blocking charge policy. Casehandling Manual Sections 11730, 11731 (August 2007). See also Casehandling Manual Sections 11730, 11731 (January 2017); *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 had long declined to hold a petition in abeyance if the pending unfair labor practice charge did 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). The Board could also decline to block an immediate election despite a party's request that it do so when the surrounding circumstances suggested that the party was 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).⁹

2. The Blocking Charge Policy and the Board's 2014 Final Rule Amending Representation Case Procedures

After notice and comment, the Board adopted some 25 amendments to its representation-case procedures in a 2014 final rule, that, among other things, was designed to advance the public interests in free and fair elections and in the prompt resolution of questions concerning representation. See *Representation-Case Procedures*, 79 FR 74308, 74308–74310, 74315, 74341, 74345, 74379, 74411 (December 15, 2014). As the Board acknowledged when adopting the April 2020 final rule (85 FR 18376–18377), the Board also made certain modifications to the blocking charge policy as a part of its 2014 final rule revising the Board's representation-case procedures. In particular, in response to allegations that at times incumbent unions may misuse the blocking charge policy by filing meritless charges to delay decertification elections, the Board imposed a requirement that, whenever any party sought to block the processing of an election petition, it must simultaneously file an offer of proof listing the names of witnesses who will testify in support of the charge and a summary of each witness' anticipated testimony and promptly make its witnesses available. 79 FR 74419; 29 CFR 130.20. The 2014 final rule also provided that if the regional director determined that the party's offer of proof does not describe evidence of conduct that, if proven, would interfere with employee free choice in an election or would be inherently inconsistent with the petition itself, and thus would require that the processing of the petition be held in abeyance absent special circumstances, the regional

director would continue to process the petition and conduct the election where appropriate. 79 FR 74419; 29 CFR 103.20. The Board expressed the view that those amendments would protect employee free choice while helping to remove unnecessary barriers to the expeditious resolution of questions of representation by providing the regional director with the information necessary to assess whether the unfair labor practice charges have sufficient support and involve the kind of violations that warrant blocking an election, or whether the charges are filed simply for purposes of delay. 79 FR 74418–74420.

Two Board members dissented from the 2014 final rule. With respect to the blocking charge policy, the dissenting Board members did not propose any changes to the blocking charge policy with respect to Type II charges. However, the two dissenting members advocated a 3-year trial period under which the Board would hold elections—and thereafter impound the ballots—notwithstanding the presence of a request to block (supported by an adequate offer of proof) based on a Type I charge. 79 FR 74456.

The Board majority rejected the dissenters' proposal to conduct elections in all cases involving Type I charges. The 2014 final rule explained that the dissenting Board Members had not identified any compelling reason to abandon a policy continuously applied since 1937. 79 FR 74418–74420, 74429 ("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.").

The courts upheld the 2014 final rule. See *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 229 (5th Cir. 2016) (noting that the Board "conducted an exhaustive and lengthy review of the issues, evidence, and testimony, responded to contrary arguments, and offered factual and legal support for its final conclusions"); *Chamber of Commerce of the United States of America v. NLRB*, 118 F. Supp. 3d 171, 220 (D.D.C. 2015) ("[T]he Board engaged in a comprehensive analysis of a multitude of issues relating to the need for and the propriety of the Final Rule, and it directly addressed the commenters' many concerns[.]"). See also *RadNet Mgmt, Inc. v. NLRB*, 992 F.3d 1114, 1123 (D.C. Cir. 2021) (rejecting arbitrary-and-capricious challenge to 2014 final rule).

Accordingly, under the blocking charge policy as it existed prior to the effective date of the April 2020

⁸ For either Type I or II charges, parties had 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) (2011); Casehandling Manual Sections 11730.7, 11733.2(b) (August 2007).

⁹ The Board 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 set forth other circumstances in which regional directors could decline to block petitions. Casehandling Manual Section 11731 (August 2007).

amendments, a regional director could not block an election based on the request of a party who had filed an unfair labor practice charge if the party had not first (1) submitted an offer of proof describing evidence that, if proven, would interfere with employee free choice in an election were one to be conducted or conduct that would be inherently inconsistent with the petition itself, (2) listed its witnesses who would testify in support of the charge, and (3) agreed to promptly make its witnesses available. Casehandling Manual Section 11730 (January 2017). Even then, the regional director retained discretion to process the petition if an exception to the blocking charge policy applied. Casehandling Manual Sections 11730, 11730.2, 11730.3, 11730.4, 11731, 11731.1–11731.6 (January 2017).

3. The April 2020 Blocking Charge Amendments

In 2019, the Board issued a Notice of Proposed Rulemaking proposing, in relevant part, to substantially change the blocking charge policy. Under the proposed rule, whenever a party filed unfair labor practice charges that would have blocked processing of the petition under prior doctrine, the Board would instead conduct the election and impound the ballots (absent dismissal of the representation petition, as noted above at fn. 1). See *Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships*, 84 FR 39930, 39937–39938 (August 12, 2019). If the charge had not been resolved prior to the election, the NPRM proposed that the ballots would remain impounded until the Board made a final determination regarding the charge. 84 FR 39937. The NPRM acknowledged that the ballots would “never be counted” in cases where the Board made a final determination that the charge had merit and that the conduct warranted either dismissing the petition or holding a new election. 84 FR 39938.

The NPRM offered several justifications for the proposed amendments, including the arguments that the Board’s historical blocking charge policy impeded employee free choice by delaying elections and 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 decertification elections. See, e.g., 84 FR 39931–39933, 39937. The majority prepared appendices and cited them in support of its claims. 84 FR 39933 & fns. 13–14, 39937.

Then-Member McFerran dissented from the NPRM’s proposed changes to the blocking charge policy. In her view, the Board majority offered no valid reasons for substantially changing the blocking charge policy that Boards of differing perspectives had adhered to for more than eight decades. 84 FR 39939–39949. Noting that the majority had implicitly conceded that its proposed vote-and-impound procedure would require regional directors to run—and employees, unions, and employers to participate in—elections conducted under coercive conditions that interfere with employee free choice, the dissent argued that the proposed blocking charge amendments would undermine employee rights and the policies of the Act. 84 FR 39940, 39941, 39943, 39945, 39948, 39949. The dissent further argued that because the proposed amendments would require regional directors to run—and employees, unions, and employers to participate in—elections that would not resolve the question of representation, the proposed amendments would impose unnecessary costs on the parties and the Board. 84 FR 39941, 39945, 39948, 39949. The dissent also pointed out inaccuracies in the data relied on by the majority in support of its proposed changes to the blocking charge policy.¹⁰

¹⁰ Then-Member McFerran also prepared an appendix analyzing FY 2016 and FY 2017 filed RD, RC, and RM petitions that were blocked pursuant to the blocking charge policy. 84 FR 39943 & fn. 63; <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-7583/member-mcferran-dissent-appendix.pdf>. Then-Member McFerran explained in her dissent that her review of the relevant data for Fiscal Years 2016 and 2017 indicated that “the overwhelming majority of decertification petitions are never blocked.” 84 FR 39943–39944 and Dissent Appendix (“Approximately 80 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.”). The dissent further explained that “[e]ven 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, [s]ection 1.” 84 FR 39944 & fn. 64 (explaining that in determining whether a petition was blocked by a meritorious charge, the dissent “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.”). The dissent additionally noted that the Board Chairman and General Counsel in office as of the issuance of the NPRM “used the same merit definition in their Strategic Plan for FY 2019–FY 2022. See, e.g., Strategic Plan p. 5,

The majority did not correct the errors before issuing the NPRM. 84 FR 39930–39939 & fn. 15.¹¹ As noted, on April 1, 2020, the Board issued a final rule substantially eliminating the blocking charge policy.¹² 85 FR 18366. The final rule differed from the NPRM. Unlike the NPRM, which had proposed a vote *and impound* procedure for *all* cases involving blocking charges until there was a final determination of the merits of the charge, the final rule adopted a vote *and immediately count the ballots* procedure for the vast majority of blocking charge cases (including all cases involving Type I blocking charges and some cases involving Type II blocking charges). 85 FR 18366, 18369–18370, 18374. The final rule also provided that notwithstanding a request to block based on a pending charge alleging certain specified types of Type

attached to GC Memorandum 19–02, available at <https://www.nlr.gov/news-publications/nlr-memoranda/general-counsel-memos>.” 84 FR 39944 fn. 64.

Based on her analysis of the relevant data, then-Member McFerran also pointed out 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. See Dissent Appendix, sec. 1.” 84 FR 39945 fn. 69 (“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.”). 84 FR 39945 fn. 69.

The dissent also pointed out numerous errors in the majority’s appendices, noting for example that the majority had artificially inflated the length of time periods that their cited cases were blocked, apparently by “inappropriately aggregat[ing] multiple blocking periods for the same case, even when those periods run concurrently [. . . which . . .] 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.” 84 FR 39946 fn. 71. The dissent also pointed out that the majority had artificially inflated the number of “blocked petitions pending” by including in its list cases that had not been blocked due to the blocking charge policy. 84 FR 39946 fn. 71, fn. 74.

¹¹ In addition to then-Member McFerran’s analysis of the data in her dissent, on December 5, 2019, Bloomberg Law published an article entitled, “Federal Labor Board Used Flawed Data to Back Union Election Rule.” Alex Ebert and Hassan A. Kanu, “Federal Labor Board Used Flawed Data to Back Union Election Rule,” *Bloomberg Law* (Dec. 5, 2019). The article reported on the results of a Bloomberg Law analysis, which found that the NPRM used flawed data in support of the proposed blocking charge amendments. Id. After publication of the Bloomberg Law article, the Board still did not issue a new NPRM correcting the data.

¹² Lauren McFerran was no longer serving on the Board when the final rule issued.

II conduct, the Board will impound the ballots for no more than 60 days (unless a complaint issues on the Type II charge within the 60-day period, in which case the ballots will be remain impounded pending a final determination by the Board). 85 FR 18369–18370, 18374. In short, under the April 2020 final rule, a blocking charge request will never delay any election, and will only rarely delay the count of the ballots. 85 FR 18370, 18375. Nevertheless, the final rule “clarifie[d] that the certification of results (including, where appropriate, a certification of representative) shall not issue until there is a final disposition of the charge and a determination of its effect, if any, on the election petition.” 85 FR 18370.

The Board adopted the amendments requiring the Board to refrain from delaying any election involving blocking charges essentially for the reasons contained in the NPRM. 85 FR 18375–18380, 18393. As for its decision to abandon the proposed vote-and-impound procedure and to substitute the requirement that ballots be immediately opened and counted in all cases involving Type I charges and a subset of Type II charges, the Board stated that it had concluded that it would be “preferable for ballots to be counted immediately after the conclusion of the election . . . with regard to most categories of unfair labor practice charges.” 85 FR 18380. The final rule agreed with a commenter that:

[I]mpoundment of ballots does not fully ameliorate the problems with the current blocking charge policy because impoundment fails to decrease a union’s incentive to delay its decertification by filing meritless blocking charges; makes it more difficult for parties to settle blocking charges, as they would not know the results of the election during their settlement discussions; and further frustrates and confuses employees waiting, possibly for an extended post-election period, to learn the results of the election.

85 FR 18380.

As noted, however, the Board chose to adopt a vote-and-impound-for-60-days-procedure (with impoundment to last longer if a complaint issued within 60 days of the election) for certain types of Type II unfair labor practice charges. The Board stated in this regard:

At the same time, however, some types of unfair labor practice charges speak to the very legitimacy of the election process in such a way that warrants different treatment—specifically, those that allege violations of section 8(a)(1) and 8(a)(2) or section 8(b)(1)(A) of the Act and that challenge the circumstances surrounding the petition or the showing of interest submitted in support of the petition, and those that allege that an employer has dominated a

union in violation of section 8(a)(2) and that seek to disestablish a bargaining relationship. We believe that in cases involving those types of charges, it is more appropriate to impound the ballots than to promptly count them. Nevertheless, in order to avoid a situation where employees are unaware of the election results indefinitely, we believe it is appropriate to set an outer limit on how long ballots will be impounded. Accordingly, the final rule provides that the impoundment will last for only up to 60 days from the conclusion of the election if the charge has not been withdrawn or dismissed prior to the conclusion of the election, in order to give the General Counsel time to make a merit determination regarding the unfair labor practice charge.

85 FR 18380.

As for the errors in the NPRM pointed out by then-Member McFerran in her dissent to the NPRM and in the Bloomberg law article, *supra* fn. 11, the Board stated in the final rule that we also acknowledge the claims in the dissent to the NPRM and by some commenters that there were errors in some of the data that the NPRM majority cited to support the proposed rule and that these errors led to exaggeration both of the number of cases delayed and the length of delay involved. Even accepting those claims as accurate, the remaining undisputed statistics substantiate the continuing existence of a systemic delay that supports our policy choice to modify the current blocking-charge procedure that does not, and need not, depend on statistical analysis. As the AFL–CIO candidly acknowledges, “[b]locking elections delays elections. That is undeniably true and requires no ‘statistical evidence’ to demonstrate.” We agree. Furthermore, anecdotal evidence of lengthy blocking charge delays in some cases, and judicial expressions of concern about this, remain among the several persuasive reasons supporting a change that will assure the timely conduct of elections without sacrificing protections against election interference. 85 FR 18377 (footnote omitted).

The April 2020 amendments became effective on July 31, 2020. See 85 FR 20156 (Apr. 10, 2020).

B. The Voluntary-Recognition Bar

1. Historical Development of the Voluntary-Recognition Bar

Since before the NLRA was passed, employers have sometimes chosen to voluntarily recognize labor unions as the collective-bargaining representatives of their employers, and the Act itself clearly contemplated that the practice of voluntary recognition would continue.¹³

¹³ Citing the Supreme Court, the Board has previously pointed out that “[v]oluntary recognition

While the statute provides for Board-conducted representation elections, with winning unions certified by the Board, the Act does not make such elections the only route to union representation under the statute, as the Supreme Court has explained.¹⁴

Rather, section 8(a)(5) of the Act requires an employer “to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).” 29 U.S.C. 158(a)(5). Section 9(a), in turn, refers to “[r]epresentatives *designated or selected* . . . by the majority of the employees” in an appropriate unit.¹⁵ Section 9(c)(1)(A), meanwhile, provides for Board-conducted elections when employees seek union representation and file a petition with the Board “alleging . . . that their employer *declines to recognize* their representative as . . . defined in section 9(a).” 29 U.S.C. 159(c)(1)(A) (emphasis added). When an employer does *not* “decline[] to recognize” the designated union, there is no obvious statutory “question of representation” under section 9(c) to be resolved by a Board election. A union that has been certified by the Board after winning an election enjoys certain statutory privileges and protections that a voluntarily recognized union does not. Most important, section 9(c)(3) of the Act, in providing that another Board election may not be held for twelve months after a valid election,

itself predates the National Labor Relations Act and is undisputedly lawful under it.” *Dana Corp.*, 351 NLRB 434, 436 (2007) (footnote omitted) (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 595–600 (1969)). As the *Dana* Board observed, “voluntary recognition has been embedded in [s]ection 9(a) from the Act’s inception.” 351 NLRB at 438. See also *Lamons Gasket Co.*, 357 NLRB 739, 741 (2011) (“Congress was well aware of the practice of voluntary recognition when it adopted the Act in 1935, because the practice long predated the Act.”) (citing H.R. Rep. No. 74–969, at 4 (1935), reprinted in 2 Legislative History of the National Labor Relations Act 1935, at 2914 (1949)) (an election is appropriate “[w]hen an employee organization has built up its membership to a point where it is entitled to be recognized . . . and the employer refuses to accord such recognition”).

¹⁴ See *United Mine Workers of America v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 72 fn. 8 (1956) (“A Board election is not the only method by which an employer may satisfy itself as to the union’s majority status.”). There, the Supreme Court observed that an employer was free to voluntarily recognize a labor union that did not comply with certain statutory requirements and that could not be certified by the Board as the result of an election. *Id.* at 71, 74–75.

¹⁵ 29 U.S.C. 159(a) (emphasis added). See *Gissel Packing Co.*, *supra*, 395 U.S. at 596–598. Sec. 9(a) provides in relevant part that representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

effectively insulates a certified union from an electoral challenge to its representative status for that one-year period.¹⁶

To be lawful, voluntary recognition pursuant to section 9(a) of the Act must be based on the union's majority support among employees.¹⁷ Such support is often demonstrated by having employees sign cards authorizing the union to represent them in collective bargaining, although the Board recognizes other mechanisms as well.¹⁸ Traditional Board law reflects that under the Act, "[o]nce voluntary recognition has been granted to a majority union, the [u]nion becomes exclusive collective-bargaining representative of the employees."¹⁹ In short, as the Supreme Court has recognized, voluntary recognition is not simply permitted under the Act; it establishes a bargaining relationship between union and employer that must be honored.²⁰ So long as employees have freely chosen the union to represent them, voluntary recognition clearly promotes the statutory policy of "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of . . . designation of representatives of their own choosing."²¹

¹⁶ 29 U.S.C. 159(c)(3) ("No 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 other statutory advantages of certification are (1) protection against recognition picketing by rival unions under sec. 8(b)(4)(C); (2) the right to engage in certain secondary and recognition activity under sec. 8(b)(4)(B) and 7(A); and (3) in certain circumstances, a defense to allegations of unlawful jurisdictional picketing under sec. 8(b)(4)(D). See *Lamons Gasket Co.*, supra, 357 NLRB at 748 & fn. 35; 85 FR 18381 fn. 124.

¹⁷ *Int'l Ladies' Garment Workers' Union v. NLRB* (Bernhard-Altmann), 366 U.S. 731, 738 (1961) (employer violated sec. 8(a)(2) of Act by recognizing and bargaining with union that lacked majority support). See, e.g., *Alliant Foodservice, Inc.*, 335 NLRB 695, 695 (2001) (employer violated sec. 8(a)(2) by recognizing union that did not legitimately represent majority of employees in bargaining unit, and union violated sec. 8(b)(1)(A) by accepting recognition).

¹⁸ See *Lamons Gasket*, supra, 357 NLRB at 741 (citing authorization cards, employee statements, and secret-ballot elections conducted by private third parties).

¹⁹ *Brown & Connolly, Inc.*, 237 NLRB 271, 275 (1978), enf'd, 593 F.2d 1373 (1st Cir. 1979).

²⁰ See *Gissel Packing Co.*, supra, 395 U.S. at 596 ("Since § 9(a) . . . refers to the representative as the one 'designated or selected' by a majority of the employees without specifying precisely how that representative is to be chosen, it was early recognized that an employer had a duty to bargain whenever the union representative presented 'convincing evidence of majority support.'").

²¹ National Labor Relations Act, sec. 1, 29 U.S.C. 151.

In 1966, a unanimous Board in *Keller Plastics*,²² an unfair labor practice case, added the voluntary-recognition bar to its previously established bar doctrines, which temporarily insulate a union from challenges to its status as exclusive bargaining representative. The *Keller Plastics* Board rejected a claim that an employer had unlawfully reached a collective-bargaining agreement with a union that had since lost the majority support it enjoyed when it was voluntarily recognized by the employer. The Board held that in cases involving voluntary recognition of a union—as in cases where a bargaining relationship was established by a Board certification, by a Board order in an unfair labor practice case, or by an unfair labor practice settlement—"the parties must be afforded a reasonable time to bargain and to execute the contracts resulting from such bargaining" because "negotiations can succeed . . . 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."²³ Following *Keller Plastics*, the Board quickly and unanimously held in *Sound Contractors*,²⁴ also decided in 1966, that the voluntary-recognition bar applied in representation cases as well as in unfair labor practice cases, barring election petitions that challenged a voluntarily recognized union's representative status during a reasonable period for bargaining.

2. Dana Corp. and Lamons Gasket

For more than 40 years, the Board consistently applied the voluntary-recognition bar as articulated in *Keller Plastics*.²⁵ In 2007, however, a divided Board, citing the increased use of

voluntary-recognition agreements to establish collective-bargaining relationships, re-examined Board doctrine and adopted a different approach. In *Dana Corp.*,²⁶ the Board established a novel election procedure in voluntary-recognition cases, through adjudication and not rulemaking. It held that *no* election bar would be imposed after an employer's "card-based recognition" of a union, nor would a contract bar be imposed on contracts executed with a voluntarily recognized union, *unless*:

(1) employees in the bargaining unit receive notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition or to support the filing of a petition by a rival union, and (2) 45 days pass from the date of notice without the filing of a valid petition. If a valid petition supported by 30 percent or more of the unit employees is filed within 45 days of the notice, the petition will be processed.

351 NLRB at 434 (footnote omitted). The *Dana* Board asserted a need to "provide greater protection for employee free choice," *id.* at 438, and cited two principal reasons for establishing the new procedure. First, it concluded that Board-conducted elections were more reliable than union-authorization cards in determining employee free choice. *Id.* at 438–440. Second, it found that the rationale for the other election bars established by the Board was "far less persuasive" in the context of voluntary recognition. *Id.* at 440–441. Nevertheless, the *Dana* Board properly acknowledged that "[s]everal courts of appeals ha[d] endorsed the current recognition-bar doctrine," while citing no contrary decisions. *Id.* at 441 & fn. 31 (collecting cases from District of Columbia Circuit and Second, Third, Sixth, Seventh, and Ninth Circuits). The dissenting Board members in *Dana* rejected both of the principal reasons offered by the majority for the new procedure. They argued that the voluntary-recognition bar served the same purposes as other election bars in giving a bargaining relationship a fair chance to succeed, particularly given that negotiations for a first contract were involved. *Id.* at 446. The dissenters also pointed out that there was no empirical evidence that the use of authorization cards was a less reliable indicator of employee free choice than an election. *Id.* at 448.

Four years later, in 2011, the *Dana* decision was overruled by a divided Board in *Lamons Gasket*,²⁷ which rejected the *Dana* procedure and restored the voluntary-recognition bar

²² *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966).

²³ 157 NLRB at 587. Among the precedent cited as support for this rule was the Supreme Court's 1944 decision in *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944). There, the Court upheld the Board's bargaining order against an employer that had unlawfully refused to bargain with a majority union, which then lost majority support. Rejecting the argument that the bargaining order was unfair to employees who opposed the union, the Court observed that the order only temporarily insulated the union from challenge and 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." 321 U.S. at 705.

²⁴ *Sound Contractors Assn.*, 162 NLRB 364, 365 & fn. 5 (1966) (permitting representation petition to be processed because union seeking to bar petition had not been voluntarily recognized by employer).

²⁵ Collective-bargaining agreements have also long been subject to a contract-bar period of up to three years, insulating the union from challenges to majority status during that period. See *General Cable Corp.*, 139 NLRB 1123, 1125 (1962).

²⁶ *Dana Corp.*, 351 NLRB 434 (2007).

²⁷ *Lamons Gasket Co.*, supra, 357 NLRB at 739.

and for the first time defined benchmarks for measuring the reasonable bargaining period covered by the bar. The Board defined “a reasonable period of bargaining, during which the recognition bar will apply, to be no less than 6 months after the parties’ first bargaining session and no more than 1 year.” 357 NLRB at 748. “In determining whether a reasonable period has elapsed in a given case,” the Board held that it would apply the multifactor test of *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), and would “impose the burden of proof on the General Counsel to show that further bargaining should be required.” 357 NLRB at 748 (footnote omitted). As noted by the *Lamons Gasket* Board, the *Lee Lumber* test considers “(1) whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and of the parties’ bargaining processes; (3) the amount of time elapsed since bargaining commenced and the number of bargaining sessions; (4) the amount of progress made in negotiations and how near the parties are to concluding an agreement; and (5) whether the parties are at impasse.” *Lee Lumber*, supra, 334 NLRB at 402.

In overruling *Dana*, the *Lamons Gasket* Board made three principal arguments. First, it argued that empirical data from the period in which the *Dana* procedure was in effect refuted the claim that voluntary recognition did not accurately reflect employee free choice: “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.” 357 NLRB at 742 (footnote omitted). Second, the Board contended that the *Dana* notice, “understood in context,” inappropriately compromised the Board’s neutrality by “suggest[ing] to employees that the Board considers their choice to be represented suspect and signals to employees that their choice should be reconsidered through the filing of a petition.” Id. at 744. Third, the Board argued that the voluntary-recognition bar, in protecting a newly established bargaining relationship, promoted the same statutory policies advanced by its other bar doctrines. Id. Thus, voluntary recognition reflected the Act’s approval of a “system of private ordering” in labor relations in which collective bargaining was to be encouraged and labor disputes avoided. Id. at 746. Voluntary recognition was consistent with employee free choice because it required a showing of majority support

among all employees in the bargaining unit, not merely a majority of voters (as in a Board election), and because the Act’s unfair labor practice provisions enabled improper recognition to be redressed. Id. at 746–747. In the view of the *Lamons Gasket* Board, the *Dana* procedure simply served to create uncertainty around the new bargaining relationship and to interfere unnecessarily in the bargaining process. Id. at 747. The dissenting Board member rejected each of these arguments, contending (among other things) that the same empirical evidence relied on by the majority in fact supported the rationale of *Dana*. Id. at 748–754.

3. The April 2020 Amendments

In 2019, as part of its larger rulemaking culminating in the April 1, 2020 final rule discussed herein, the Board proposed, subject to public comment, to overrule *Lamons Gasket* and to reinstate the *Dana* procedure.²⁸ As support for the proposed rule, the Board cited the views of the *Dana* Board and the dissenting Board member in *Lamons Gasket*. No intervening judicial decisions had questioned *Lamons Gasket* or its restoration of the longstanding voluntary-recognition bar, nor had a petition for rulemaking addressing the issue been filed with the Board. Then-Member McFerran dissented.²⁹

On April 1, 2020, following a public comment period, the Board adopted a final rule that essentially codified the *Dana* procedure.³⁰ The new rule (“Processing of petitions filed after voluntary recognition”) appears as § 103.21 in the Board’s Rules and Regulations, 29 CFR 103.21. Under the rule, neither the employer’s voluntary recognition of a union, nor the first collective-bargaining agreement executed by the parties after recognition, will bar the processing of an election petition, unless: (1) the employer or the union notifies the Board’s Regional Office that recognition has been granted; (2) the employer posts a prescribed notice of recognition “informing employees that recognition

has been granted and that they have a right to file a petition during a 45-day ‘window period’ beginning on the date the notice is posted”; (3) the employer distributes the notice electronically to employees, if electronic communication is customary; and (4) 45 days from the posting date pass without a properly supported election petition being filed. The Board noted that it did “not rely on any data, or analysis of data, other than that discussed in *Dana* and in *Lamons Gasket*, which [it had] fully considered.”³¹

In explaining the reasons for the new rule, the Board essentially repeated the rationale of the *Dana* decision, advancing arguments that had been rebutted by the *Lamons Gasket* decision.³² Thus, the Board characterized Board elections as the “Act’s preferred method for resolving questions of representation,” citing the Act’s election-year bar (under section 9(c)(3), after a valid Board election is held, another election may not be directed for one year) and the specific statutory protections granted only to a Board-certified union.³³ The Board asserted that “secret-ballot elections are better than voluntary recognition at protecting employees’ [s]ection 7 freedom to choose, or not choose, a bargaining representative.”³⁴ It noted that the Board “does not supervise voluntary recognitions” and rejected the notion that the Act’s unfair labor practice provisions were sufficient to address coercive conduct related to voluntary recognition.³⁵ A Board election was deemed superior to voluntary recognition because “it presents a clear picture of employee voter preference at a single moment.”³⁶ Rejecting criticism of the proposed rule, the Board insisted that it does not “restrict the lawful voluntary establishment of majority-supported bargaining relationships, nor does it limit the immediate statutory rights and responsibilities that ensue upon commencement of those relationships.”³⁷ According to the Board, the rule was also supported by the need to protect employees’ ability to challenge the union’s majority status from the possibility that voluntary recognition immediately triggering an election bar might be followed by a

²⁸ NLRB, *Representation Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships*, Notice of Proposed Rulemaking, 84 FR 39930, 39938, 39958 (Aug. 12, 2019).

²⁹ Id. at 39949–39951.

³⁰ NLRB, *Representation Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships*, Final Rule, 85 FR 18366, 18367–18368, 18370, 18380–18388, 18399–183400 (April 1, 2020). At the time the final rule was adopted, the Board member who had dissented from the proposed rule (then-Member McFerran) was not serving on the Board.

³¹ 85 FR 18373.

³² 85 FR 18380–18388.

³³ Id. at 18381.

³⁴ Id.

³⁵ Id.

³⁶ Id.

³⁷ Id. at 18382.

collective-bargaining agreement, which would trigger its own, separate bar.³⁸

The Board also addressed experience under the *Dana* procedure, as described in the *Lamons Gasket* decision, by echoing the arguments of the dissenting Board member in *Lamons Gasket*.³⁹ It acknowledged that “only 7.65 percent of *Dana* notice requests resulted in election petitions, only 4.65 percent of *Dana* notices resulted in actual elections, and employees decertified the voluntarily recognized union in only 1.2 percent of the total cases in which *Dana* notices were requested.”⁴⁰ In expressing the view that “the fact that only a small percentage of all *Dana* notices resulted in ending continued representation by the voluntarily recognized union does not mean that the post-recognition open period procedure was unnecessary and should not be restored,” the Board pointed to the fact that in the (rare) instances where a *Dana* election was held, the union was decertified about one-quarter of the time.⁴¹ As for the overwhelming majority of cases where no *Dana* election was held, the Board asserted that it knew “nothing about the reliability of the proof of majority support that underlay recognition in each of these cases,” nor “why no petition was filed.”⁴² In turn, the Board cited the absence of evidence that the *Dana* procedure had produced negative effects, such as discouraging voluntary recognition or discouraging or delaying collective bargaining.⁴³ The Board acknowledged the possibility that the “existence of a pending election petition will cause unions to spend more time campaigning or working on election-related matters rather than doing substantive work on behalf of employees,” but concluded “that this is a reasonable trade-off for protecting employees’ ability to express their views in a secret-ballot election.”⁴⁴

The new election procedure established by the Board’s rule went into effect on June 1, 2020. In response to a series of Freedom of Information Act requests, the Board has compiled and disclosed data that reflects its experience under the rule.⁴⁵ That

experience has been entirely consistent with the Board’s experience under the *Dana* procedure, during the 2007–2011 period. The new data, which has been assembled incrementally by the Board’s FOIA officer in response to successive information requests, show as follows.⁴⁶ First, for the calendar year 2020, the data show that 32 requests for voluntary recognition notices were filed with the Board. In those cases, no election petitions were filed.⁴⁷ For the period from January 1, 2021 through June 30, 2021, the data shows that 39 requests for notices were filed, and no subsequent petitions were filed. For the period from July 1, 2021 through September 30, 2021, 31 requests for notices were filed. One decertification petition was subsequently filed, after which the union disclaimed interest. For the period from October 1, 2021 through December 31, 2021, 53 requests were filed, and no subsequent petitions were filed. For the period from January 1, 2022 through March 31, 2022, the data shows that 51 requests for notices were filed, and no subsequent petitions were filed. For the period from April 1, 2022 through June 30, 2022, the data shows that 54 requests for notices were filed, and no subsequent petitions were filed. As a whole, then, the data thus far show

that since the effective date of § 103.21, 260 requests for recognition notices were filed with the Board. In those cases, one election petition was subsequently filed, and no elections were held—although the union in the one case where a petition was filed disclaimed interest after its filing. Thus, only 0.4 percent of recognition notice requests resulted in election petitions, 0 percent of notices resulted in actual elections, and (if we count the disclaimer as an effective proxy for the de-selection of the union in the sole case where a petition was filed), employees opted not to retain the voluntarily recognized union in only 0.4 percent of the total cases in which recognition notices were requested. In over 99 percent of notice cases, employees appear to have affirmed their choice to be represented by a union.

As we explain below, the Board’s preliminary view, subject to comments, is that the voluntary-recognition bar as articulated in *Lamons Gasket* better serves the policies of the National Labor Relations Act than does the current rule.

C. Section 9(a) Recognition in the Construction Industry

1. Overview

In the construction industry, employees often work for their employer for only a relatively brief period until the completion of a discrete project, at which time they may have begun working on a new project for a different employer.⁴⁸ This sporadic and temporary feature of much construction-industry work complicates a union’s effort to demonstrate majority support among employees whose time with any one employer may be fleeting. At the same time, the widespread use of the project bid process means that construction employers need to know their labor costs, and thus, the terms of a collective-bargaining agreement, even before they hire their first employee.⁴⁹ The employer has to be able to forecast its labor costs to submit a contract bid and have available a pool of skilled craft workers ready for quick referral.⁵⁰

Consequently, construction employers and unions frequently negotiate and enter into prehire collective-bargaining

001133&type=request; <https://foiaonline.gov/foiaonline/action/public/submissionDetails?trackingNumber=NLRB-2022-000090&type=Request>; <https://foiaonline.gov/foiaonline/action/public/submissionDetails?trackingNumber=NLRB-2022-000354&type=Request>; <https://foiaonline.gov/foiaonline/action/public/submissionDetails?trackingNumber=NLRB-2022-000844&type=Request>; and <https://foiaonline.gov/foiaonline/action/public/submissionDetails?trackingNumber=NLRB-2022-001456&type=Request>.

⁴⁶ In a few instances, the FOIA compilations show that a petition was filed, but further inquiry shows that the petition was an RC petition filed prior to voluntary recognition and later withdrawn. Those cases have not been counted as examples of cases where a subsequent petition was filed. In six cases, the FOIA spreadsheets indicate that a petition was filed, but follow-up research in the Board’s recordkeeping system discloses no such petition, thus suggesting that the registry of a petition was in error. Those cases also have not been counted as examples of cases where a subsequent petition was filed. A few cases (none of which involved petitions) appear duplicative and have only been counted once. One case, in which a notice was requested but no pertinent information was supplied even after it was requested, has also not been counted in the analysis of petitions filed in response to voluntary recognition notice requests.

In yet another case, which has not been counted in this analysis, voluntary recognition was, according to the FOIA compilations, extended after the filing of a petition, but case records suggest that in fact the union won an election and no voluntary recognition was involved.

⁴⁷ However, in one case, after an initial faulty notice posting, the union subsequently disclaimed interest for unknown reasons. No petition was filed. Given the ambiguity, this case has not been counted in our analysis at all.

⁴⁸ *John Deklewa & Sons*, 282 NLRB 1375, 1380 (1987) (quoting S. Rep. No. 86–187, reprinted in 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (Leg. Hist.), at 423, and H. Rep. No. 86–741, reprinted in 1 NLRB, Leg. Hist., at 777–778), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

⁴⁹ Id. (quoting S. Rep. No. 86–187, reprinted in 1 NLRB, Leg. Hist., at 424).

⁵⁰ Id.

³⁸ Id. at 18382–18383.

³⁹ Id. at 18383–18384.

⁴⁰ Id. at 18383.

⁴¹ Id.

⁴² Id.

⁴³ Id. at 18384.

⁴⁴ Id. at 18385.

⁴⁵ The data cited here can be found at <https://foiaonline.gov/foiaonline/action/public/submissionDetails?trackingNumber=NLRB-2021-000944&type=request>; <https://foiaonline.gov/foiaonline/action/public/submissionDetails?trackingNumber=NLRB-2021-000944&type=request>.

agreements.⁵¹ For the length of these agreements, even before it hires any employees, the construction employer recognizes the union as the bargaining representative of the employer's eventual employees and the employer is guaranteed precise labor costs pursuant to the agreement and, in the event of a union hiring hall, a source of skilled craft workers.⁵²

In 1959, responsive to these unique construction-industry practices, Congress amended the Act,⁵³ adopting section 8(f),⁵⁴ which permitted a limited alternative in the building and construction industry to the Act's existing section 9(a) requirement that a union have majority support to obtain exclusive collective-bargaining representative status.⁵⁵ By declaring that "[i]t shall not be an unfair labor practice" to do so, section 8(f) sanctions the construction-industry practice of a construction employer and a union entering into a prehire agreement even where the union has not established its majority support among any bargaining unit of the employer's employees under section 9(a).⁵⁶

For more than 35 years, the Board's decision in *John Deklewa & Sons* has governed how the Board has handled these 8(f) agreements and the interplay with a construction employer's 9(a) recognition of a union in instances where the union does have the support of a majority of the bargaining unit employees. Under *John Deklewa & Sons*, the Board adopted a rebuttable presumption that a collective-bargaining relationship in the construction industry was established under section 8(f), with the burden of proving that the relationship instead falls under section 9(a) placed on the party so asserting.⁵⁷

The distinction is important because, unlike where there is only an 8(f) relationship, a union recognized as the 9(a) representative enjoys the full panoply of rights and obligations available to unions in all other industries as the exclusive collective-bargaining representative under section 9(a).⁵⁸ This includes the irrebuttable presumption of majority support during the term of the contract and a rebuttable presumption of majority support at other times, including at the contract's expiration.⁵⁹ In practice, under the Board's contract-bar rules, 9(a) recognition bars the filing of a representation petition challenging the union's majority status during the "reasonable period" of an agreement (up to 3 years) outside of the "window period" and imposes an obligation on the employer to continue to recognize and bargain with the union even after the parties' agreement has expired.⁶⁰ By contrast, as the Board explained in *John Deklewa & Sons*, there is no contract or recognition bar where there is only an 8(f) relationship: "the 8(f) union enjoys no presumption of majority status on the contract's expiration and cannot picket or strike to compel renewal of an expired agreement or require bargaining for a successor agreement. At no time does it enjoy a presumption of majority status, rebuttable or otherwise, and its status as the employees' representative is subject to challenge at any time."⁶¹

Nonetheless, nothing in section 8(f) prevents a union representing employees in the construction industry from overcoming the 8(f) presumption and obtaining the same 9(a) recognition (and the attendant benefits) as any other union. Thus, under *John Deklewa &*

Sons, the Board provided for unions representing employees in the construction industry to obtain 9(a) recognition by demonstrating—similar to unions representing employees in nonconstruction industries—a "clear showing of majority support" from the unit employees, assayed either through a Board representation election or the construction employer voluntarily recognizing that a majority of unit employees had designated the union as its collective-bargaining representative.⁶²

Additionally, because section 8(f) uniquely permits voluntary recognition in the construction industry in the absence of majority support, where a construction employer voluntarily recognizes a union, in order to avoid the uncertainty of whether the recognition is pursuant to section 8(f) or 9(a), there must be unambiguous evidence that the construction employer's recognition was pursuant to section 9(a) instead of 8(f). In considering whether there was unambiguous evidence of section 9(a) recognition, the Board has looked to positive evidence, including contract language, of the union having made an unequivocal demand for 9(a) recognition and the employer having unequivocally granted it.⁶³

In *Staunton Fuel & Material, Inc.*, the Board defined the minimum requirements for what must be stated in a written recognition agreement or contract clause in order for it to serve as sufficient evidence of the union having attained 9(a) status.⁶⁴ The Board, following the approach taken by the Tenth Circuit in *NLRB v. Triple C Maintenance, Inc.*, 219 F.3d 1147 (10th

⁵¹ Id. at 1385–1387 & fn. 53.

⁵² Id. at 1385.

⁵³ The Landrum-Griffin Act of 1959, Public Law 86–257, 73 Stat. 541, amending 29 U.S.C. 151–169.

⁵⁴ Sec. 8(f), 29 U.S.C. 158(f).

⁵⁵ *John Deklewa & Sons*, 282 NLRB at 1380.

⁵⁶ Id.

⁵⁷ The Board in *John Deklewa & Sons* abandoned the "conversion doctrine," adopted in 1971, 16 years before it issued *John Deklewa & Sons*, in 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. Id. at 1377. The "conversion doctrine" was premised on an 8(f) agreement being a "preliminary step that contemplates further action for the development of a full bargaining relationship." Id. at 1378 (quoting *Ruttmann Construction Co.*, 191 NLRB 701, 702 (1971)). As such, the 8(f) agreement could be repudiated at any time by any party but also permitted the signatory union to convert the 8(f) agreement into a 9(a) relationship/agreement based on its majority support during a relevant period, even though "[t]he 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. In contrast, under *John Deklewa & Sons*, the parties to an 8(f) agreement cannot unilaterally repudiate the agreement until it expires or the unit employees vote to reject or change their representative. Id. at 1387.

⁵⁸ Id. at 1385.

⁵⁹ Id. at 1387.

⁶⁰ See *Mountaire Farms, Inc.*, 370 NLRB No. 110, slip op. at 1 (2021) ("During this 'contract bar' period, the Board will dismiss all representation petitions unless they are filed during the 30-day period that begins 90 days and ends 60 days before the agreement expires. In other words, there is a 30-day period—customarily known as the 'window period'—during which a petition may be properly filed while the agreement is still in effect.") (internal citation omitted); *MSR Industrial Services, LLC*, 363 NLRB 1, 2 (2015) ("When relationships in the construction industry are governed by section 9(a), the employer cannot change terms and conditions of employment unilaterally upon contract expiration, and it must continue to recognize and bargain with the union after the contract expires."). See also sec. 8(f), 29 U.S.C. 158(f) (recognizing that an 8(f) agreement "shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)").

⁶¹ 282 NLRB at 1387.

⁶⁴ 335 NLRB 717, 719–720 (2001).

Cir. 2000) and *NLRB v. Oklahoma Installation Co.* 219 F.3d 1160 (10th Cir. 2000), found that “[a] recognition agreement or contract provision will be independently sufficient to establish a union’s 9(a) representation status 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.”⁶⁵

Significantly, this contract language does not substitute for the union showing or offering to show evidence of its majority support; it does, however, provide a contemporaneous, written memorialization that the union had majority support at the time of the 9(a) recognition. While holding that contract language can be independently dispositive of a 9(a) relationship, the Board in *Staunton Fuel* left open the issue of whether an employer could challenge the union’s majority support within the 10(b) period where the contractual language the employer had agreed to unequivocally stated that the union made a showing of majority support.⁶⁶ As the D.C. Circuit has held, if other evidence casts doubt on the assertion that the union enjoyed majority support at the time the employer purportedly granted 9(a) recognition, then the contract language necessarily fails to satisfy its intended purpose.

Thus, in *Nova Plumbing, Inc. v. NLRB*, the D.C. Circuit held that language in the collective-bargaining agreement between a construction employer and a union could not establish a 9(a) relationship.⁶⁷ The court pointed to strong evidence in the record that contradicted the contractual language.⁶⁸ In particular, senior employees who had been longtime union members opposed the union representing them with this employer, for instance a meeting between the senior employees and union representatives turned “extremely hostile,” and the employer’s field superintendents and other foremen “encountered resistance” as they informed other employees about having to join the union.⁶⁹ The court reasoned that language in the collective-bargaining agreement “cannot be

dispositive at least where, as here, the record contains strong indications that the parties had only a section 8(f) relationship.”⁷⁰ Subsequently, in *M & M Backhoe Service, Inc. v. NLRB*, the D.C. Circuit distinguished *Nova Plumbing* to uphold the language in the parties’ agreement establishing that the union was the 9(a) representative where there was evidence that the union actually had majority support, even if the employer never requested to see it.⁷¹ Six years after *M & M Backhoe*, in *Allied Mechanical Services, Inc. v. NLRB*, the D.C. Circuit quoted the *Nova Plumbing* court but, in doing so, added emphasis to indicate that contract language cannot be dispositive of a union’s 9(a) status where the record contains contrary evidence.⁷²

More recently, the D.C. Circuit in *Colorado Fire Sprinkler, Inc. v. NLRB* rejected the union’s claim of 9(a) recognition where the union relied solely on demonstrably false contract language stating that the employer had “confirmed that a clear majority” of the employees had designated it as their bargaining representative, even though not a single employee had been hired at the time the parties initially executed their agreement containing that language.⁷³ The court noted that “actual evidence that a majority of employees have thrown their support to the union must exist and, in Board proceedings, that evidence must be reflected in the administrative record.”⁷⁴ The court recognized that the only evidence of the union’s majority support that could be pointed to in the record was the “demonstrably false” contract language.⁷⁵ In fact, as the court pointed out, “[t]ellingly, at no point in the administrative record did the [u]nion even explain, let alone proffer, what evidence it claimed to have collected” to support its assertion that a majority of employees had designated it as their

bargaining representative.⁷⁶ The court concluded that the Board had improperly “blink[ed] away record evidence undermining the credibility or meaningfulness of the recognition clauses” and “ma[de] demonstrably untrustworthy contractual language the be-all and end-all of [s]ection 9(a) status.”⁷⁷ Construction industry employers and unions—like those in all other industries—cannot have created a 9(a) relationship where the union did not enjoy majority support, regardless of whether they agree to a contractual provision falsely attesting to the union’s majority support.⁷⁸

2. The 6-Month Limitations Period for Challenging a Union’s 9(a) Recognition in the Construction Industry

Importantly, in *John Deklewa & Sons*, despite the greater statutory leeway granted to construction employers and unions to enter into section 8(f) collective-bargaining relationships, the Board recognized that unions seeking section 9(a) representation do not “have less favored status with respect to construction industry employers than they possess with respect to those outside the construction industry.”⁷⁹

Six years after issuing *John Deklewa & Sons*, the Board in *Casale Industries*⁸⁰ relied on this basic tenet from *John Deklewa & Sons*—that unions representing construction-industry employees should be treated no less favorably than those representing nonconstruction-industry employees—to explicitly incorporate into the representation arena the teachings of the Supreme Court in *Local Lodge No. 1424, International Association of Machinists, AFL–CIO (Bryan Manufacturing Co.) v. NLRB*. In *Bryan Manufacturing*, the Supreme Court held that if an employer recognizes a union as the section 9(a) representative and more than 6 months

⁷⁶ Id. at 1041.

⁷⁷ Id.

⁷⁸ More recently, relying on the D.C. Circuit decision in *Colorado Fire Sprinkler*, the Board in *Enright Seeding, Inc.* noted that “contractual language can only serve as evidence of a union’s 9(a) majority representation *if it is true*.” 371 NLRB No. 127, slip op. at 5 (emphasis added). Furthermore, the Board explained that “[c]ontract language alone is insufficient to demonstrate the union’s 9(a) status if other evidence casts doubt on the assertion that the union enjoyed majority support at the time the employer purportedly granted 9(a) recognition.” Id., slip op. at 6. An application for enforcement of the Board’s decision in *Enright Seeding* is currently pending in the Eighth Circuit.

⁷⁹ *John Deklewa & Sons*, 282 NLRB at 1387 fn. 53. Just as importantly, employees working for construction employers are entitled to the same rights and opportunities for their union to obtain 9(a) status through voluntary recognition as employees in nonconstruction industries.

⁸⁰ *Casale Industries*, 311 NLRB 951, 953 (1993).

⁷⁰ Id.

⁷¹ 469 F.3d 1047, 1050 (D.C. Cir. 2006) (“This case is like *Nova Plumbing* in the following respects: the union offered to prove to the employer that it had majority support; and the employer recognized the union without examining the union’s proof. But there is a critical difference. Unlike *Nova Plumbing*, in which there was no evidence that the union actually had majority support, here the record shows—as the Board found—that a majority of employees voluntarily signed union authorization cards signifying their support of [the union].”).

⁷² 668 F.3d 758, 766 (2012) (“Standing alone . . . contract language and intent cannot be dispositive at least where . . . the record contains strong indications that the parties had only a section 8(f) relationship.”) (quoting *Nova Plumbing*, 330 F.3d at 537) (emphasis added in *Allied Mechanical Services*).

⁷³ 891 F.3d 1031, 1036 (D.C. Cir. 2018).

⁷⁴ Id. at 1040.

⁷⁵ Id.

⁶⁵ Id. at 719–720.

⁶⁶ Id. at 720 fn. 14.

⁶⁷ 330 F.3d 531, 537–538 (D.C. Cir. 2003).

⁶⁸ Id. at 533.

⁶⁹ Id. at 537.

elapse, the Board will not entertain a claim that the union lacked majority status when it was initially granted recognition.⁸¹

In *Bryan Manufacturing*, more than 6 months after the parties had executed a collective-bargaining agreement, unfair labor practice charges were filed contesting the parties' enforcement of the union-security clause in the contract on the grounds that the union indisputably lacked majority support at the time the parties executed their agreement.⁸² Nonetheless, the Court reversed the Board and dismissed the complaint because, under section 10(b)'s 6-month limitations period, the complaint was premised on the allegedly unlawful recognition of the union, which occurred more than 6 months prior to the filing of the charge.⁸³ The Court based its decision on not only the statutory language but also the practical need for a time restriction on challenges to a union's initial recognition.⁸⁴ As the Court acknowledged, quoting the legislative history from the Congress that enacted it, the 6-month limitations period under section 10(b) is essential "to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused,' . . . and of course to stabilize existing bargaining relationships."⁸⁵

Relying on *Bryan Manufacturing*, in *Casale*, the Board reiterated that, in nonconstruction industries, the Board will not entertain a claim that a union lacked majority status at the time of recognition if more than 6 months have elapsed because "a contrary rule would mean that longstanding relationships would be vulnerable to attack, and stability in labor relations would be undermined."⁸⁶ The Board stated succinctly that these interests should prevail in construction industry representation cases: "These same principles would be applicable in the construction industry . . . [P]arties in nonconstruction industries, who have established and maintained a stable [s]ection 9 relationship, are entitled to protection against a tardy attempt to disrupt their relationship. Parties in the

construction industry are entitled to no less protection."⁸⁷

3. The Board's 2019 NPRM on 9(a) Recognition in the Construction Industry

On August 12, 2019, the Board issued an NPRM seeking public comments on its proposal, among other things, to modify the manner in which construction employers may acknowledge a union's 9(a) status.

The Board proposed in its 2019 NPRM to overrule *Staunton Fuel*, regarding the sufficiency of contract language alone to establish a 9(a) bargaining relationship.⁸⁸ The Board contended that overruling *Staunton Fuel* would be in accordance with the D.C. Circuit decision in *Colorado Fire Sprinkler* and that it would be most consistent with statutory majoritarian principles and protecting employee free choice.⁸⁹ The Board reasoned that the proposed rule was necessary to prevent a union, without having any extrinsic proof of its majority support, from barring the processing of an election petition filed by an employee or a rival union for up to three years based solely on language in the union's collective-bargaining agreement with a construction employer.⁹⁰

Under the rule proposed in the 2019 NPRM, the Board would require, in the representation context, the parties to retain additional positive evidence of the union's 9(a) majority support beyond the parties' contract language. Specifically, if a representation petition is filed, and the parties are unable to present positive evidence of the union having made a contemporaneous showing of support from a majority of unit employees at the time initial recognition was granted, the parties would be unable to rely on the Board's customary voluntary-recognition and contract bars. The regional director would be required to process the representation petition, even if it would destabilize the collective-bargaining relationship.⁹¹ Moreover, if the employer had granted the union 9(a) recognition at a time when it did not

enjoy majority support, the Board would be processing a representation petition at a time when the employer had provided the union unlawful assistance under section 8(a)(2) and (1) so that laboratory conditions may not exist to ascertain employees' true sentiment towards the union.⁹²

While the NPRM indicated that the Board sought to overrule *Staunton Fuel*, the Board's NPRM made no mention whatsoever of altering the bedrock principle from *Bryan Manufacturing*, reiterated in *Casale*—which was itself a representation case involving an election petition—that a challenge cannot be made to a union's initial recognition by a construction employer after 6 months had elapsed. Indeed, no mention was made of section 10(b), or that a modification to the Board's limitations period for challenging a union's initial recognition of 9(a) majority status was in any way being contemplated by the Board.

Accordingly, under the language and reasoning of the Board's NPRM, and in accordance with *Casale*, even if a construction employer and/or a union were unable to present positive evidence of the union's initial 9(a) recognition, a representation petition challenging the union's 9(a) recognition that was based on unequivocal written 9(a) recognition could not be processed if more than 6 months had elapsed from the union's initial 9(a) recognition.

4. The 2020 Final Rule

On April 1, 2020, following a public comment period, the Board promulgated its final rule adopting the proposed language from its NPRM but also stating in the preamble to the rule that it was overruling *Casale* "to the extent that it is inconsistent with the instant rule."⁹³ The Board proceeded by stating that "we overrule *Casale*'s holding that the Board will not entertain a claim that majority status was lacking at the time of recognition where a construction-industry employer extends 9(a)

⁹² See *Joseph Weinstein Electric Corp.*, 152 NLRB 25, 39 (1965) (a construction employer's 9(a) recognition of and entering into an agreement with a union that does not enjoy majority support is unlawful under sec. 8(a)(2) and (1) and 8(b)(1)(A)); *Bear Creek Construction Co.*, 135 NLRB 1285, 1286–1287 (1962) (a construction employer provided unlawful assistance under sec. 8(a)(2) to a union in obtaining membership applications and checkoff authorization cards and, therefore, was ordered to cease and desist from recognizing the union as its employees' collective-bargaining representative and giving effect to the parties' agreement); see also *General Shoe Corp.*, 77 NLRB 124, 126 (1948) ("An election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammelled choice for or against a bargaining representative.").

⁹³ 85 FR 18391.

⁸¹ 362 U.S. 411, 419 (1960); see also *North Bros. Ford*, 220 NLRB 1021, 1021 (1975).

⁸² 362 U.S. at 412.

⁸³ Id. at 416–417.

⁸⁴ Id. at 419.

⁸⁵ Id.

⁸⁶ *Casale*, 311 NLRB at 953 (citing *Bryan Manufacturing Co.*, 362 U.S. at 411).

⁸⁷ Id. (citing *John Deklewa & Sons*, 282 NLRB at 1387 fn. 53).

⁸⁸ 84 FR 39938–39939.

⁸⁹ Id.

⁹⁰ Id.

⁹¹ See *General Cable Corp.*, 139 NLRB 1123, 1125 (1962) (finding the delay as to when employees are able to exercise their free choice in an election "fully warranted when viewed in the light of countervailing considerations, including the necessity to introduce insofar as our contract-bar rules may do so, a greater measure of stability of labor relations into our industrial communities as a whole to help stabilize in turn our present American economy").

recognition to a union and 6 months elapse without a petition.”⁹⁴ The Board asserted that the DC and Fourth Circuits, and some former Board Members, had expressed doubts regarding section 10(b)’s applicability to challenges to a construction-industry union’s purported 9(a) status.⁹⁵ The Board claimed that “the *Casale* Board failed to recognize that employees and rival unions will likely presume that a construction-industry employer and union entered an 8(f) collective-bargaining agreement Thus, it is highly unlikely that [employees and rival unions] will file a petition challenging the union’s status within 6 months of recognition.”⁹⁶ The Board also stated that, “most significantly, [the Board finds that] *Casale*’s requirement that an election petition be filed within 6 months to challenge a purported 9(a) recognition in the construction industry improperly discounts the importance of protecting employee free choice”⁹⁷

The practical effect of the Board’s unanticipated overruling of *Casale* in the final rule—an action not mentioned, much less considered by the Board in the NPRM—was to require that a union and employer be prepared to prove evidence of the union’s initial majority support—forever. Under the final rule, a challenge could be made to a construction employer’s initial recognition of a union many years into the future at a time when it would be fundamentally unreasonable to expect the construction employer or the union to have maintained contemporaneous evidence of the union’s majority support. Under the rule, there is no limit to the amount of time that may have passed since the initial recognition, but parties would be required to produce proof of the initial majority support in order for the Board to reject a challenge to even a longstanding employer-union 9(a) relationship.

D. Pending Litigation Challenging the 2020 Final Rule

On July 15, 2020, the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) and the Baltimore-DC Metro Building and Construction Trades Council sued the NLRB (D.D.C. No. 20–cv–1909) (“AFL–CIO II”), alleging that the entirety of the April 2020 Rule was invalid because, among other things, it is arbitrary,

capricious, an abuse of discretion, and in violation of the NLRA.

On August 11, 2020, the NLRB filed a motion to transfer *AFL–CIO II* to the United States Court of Appeals for the District of Columbia Circuit, arguing that the district court lacks subject matter jurisdiction. The AFL–CIO opposed the transfer. The NLRB previously advanced similar threshold jurisdictional arguments in *AFL–CIO v. NLRB* (“*AFL–CIO I*”) (D.D.C. Case No. 20–cv–675 (KBJ)), which is currently pending decision by the D.C. Circuit (Case No. 20–5223), concerning changes to the Board’s representation case procedures that the Board promulgated on December 18, 2019. On October 23, 2020, the district court in *AFL–CIO II* ordered a temporary stay pending resolution of the parties’ cross-appeals of *AFL–CIO I*, where the same jurisdictional issue will be decided. On May 14, 2021, the D.C. Circuit held oral argument in *AFL–CIO I*. Once the D.C. Circuit issues its decision, the *AFL–CIO II* parties must file a joint status report within 14 days proposing a schedule for further proceedings. That litigation remains pending.

E. Rulemaking Petitions Seeking Rescission of the April 1, 2020 Rule

On November 16, 2021, the AFL–CIO and North America’s Building Trades Unions (“NABTU”) filed a joint petition for rulemaking (“2021 petition”) requesting that the Board rescind each of the amendments made in the April 1, 2020 final rule. The 2021 petition urged the Board to: (1) rescind § 103.20, arguing that the Board violated the Administrative Procedure Act in two respects (by presenting erroneous data in the NPRM and failing to correct those errors in the final rule, and by adopting a final rule that was not a logical outgrowth of the proposed rule) and additionally arguing, as a policy matter, that the changes to the blocking charge policy were ill-conceived; (2) rescind § 103.21, alleging that the Board had violated the Administrative Procedure Act by failing to respond to the AFL–CIO’s comment that the rule violated the Board’s duty of neutrality with respect to employees’ choice concerning union representation; and (3) rescind § 103.22, because the NPRM had not proposed overruling *Casale* and did not advise the public that it was contemplating overruling *Casale* and thus failed to provide the public with an opportunity to be heard on such a fundamental modification to collective-bargaining relationships in the construction industry.

On April 7, 2022, UNITE HERE International Union (“UNITE HERE”) filed a petition (“2022 petition”) for rulemaking specifically requesting the Board to rescind § 103.21. The 2022 petition expressed its support for the 2021 petition but listed additional policy arguments favoring a return to the Board’s prior voluntary-recognition bar doctrine.⁹⁸

filed a petition (“2022 petition”) for rulemaking specifically requesting the Board to rescind § 103.21. The 2022 petition expressed its support for the 2021 petition but listed additional policy arguments favoring a return to the Board’s prior voluntary-recognition bar doctrine.⁹⁸

III. Statutory Authority

Section 6 of the NLRA, 29 U.S.C. 156, 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, 5 U.S.C. 553], such rules and regulations as may be necessary to carry out the provisions of this [Act].”⁹⁹ The Supreme Court unanimously held in *American Hospital Association v. NLRB*, 499 U.S. 606, 609–610 (1991), that the Act authorizes the Board to adopt both substantive and procedural rules governing representation case proceedings. The Board interprets section 6 as authorizing the proposed amendments to its existing rules.

IV. The Proposed Rule Amendments

A. Rescission of the April 1, 2020 Blocking Charge Amendments

As set forth above, the Board developed the blocking charge policy through adjudication more than eight decades ago. And, for the more than eight decades that the Board adhered to the policy, the blocking charge policy enabled the Board to fulfill one of its core obligations: to preserve laboratory conditions for ascertaining employee choice during Board-conducted elections. In addition, the policy advanced the interests of potential voters by shielding them from voting in an atmosphere tainted by coercion. Reviewing courts have approved the Board’s historical blocking charge policy. See, e.g., *Bishop v. NLRB*, 502 F.2d 1024, 1028–1029, 1032 (5th Cir. 1974) (distinguishing *Templeton v. Dixie Color Printing Co.*, 444 F.2d 1064 (5th Cir. 1971), and *Surratt v. NLRB*, 463 F.2d 378 (5th Cir. 1972), as involving a “high degree of arbitrariness” in application of the blocking-charge policy). No court has ever held the policy invalid, despite occasional disagreements between the Board and

⁹⁸ The 2021 and 2022 petitions for rulemaking will be part of the administrative record for this rulemaking.

⁹⁹ Sec. 6 of the Act refers to the Board’s authority to “rescind” rules, while sec. 553 of the Administrative Procedure Act refers to the “repeal” of rules. See also 5 U.S.C. 551(5) (“[R]ule making’ means agency process for formulating, amending, or repealing a rule”). For purposes of this NPRM, we treat these terms as interchangeable.

⁹⁴ Id.

⁹⁵ Id.

⁹⁶ Id.

⁹⁷ Id.

the courts over the application of the policy in particular cases. For the reasons that follow, we are inclined to believe, subject to comments, that the pre-April 2020 blocking charge policy better balances the Board's interests in protecting employee free choice, preserving laboratory conditions in Board-conducted elections, and resolving questions concerning representation expeditiously.

Before explaining why we are inclined to believe, subject to comments, that the pre-April 2020 blocking charge policy better balances the Board's interests than the April 2020 final rule, we note that the rulemaking process that the Board followed in adopting the April 2020 rule was flawed in its treatment of Board election data. As discussed above and as the parties that filed the 2021 rulemaking petition also noted, 2021 Petition at 2–12, the NPRM contained flawed data that was never corrected in the final rule.

In adopting the final rule, the Board contended that any errors did not matter because the blocking charge policy by definition delays the conduct of elections, and its conclusion—that its amendments to the blocking charge policy better protect employees' statutory right of free choice on questions concerning representation—constituted a “policy choice . . . that . . . does not . . . depend on statistical analysis.” 85 FR 18366, 18377. We do not dispute that in rulemaking, the Board may be free to make a policy choice that does not primarily rely on either statistical data or particular facts about the operation of the prior rule.¹⁰⁰ Nevertheless, we are concerned that the Board's failure to correct errors in the data presented in the NPRM might well have harmed the rulemaking process.¹⁰¹

More importantly, turning to the merits of the April 2020 final rule, the Board is inclined to believe, subject to comments, that returning to the Board's pre-April 2020 blocking charge policy would best serve the policies of the Act. Permitting regional directors to generally decline to process an election

petition at the request of a party who has filed a charge alleging conduct that would interfere with employee free choice or conduct that is inherently inconsistent with the petition (and who has simultaneously filed an adequate offer of proof and agreed to promptly make its witnesses available), until the merits of the charge can be determined, better protects employee free choice than the April 2020 amendments that require regional directors to conduct elections in all cases no matter how serious the unfair labor practice charges and no matter how powerful the indicia of their merit. Accordingly, we propose to amend the wording of 29 CFR 103.20 to conform to the wording of that section as it existed prior to the April 2020 final rule.¹⁰² In all other respects, the Board's prior applicable law regarding the blocking charge policy, which was developed through adjudication, would be restored.

Although we agree with the April 2020 Board that, under ordinary circumstances, the Board should conduct elections expeditiously, there can also be no denying—and the April 2020 Board did not deny—that the Board has regularly confronted cases involving unlawful conduct that either interferes with the ability of employees to make a free choice about union representation in an election or is inherently inconsistent with the petition itself. The Board is inclined to believe, subject to comments, that it would undermine employee rights, and would run counter to the Board's duty to conduct elections in circumstances in which employees may freely choose whether to be represented by a union, if the Board were to require regional directors to conduct, and employees to vote in, a coercive atmosphere. But, as the April 2020 Board acknowledged in adopting the final rule, the 2020 blocking charge amendments require the Board to do precisely that. In particular, the April 2020 Board acknowledged that the results of the elections must be set aside and rerun elections ordered when the Type I charges are found to have merit and to have impacted the election. The April 2020 Board further

acknowledged that the ballots cast in cases involving certain types of Type II charges will either not be honored (if the ballots had been counted) or will “never be counted” (if they were impounded because a complaint, which issued within 60 days of the election, is found to have merit). Thus, it cannot be denied that under the April 2020 amendments, regional directors will be required to run—and employees, unions, and employers will be required to participate in—elections conducted under coercive conditions. 85 FR 18370, 18378–18380. Subject to comments, we are also inclined to believe that because the April 2020 final rule requires regional directors to run—and employees, unions, and employers to participate in—elections that will not resolve the question of representation because they were conducted under coercive circumstances, the proposed amendments run the risk of imposing unnecessary costs on the parties and the Board. Subject to comments, we are also inclined to believe that the Board's position in the April 2020 rulemaking—that nothing is more important under the Act and its policies than having employees vote without delay in every case (even though it means they will be required to vote in elections under coercive conditions)—cannot be squared with the Board's responsibility to provide laboratory conditions for ascertaining employee choice during Board-conducted elections. Put simply, we are inclined to disagree with the April 2020 Board's conclusion that it is inappropriate to delay an initial election to shield employees from having to vote under coercive circumstances.

Subject to comments, we also question the April 2020 Board's premise that its amendment requiring elections to be held in all cases involving requests to block 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. While we recognize that blocking elections based on nonmeritorious charges may result in some delay, our preliminary position, subject to comments, is that the benefits of not allowing elections to proceed under the clouds of an unfair labor practice far outweigh any such delay. We are inclined to believe that the Board's blocking charge policy as it existed prior to the effective date of the April 2020 final rule best preserved employee free choice in representation cases in which petitions are blocked because of concurrent unfair labor practice charges. We note that because

¹⁰⁰ While we acknowledge the Supreme Court's teaching that *relevant* data must be examined in the course of rulemaking, *Motor Vehicle Mfrs. Assn. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983), it remains true that the Agency may make policy decisions for which the data does not provide the answer.

¹⁰¹ Cf. *American Relay Radio League v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008) (“[S]tudies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment.”); *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375, 392–393 (D.C. Cir. 1973) (relying on inaccurate data is a “critical defect” in an agency's decisionmaking during a rulemaking proceeding).

¹⁰² See 29 CFR 103.20 (Dec. 15, 2014) (requiring that a party filing a request to block must simultaneously file an adequate offer of proof and promptly make its witnesses available, and further providing that “[i]f 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 or would be inherently inconsistent with the petition itself, and thus would require that the processing of the petition be held in abeyance absent special circumstances, the regional director shall continue to process the petition and conduct the election where appropriate.”).

the historical blocking charge policy provided for the regional director to resume processing the representation petition to an election if a charge were ultimately determined to lack merit, employees in those cases would be afforded the opportunity to vote whether they wish to be represented, and thus employee free choice was preserved. However, unlike the April 2020 rule amendments, the Board's historical blocking charge policy also protects employee free choice in cases involving *meritorious* charges by suspending the processing of the election petition until the unfair labor practices are remedied. By shielding employees from having to vote under coercive conditions, the historical blocking charge policy would seem to be more compatible with the policies of the Act and the Board's responsibility to provide laboratory conditions for ascertaining employee choice during Board-conducted elections. In short, we are inclined to believe, subject to comments, that it is the 80-year-old blocking charge policy, not the April 2020 final rule amendments requiring elections in all cases involving requests to block, that best protects employee free choice in the election process. 84 FR 39945.¹⁰³

¹⁰³ Subject to comments, we question the suggestion of the April 2020 Board that the Board's historical blocking charge policy can prevent employees from ever obtaining an election if they continue to desire an election after the merits of the charge are determined. 85 FR 18366, 18377. As shown, if the petition was held in abeyance because of a Type I charge, the regional director resumed processing the petition once the charge was ultimately found to lack merit or the unfair labor practice conduct was remedied. Casehandling Manual Sections 11732, 11733.1, 11734 (August 2007). If, on the other hand, the petition was dismissed because of a Type II charge, it was subject to reinstatement if the charge was found nonmeritorious. *Id.* at section 11733.2. And, as the courts had recognized, even if the petition was dismissed because of a meritorious Type II blocking charge, employees could, 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.”); see also *Albertson’s Inc. v. NLRB*, 161 F.3d 1231, 1239 (10th Cir. 1998) (“[A]ny 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.”). Moreover, even if the petitioner withdrew their petition, another employee was free to file a new petition. To be sure, as the April 2020 Board noted, 85 FR 18377, 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.

In proposing to return to the Board's historical blocking charge policy, we further note that the April 2020 Board pointed to nothing that had changed in the representation case arena during the eight decades that the blocking charge policy had been in existence that justified making their sea change in the law. Prior to the adoption of the April 2020 final rule, Congress had not amended the Act in such a way as to call the blocking charge policy into question. No court had invalidated the policy. To the contrary, the courts had recognized that the salutary reasons for the blocking charge policy “do not long elude comprehension,” and that the policy had “long-since [been] legitimized by experience.” *Bishop v. NLRB*, 502 F.2d 1024, 1028, 1032 (5th Cir. 1974).¹⁰⁴ And, significantly, the

We also question the final rule's complaint, 85 FR 18367, 18379, that the pre-April 2020 blocking charge policy renders illusory the possibility of employer-filed (“RM”) election petitions. Under that policy 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, as noted, then-Member McFerran's analysis of the relevant data indicated 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.

¹⁰⁴ *Accord Blanco v. NLRB*, 641 F.Supp. 415, 417–418, 419 (D.D.C. 1986) (rejecting claim that sec. 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 & Hospitality, LLC v. Ahearn*, 749 F.Supp.2d 951, 960–961 (D. Alaska 2010) (“[W]here 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.”). As the Fifth Circuit explained in *Bishop*, 502 F.2d at 1028–1029 (citations omitted), “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

Agency's regional directors—the officials who are charged with administering the policy in the first instance, and whose opinions were explicitly sought and received by the Board—had publicly endorsed the policy.¹⁰⁵

Subject to comments, we also question the reasons offered by the Board in adopting the April 2020 amendments and eliminating the historical blocking charge policy.

First, the April 2020 Board repeatedly emphasized the obvious: that the blocking charge policy causes delays in conducting elections. From this, the Board argued that the blocking charge policy impedes employee free choice. 85 FR 18366, 18367, 18372–18373, 18375–18380, 18393. However, as then-Member McFerran pointed out in her dissent to the proposed amendments, the Board's conclusion does not necessarily follow from its premise. 84 FR 39943. To the contrary, we are inclined to believe that the blocking charge policy better protects employee free choice notwithstanding the delay that the policy necessarily entails. As the Board has previously observed, “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 fn. 57 (emphasis in original). We thus are inclined to agree with the observation of the December 2014 Board, when it codified the decades-old blocking charge policy, that “[i]t advances no policy of the Act for the agency to conduct an election unless employees can vote without unlawful interference.” 79 FR 74429. If the circumstances surrounding an election interfere with employee free choice, then, contrary to the April 2020 final rule, it does not seem “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. 85 FR 18367,

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.”

¹⁰⁵ See April 13, 2018 Regional Director Committee's Response and Comments to the Board's Request for Information on the Representation-Case Procedures, at 1 (reporting that directors “do not see a need to change” blocking charge § 103.20).

18380, 18393. That is why, as the April 2020 Board acknowledged, elections conducted under coercive circumstances under its amendments will not actually resolve the question of representation.¹⁰⁶

Second, the Board complained 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 decertification elections. 85 FR 18367, 18376, 18377, 18379–18380, 18393. But, as then-Member McFerran pointed out in her dissent to the proposed rule, the prior Board majority made 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). 84 FR 39943. Nor did the final rule. In short, there has been no showing that it was the norm for unions to file frivolous blocking charges to postpone elections in RD or RM cases. And, as noted, the NPRM dissent's analysis of the pre-Covid data would seem to undercut the April 2020 Board's unsupported concern, as it appears to show that an overwhelming majority of the decertification petitions and employer filed RM petitions are never blocked, and that even in the minority of instances when decertification petitions and RM petitions are blocked, most of these petitions are blocked by meritorious charges.¹⁰⁷ Moreover,

¹⁰⁶ The April 2020 Board made the claim that employees would be less “frustrate[d]” or “confuse[d]” under its amendments, 85 FR 18380, which provide that, although the ballots will be promptly opened and counted in the vast majority of cases, the results of the election will nevertheless not be certified until there has been a final disposition of the charge and a determination of its effects on the petition by the Board. 85 FR 18370. We reject this speculative proposition. We are inclined to believe, subject to comments, that opening and counting ballots submitted under coercive circumstances, yet refusing to certify the results, will, at best, confuse employees and, at worst, actively mislead them by conveying a materially false impression of union support. Moreover, it takes the same amount of time to determine the merits of the charge, whether that determination is made before an election is conducted (as under the Board's historical blocking charge policy) or whether that determination is made after the election (as is the case under the April 2020 amendments). In short, just as was the case under the Board's historical blocking charge policy, the question of representation cannot be resolved under the April 2020 final rule until the merits of the charge have been determined. In any event, the final rule also did not address the frustration that might well be felt by employees who, under the April 2020 final rule, will be required to vote under coercive circumstances.

¹⁰⁷ Moreover, the NPRM dissent's analysis seemed to show that the merit rates for blocking

subject to comments, we are inclined to believe that the regulatory provisions adopted in 2014—requiring the party that seeks to block the election to (1) simultaneously file an offer of proof providing the names of its witnesses who will testify in support of the charge and a summary of each witness' anticipated testimony, and (2) promptly make the witnesses available to the regional director—constitute a disincentive to file frivolous charges and provide powerful tools to regional directors to promptly dispose of any frivolous charges that are filed. See *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 228 (5th Cir. 2016) (citing amended § 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.”).

Further, 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, the final rule cited the same few isolated cases that the NPRM had cited to support the April 2020 Board's claim of judicial concern about the blocking charge policy's effect on employee free choice. 85 FR 18367, 18376; 84 FR 39931–39932. Subject to comments, we are inclined to believe that those cases do not constitute persuasive authority for eliminating the blocking charge policy, for the same reasons the dissenting Board member articulated in her dissent to the NPRM.¹⁰⁸

charges filed in the RD and RM contexts—66 percent and 89 percent respectively—were substantially higher than the merit rate for all unfair labor practice charges, which in FYs 2016 and 2017 merely ranged from 37.1% to 38.6%. 84 FR 39944 & fn. 64, 39945 fn. 69 (and materials cited therein). Ultimately, however, just as the April 2020 Board decided to substantially eliminate the blocking charge policy based on a policy choice that does not depend on statistical analysis, we propose to return to the judicially approved, historical blocking charge policy based on a policy choice that the historical blocking charge policy better enables the Board to fulfill its function in election proceedings of providing a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of employees.

¹⁰⁸ As mentioned above, although the Board's application of the blocking charge policy in a particular case had occasionally been criticized, no court had ever denied enforcement to a Board

Third, the April 2020 Board found 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 they wish to obtain, or retain, union representation. 85 FR 18367, 18377, 18393. Subject to comments, we are inclined to believe that that does not constitute a persuasive reason to retain the April 2020 amendments. As the dissent to the NPRM pointed out, the Board ignored that regional directors and the General Counsel make all sorts of administrative determinations that impact the ability of employees to obtain an election or to retain union representation. 84 FR 39944. 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 nonlitigable). 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).¹⁰⁹ Indeed, the Board's skepticism toward regional director administrative determinations in this context is in considerable tension with Congress' decision to authorize regional directors to administratively decide when elections should be conducted in

decision based upon a generalized rejection of that policy. 84 FR 39943.

¹⁰⁹ The D.C. Circuit's decision in *Allied Mechanical Services, Inc. v. NLRB*, 668 F.3d 758, 761, 771, 773 (D.C. Cir. 2012) provides further support for the notion that the April 2020 Board's distrust of administrative determinations is not well founded. There, the court rejected claims that an administrative settlement of a *Gissel* complaint—that is, a settlement agreement approved by a regional director requiring the company to bargain with the union as the unit's exclusive representative—was insufficient to demonstrate that a union had sec. 9(a) status. *Id.* at 770–771. In doing so, the court relied on a longstanding presumption that the actions of administrative officials are fair and regular. *Id.* (citing cases). The court reasoned, moreover, that it would be “unlikely—and even illogical—to suppose that the Board's General Counsel would have asserted that a majority of [the Company'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.” *Id.* at 771.

the first place and when the results of elections should be certified in section 3(b) of the Act. See also 79 FR 74332–74334 (observing that Congress expressed confidence in the regional directors' abilities when it enacted section 3(b)).

Fourth, the April 2020 Board complained that employees who support decertification petitions are adversely affected by blocking charges because delay robs the petition effort of momentum and thereby threatens employee free choice. 85 FR 18367, 18393. We are inclined to believe, subject to comments, that this justification for the April 2020 amendments misapprehends the core statutory concerns underlying the blocking charge policy. As then-Member McFerran noted in her dissent to the NPRM, if a party has committed unremedied 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. 84 FR 39944. Indeed, the momentum that the final rule 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.¹¹⁰

¹¹⁰ Subject to comments, we question whether the Board was justified in adopting its amendments because they allow the balloting to occur when the parties' respective arguments are "fresh in the mind[s] of unit employees." 84 FR 39937–39938, 85 FR 18393. Under the Board's historical blocking charge policy, balloting also occurred when the parties' respective arguments were "fresh in the minds" of unit employees, because parties had an opportunity to campaign after the regional director resumed processing a petition (once either the unfair labor practice conduct was remedied or the director determined that the charge lacked merit). Subject to comments, we are inclined to believe that all the April 2020 final rule ensures is that balloting will occur when the unremedied *coercive conduct* is fresh in the minds of unit employees, undermining the Act's policy of protecting employee free choice in the election process and contravening the Board's duty to conduct fair elections.

We also question whether the Board was justified in adopting the April 2020 amendments because they eliminate the ability of either party to control the pre-election narrative as to whether the Board has found probable cause that the employer has committed unfair labor practices. 84 FR 39938, 85 FR 18393. As then-Member McFerran pointed out in her dissent to the NPRM, under the Board's historical blocking charge policy, neither the Board nor the regional director notified unit employees that the petition was being held in abeyance because there was "probable cause" to believe that

The April 2020 Board also criticized the blocking charge policy as creating "an anomalous situation" whereby conduct (if alleged in election objections) that cannot be found to interfere with employee free choice because it occurred pre-petition, see *Ideal Electric*, 134 NLRB 1275 (1961), can nevertheless be the basis for delaying or denying an election. 85 FR 18367, 18393. We question whether this constitutes a persuasive reason not to return to the blocking charge policy as it existed prior to the effective date of the April 2020 amendments. *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 Healthcare, Inc.*, 343 NLRB 906, 912 fn. 21 (2004). Accord *Madison Square Garden CT., LLC*, 350 NLRB 117, 122 (2007). Further, as the April 2020 Board implicitly conceded, under its final rule, it is equally the case that ballots will "never be counted" in some cases based on serious pre-petition misconduct, such as where the employer instigates the petition and where a complaint issues within 60 days of the election. 85 FR 18378, 18380 (even if the ballots are counted under the April 2020 final rule because the complaint on the Type II charge issues more than 60 days after the election, the ballots will be thrown out if the Board ultimately decides that the charge has merit). Moreover, under the pre-April 2020 blocking charge policy, regional directors had discretion to reject

a party had committed unfair labor practices. 84 FR 39946 fn. 70. To be sure, under the Board's historical blocking charge policy, a party was free to tell unit employees that the regional director had blocked action on the petition because a party stood accused of committing unfair labor practices, and the charged party was free to tell the unit employees that it was innocent of any wrongdoing and that the charging party was responsible for the delaying the employees' opportunity to vote. But, under the April 2020 final rule, parties are similarly free to inform unit employees, in advance of the election in the vast majority of cases, that although employees will be permitted to vote, the results of the election will not be certified until a final determination is made as to the merits of the unfair labor practice charge(s) alleging that a party has engaged in conduct that interferes with employee free choice (or that the regional director will impound the ballots cast in the election for at least 60 days—rather than immediately opening and counting the ballots following the election—because a party stands accused of committing unfair labor practices concerning the legitimacy of the petition itself). The charged party, meanwhile, will be free to inform unit employees that it is innocent of any wrongdoing and that the charging party is responsible for the delay in the certification of the results or the opening and counting the ballots.

blocking requests and proceed straight to an election when they concluded that, under the circumstances, employees would be able to exercise free choice notwithstanding a pending unfair labor practice charge (because, for example, the charge merely alleged minor and isolated pre-petition unfair labor practice conduct).¹¹¹

The April 2020 Board also justified its amendments to the blocking charge policy by claiming that regional directors had not been applying the blocking charge policy consistently. 85 FR 18367, 18379, 18393. However, after reviewing the final rule, we question whether that justification is persuasive. The final rule did not offer any specific evidence demonstrating any significant differences in how regions were actually applying the blocking charge policy as it existed at the time. Moreover, because the pre-April 2020 blocking charge policy entitled parties to file requests for Board review of regional director decisions to block elections based on either Type I or Type II charges, we believe that the Board had the ability to correct any erroneous blocking determinations made by regional directors. See 29 CFR 102.71 (2011); Casehandling Manual Sections 11730.7, 11733.2(b) (January 2017). Accordingly, we are inclined to believe that a return to the blocking charge policy as it existed prior to the effective date of the amendments would not create a widespread problem where petitions that would normally be blocked in some regions would normally be processed to election in other regions.

The April 2020 Board also faulted the blocking charge policy because a possible result of delaying elections is that employees who were in the workforce when the petition was filed might not be in the workforce when the election is ultimately held following disposition of the blocking charge, thereby disenfranchising those employees. 85 FR 18367, 18378, 18393. Subject to comments, we question whether this justification for eliminating the historical blocking charge policy is persuasive. Unless the Board were to conduct elections the day the election petition is filed, the possibility of employee turnover is unavoidable. Indeed, even in the absence of any unfair labor practice charges being filed

¹¹¹ See Casehandling Manual Section 11731.2 (January 2017) ("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.").

prior to the election, those eligible to vote are *not* those employed in the unit at the time the petition is filed. Rather, the employees who are eligible to vote in the election are those employees who were employed during the payroll period for eligibility and who remain employed as of the election. In directed election cases, this means that only employees employed in the unit during the payroll period immediately preceding the date the decision and direction issues—and who remain employed as of the election—are eligible. Casehandling Manual Section 11312.1 (August 2007). In the stipulated election context, the payroll period for eligibility is normally the last payroll period ending before the regional director's approval of the agreement. Casehandling Manual Sections 11086.3, 11312.1 (August 2007).

Subject to comments, we are inclined to believe that it serves no valid purpose to conduct elections in which employees cannot exercise free choice, even though delaying the election until employees can vote in a noncoercive atmosphere might mean that some employees who were present at the time the petition was filed are no longer employed at the time a free and fair election is held. As for the subset of cases where the charges are nonmeritorious, we question whether it is “unjust” to bar employees from voting who were employed at the time of the petition filing, but who are no longer employed when the regional director resumes processing the petition. As noted, the same rule applies in cases where no unfair labor practice charges are ever filed. Thus, employees who were employed as of the filing of the petition, but who are no longer employed as of the time of the election, are not eligible to vote. Certainly, there is nothing in the blocking charge policy that compels any employee to leave their place of employment during the period when the petition is held in abeyance pending a determination of the merits of the charge. The April 2020 Board does not explain why employees who are no longer in the workforce should be given a say in determining whether current employees should be represented for purposes of collective bargaining with their employer.¹¹²

¹¹² Subject to comments, we are also inclined to believe that the April 2020 Board's view—that it should prioritize speedy elections over employee free choice in order to maximize the likelihood that those employed at the time of the petition filing will be able to vote in an election—is undermined by the same Board's adoption of the 2019 Representation-Case Procedures Rule that delayed the period of time between the filing of the petition and the holding of the election (thereby potentially disenfranchising those employed when the petition

We additionally note that the April 2020 amendments do not entirely eliminate the risk that employees who end up voting in a valid election (*i.e.*, an election whose results are certified) will not be those who were employed at the time of the petition filing. To repeat, the April 2020 final rule recognizes that the Board should set aside the initial election and, in certain circumstances, conduct a rerun election in cases where the charges are meritorious. And just as was the case prior to the April 2020 amendments, the eligibility period for rerun elections after that final rule is the payroll period preceding the date of issuance of the notice of rerun election, *not* the payroll period preceding the date of the original decision and direction of election (or approval of the stipulated election agreement), and certainly not the date of the petition filing. See Casehandling Manual Sections 11436, 11452.2 (August 2007); Casehandling Manual Sections 11436, 11452.2 (September 2020). Some risk of disenfranchisement is unavoidable in this context, but the risk of disenfranchisement caused by holding an election under nonlaboratory conditions may well outweigh that risk under the 2020 final rule.

The final rule also appeared to suggest that the blocking charge policy impeded settlement and that the policy should therefore be eliminated to promote settlement of blocking charges. 85 FR 18380. We confess that we are not entirely certain that we understand the Board's cryptic statements in this regard. To the extent that the April 2020 Board adopted the amendments because it believed they would promote settlement (by enabling the parties to

was filed) in cases where there have been no unfair labor practice charges of any kind filed, let alone those alleging conduct that would interfere with employee free choice. See *Representation-Case Procedures*, 84 FR 69524, 69524–69525, 69560–69563, 69566–69569, 69572–69579, 69580–69585 (Dec. 18, 2019) (noting that the Board's December 2019 rule delays the period between the filing of the petition and the election in directed election cases by, for example, delaying the opening of the pre-election hearing by two weeks—beyond any Board's processing time in more than two decades—while simultaneously making such hearings easier to postpone, entitling parties to file briefs in all cases a week after the close of the pre-election hearing (with additional extensions of up to 2 weeks) even when the regional director concludes that briefing would be unhelpful, entitling parties to litigate matters that are not relevant to the statutory purpose of the pre-election hearing and requiring regional directors to decide matters that need not be decided to determine whether a question of representation exists that should be resolved by an election; and instituting a 20-business day waiting period between the direction of election and the election itself to allow the Board to rule on interlocutory appeals that are rarely filed prior to the election, almost never result in reversals before the election, and in any event could be mooted by election results).

know the results of the election during their settlement discussions), we question whether that belief is a reason to refrain from restoring the Board's historical blocking charge policy. The blocking charge policy advances core statutory interests—promoting employee free choice regarding whether to be represented by a labor organization for purposes of collective bargaining. We are inclined to believe that, even assuming for purposes of argument that the April 2020 final rule promotes settlement of charges, the worthy administrative goal of promoting settlement of unfair labor practice charges should not trump the fundamental *statutory* policy of protecting the right of employees to freely choose whether to be represented for purposes of collective bargaining by labor organizations.

In any event, we note that the April 2020 Board did not explain why parties would in fact be more likely to settle a charge under the April 2020 amendments (which provide for the holding of an election in all cases) than they would be to settle if the same charge were instead holding up an election and preventing employees from voting (under the pre-April 2020 blocking charge policy). And we question whether that is the case. Indeed, we suspect that the April 2020 Board thought that settled charges should not be deemed meritorious in part because it believed that at least some employers thought that it was worth settling blocking charges under the historical blocking charge regime that they otherwise would not have settled just so that their employees could vote “sooner” to possibly rid themselves of their representative in a decertification election. However, as noted, under the April 2020 amendments, employees will be permitted to vote even if the employer does not settle a pending charge against it before the election. Nor is it clear why the April 2020 final rule would encourage a union (that is seeking to delay its ouster) to settle its unfair labor practice charge after the election. As noted, under the April 2020 amendments, the certification of results is withheld until there is final disposition of the charge and its impact on the election by the Board. 85 FR 18370, 18377, 18399. In other words, under the April 2020 final rule, the outcome of the representation case still must await the outcome of the unfair labor practice case (even though an election has been held), the same result that obtained under the Board's historical blocking charge policy. And it

takes the same amount of time to determine the merits of the charge whether that determination is made before an election is conducted (as under the Board's historical blocking charge policy) or whether that determination is made after the election (as is the case under the April 2020 amendments).

We also question the April 2020 Board's apparent view that once the results of the election are known, the unfair-labor-practice-charge-settlement discussions are simplified because the parties' strategic considerations related to the election are removed from consideration. 85 FR 18380. Thus, although under the April 2020 amendments, an election will be held in all cases, it seems that parties will still have to consider the representation case as part of their settlement negotiations regarding the unfair labor practice charge(s). Because, as the April 2020 Board noted (85 FR 18377), a "settled charge" cannot be deemed meritorious unless it has been admitted by the charged party, a settled charge cannot result in a rerun election (or dismissal of the petition) unless the charged party agrees to a rerun election as part of the settlement agreement or admits that it violated the Act as part of the settlement. Thus, the party seeking to set aside the election results will need to address the representation case as part of its settlement discussions regarding the unfair labor practice charge(s) it filed. (In other words, the charging party will want the charged party as part of the settlement to agree to a rerun election or to admit that it violated the Act.) Indeed, knowledge of the provisional election outcome may perversely incentivize cases *not* to settle where a party deems that vote tally so valuable to its interests that it makes it efficient to litigate a long-shot legal theory in the unfair labor practice case.

Finally, the final rule asserted that there is no reason to delay elections when charges allege conduct that would interfere with employee free choice because the Board can always conduct a rerun election if the charge is ultimately found meritorious (or issue an affirmative bargaining order in cases involving the limited subset of Type II charges). 85 FR 18378, 18380. Subject to comments, we are inclined to disagree. Indeed, we are inclined to believe that, by requiring the Board to conduct elections under coercive circumstances, the April 2020 amendments contravene the Board's responsibility to conduct free and fair elections and undermines the Act's policy of protecting employee free choice in the election process. We also are inclined to believe, subject to

comments, that by forcing employees to go to elections that will not count, the April 2020 final rule additionally threatens to create a sense among the employees that attempting to exercise their section 7 rights is futile, while risking imposing unnecessary costs on the parties and the Board. Moreover, by requiring the Board to conduct elections that will have to be rerun, the April 2020 final rule would seem to threaten industrial peace.

Subject to comments, we are inclined to believe that the April 2020 amendments do not put the unit employees 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 voting in an atmosphere of coercion. But employees seemingly have to vote in an atmosphere of coercion under the April 2020 amendments, because the April 2020 final rule requires regional directors to conduct elections in all cases where there are concurrent unfair labor practice charges and further requires the opening and counting of the ballots in the vast majority of such cases. Accordingly, when a rerun election is conducted after the charged party takes all the action required by the Board order or settlement agreement, the union will have to convince each employee who voted against it under coercive conditions to switch their 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 conduct was remedied. And, as the Board previously concluded in its 2014 rule, 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). The union will also have to convince employees that it is worth voting for the union—and to risk incurring the wrath of their employer—even though employees will know that the union already lost the earlier election, 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.¹¹³ It certainly cannot be counted as a statutory success if a union chooses not to seek a rerun election after losing an election conducted under coercive conditions that interfered with employee free choice. Thus, we are inclined to believe, subject to comments, that it is the historical blocking charge policy, rather than the April 2020 amendments, that puts the unit 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.

We are also inclined to believe that the April 2020 final rule creates perverse incentives for employers to commit unfair labor practices. By requiring the Board to conduct elections in most cases where Type I or Type II unfair labor practice conduct has occurred, the final rule 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 reflect the uninhibited desires of the employees; and (2) to create a sense among employees that seeking to exercise their section 7 rights is futile.¹¹⁴ 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 and

¹¹³ We note that the April 2020 final rule implicitly conceded the validity of these concerns in two primary respects. First, the rule acknowledged that the harm employees will suffer by voting in an election that will later be set aside can be addressed "in some cases" by impounding the ballots. 85 FR 18378, 18380. Second, the rule apparently relied on a premise that the immediate opening and counting of the ballots in the vast majority of cases provides a disincentive for unions to file charges seeking to block the election because tallying the ballots reveals to employees that the union is acting against their wishes. 85 FR 18379–18390. Thus, under this premise, if the union has lost the election that was conducted despite the pendency of charges alleging coercive conduct, that circumstance will (or is at least very likely to) have a meaningful effect on employees' perception of the union.

¹¹⁴ Indeed, it seems difficult, at least, to square the April 2020 final rule's 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" *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 591–592, 610–611, 614–615 (1969).

contravening the statutory policy favoring “eliminat[ing] the causes of certain substantial obstructions to the free flow of commerce.” 29 U.S.C. 151.

In sum, we are inclined to believe, subject to comments, that the Board’s historical blocking charge policy better protects employee free choice than the April 2020 amendments. Accordingly, we propose to permit regional directors once again to generally decline to process election petitions at the request of a party who has filed an unfair labor charge alleging conduct that would interfere with employee free choice in an election or that is inherently inconsistent with the petition itself and which is supported by an offer of proof listing the names of the witnesses who will testify in support of the charge and a summary of each witness’s anticipated testimony, until the merits of the charge can be determined.

B. Rescission of Rule Providing for Processing of Election Petitions Following Voluntary Recognition; Voluntary-Recognition Bar to Processing of Election Petitions

The Board, subject to comments on all aspects of the proposed rule, proposes to rescind the current § 103.21 of the Board’s Rules and Regulations, providing for the processing of election petitions following voluntary recognition, and to replace it with a new rule that codifies the traditional voluntary-recognition bar as refined in *Lamons Gasket Co.*, 357 NLRB 739 (2011), which the Board overruled in adopting § 103.21.¹¹⁵

¹¹⁵ Concerning the appropriateness of bargaining units in this context, in *Central General Hospital*, 223 NLRB 110, 111 fn. 10 (1976), the Board stated: “As in the contract bar area, e.g., *Airborne Freight Corporation*, 142 NLRB 873, 874–875 (1963), a recognition agreement constitutes a bar only if the unit involved meets the requisite standard of appropriateness.” Thus, under the proposed rule, the recognition bar applies where the recognized unit is an appropriate one. However, as *Central General Hospital* suggests, this requirement incorporates the long-standing principle that the appropriateness of the unit depends on the context, and the question of whether a voluntarily recognized unit is appropriate may turn on considerations deemed relevant in this particular setting, or in an analogous context, such as contract or successor bar, rather than those that obtain in the case of an initial determination made by the Board following a representation petition. Id. at 111–112 (“[T]he resulting unit is sufficiently appropriate for the recognition agreement to operate as a bar”) (emphasis added). See also *NLRB v. Cardox Div. of Chemetron Corp.*, 699 F.2d 148, 156 (3d Cir. 1983) (“[I]n a voluntary recognition case, section 9(b) requires only that the Board make a determination that the unit agreed upon by the parties is not inconsistent with the National Labor Relations Act and past Board policy.”); *Airborne Freight Corp.*, supra 142 NLRB at 874–875 (“[T]he voluntary grouping of the two clericals with the operating employees, a number of whom regularly perform clerical functions, is insufficient to render the

The proposed rule, like current § 103.21, is limited to the representation-case context. It does not subject an employer to unfair labor practice liability under section 8(a)(5) of the Act for withdrawing recognition from a voluntarily recognized union before a reasonable period for bargaining has elapsed. See, e.g., *Brown & Connolly, Inc.*, 237 NLRB 271, 275 (1978), enf’d. 593 F.2d 1373 (1st Cir. 1979). The Board invites public comment on whether it should adopt as part of the Board’s Rules and Regulations a parallel rule to apply in the unfair labor practice context, prohibiting an employer—which otherwise would be privileged to withdraw recognition based on the union’s loss of majority support—from withdrawing recognition from a voluntarily recognized union, before a reasonable period for collective bargaining has elapsed.

The Board’s preliminary view is that restoring the voluntary-recognition bar, in its more traditional form, as well as the traditional contract bar in cases of voluntary recognition, better serves the policies of the National Labor Relations Act, respecting—indeed, vindicating—employee free choice, while encouraging collective bargaining and preserving stability in labor relations.¹¹⁶ Experience under § 103.21, meanwhile, seems to show that voluntary recognition almost always reflects employee free choice accurately. This was the experience under *Dana* as well. Thus, the Board is concerned that § 103.21 imposes requirements that burden collective bargaining without producing commensurate benefits in vindicating employee free choice of bargaining representatives. Such a disproportionate waste of party and Board resources cannot be justified by reference to Federal labor policy, which favors voluntary recognition.¹¹⁷

contractual agreement inherently inappropriate and remove the agreement as a bar”).

¹¹⁶ With the rescission of the current rule and the rejection of the rationales for treating voluntarily-recognized unions substantially differently for the purposes of challenges to a union’s status, the Board’s contract-bar doctrine—which generally insulates a union, regardless of the means by which it established its majority status, from challenges during the term of a collective-bargaining agreement—will be restored in the case of contracts executed with voluntarily-recognized unions to the same extent it has applied historically (typically, if certain criteria are met, for a period not to exceed 3 years). See *Lamons Gasket Co.*, supra, 357 NLRB at 745 fn. 22.

¹¹⁷ In affirming the Board’s application of the traditional voluntary-recognition bar, the District of Columbia Circuit, for example, has explained that whatever advantages an election may have over the use of authorization cards to determine employee support for a union, “an employer’s voluntary recognition of a majority union also remains ‘a

We believe, subject to comments, that restoration of the voluntary-recognition bar as proposed in this document is fully consistent with the statutory language and would better effectuate the purpose and policies of the Act. Several Federal appellate courts have endorsed the voluntary-recognition bar, deferring to the Board’s understanding of the Act and its application of the Act’s policies.¹¹⁸ No court of appeals has rejected the voluntary-recognition bar. Neither the *Dana* Board nor the Board that promulgated § 103.21 argued that the traditional voluntary-recognition bar was irrational or inconsistent with the Act. Nor did the Board at either time argue that the election procedure established in *Dana*, and then reestablished in § 103.21, was somehow compelled by the Act.¹¹⁹ While the Board’s approach to the voluntary-recognition bar has varied, the Board consistently has viewed the issue as presenting a policy choice for the Board to make, and this, of course, is how the Federal courts have seen it for decades. Similarly, applying contract-bar principles has long been recognized as promoting stability in the bargaining relationships between employers and unions.¹²⁰

In proposing to restore the traditional voluntary-recognition bar, subject to comments, we give weight to the rationale for the bar that the Board, with judicial approval, has advanced and adhered to in the past: that the new

favored element of national labor policy.” *NLRB v. Creative Food Design Ltd.*, 852 F.2d 1295, 1299 (D.C. Cir. 1988) (quoting *NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1978)). Other circuits have characterized voluntary recognition precisely the same way. See, e.g., *NLRB v. Winco Petroleum Co.*, 668 F.2d 973, 981 (8th Cir. 1982); *NLRB v. Lyon & Ryan Ford, Inc.*, 647 F.2d 745, 750 (7th Cir. 1981).

¹¹⁸ See, e.g., *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1247–1248 (D.C. Cir. 1994); *Royal Coach Lines, Inc. v. NLRB*, 838 F.2d 47, 51–52 (2d Cir. 1988); *NLRB v. Lyon & Ryan Ford, Inc.*, supra, 647 F.2d at 750–751; *NLRB v. Broadmoor Lumber Co.*, supra, 578 F.2d at 241; *Toltec Metals, Inc. v. NLRB*, 490 F.2d 1122, 1125–1126 (3d Cir. 1974); *NLRB v. San Clemente Publishing Corp.*, 408 F.2d 367, 368 (9th Cir. 1969); *NLRB v. Montgomery Ward & Co.*, 399 F.2d 409, 411–413 (7th Cir. 1968); *NLRB v. Universal Gear Service Corp.*, 394 F.2d 396, 397–398 (6th Cir. 1968).

¹¹⁹ See *United Mine Workers of America v. Arkansas Oak Flooring Co.*, supra, 351 U.S. at 73 (explaining that union’s failure to comply with certain statutory provisions, which prevented union from being certified by Board, did not prevent union from being voluntarily recognized by employer: “The very specificity of the advantages to be gained [by compliance with statutory provisions] and the express provision for the loss of these advantages imply that no consequences other than those so listed shall result from noncompliance.”). The statutory benefits conferred only on certified unions are discussed above at fn. 16 and the accompanying text.

¹²⁰ See, e.g., *General Cable Corp.*, 139 NLRB 1123, 1125 (1962).

collective-bargaining relationship established through voluntary recognition—just like bargaining relationships established through other lawful means and protected by related Board bar doctrines—“must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed,” in the Supreme Court’s words,¹²¹ in order to promote the Act’s goals of encouraging the practice and procedure of collective bargaining. We specifically invite comment on the reasonable period for bargaining defined in the proposed rule. In our initial view, the current rule tends to undermine (a) the stability vital for the parties to successfully negotiate a first contract, as the employer may question whether its negotiating partner may be out of the picture in a matter of weeks, and (b) the stability needed to fairly administer an executed collective-bargaining agreement without the shadow of a possible challenge to the union’s status by making the contract bar contingent on the notice procedure.

In proposing to return to the voluntary-recognition bar that existed under the Board’s *Lamons Gasket* decision, we note that the Board in *Lamons Gasket* provided, in accordance with its decision in *Smith’s Food & Drug Center*, 320 NLRB 844 (1996), that “voluntary recognition of one union will not bar a petition by a competing union if the competing union was actively organizing the employees and had a 30-percent showing of interest at the time of recognition.” 357 NLRB at 745 fn. 22. Because of the importance of stability to newly-established collective-bargaining relationships, we invite public comment on whether the Board should continue to process, consistent with *Smith’s Food*, a representation petition filed by a competing union that had a 30-percent showing of interest at the time of recognition or bar the processing of such a petition so as to not delay until after a Board election the employer’s recognition of the employees’ designation of their collective-bargaining representative.

We are further inclined to believe that § 103.21 rejects the premise that newly established bargaining relationships must be given a fair chance to succeed in the context of voluntary recognition. In the name of promoting employee free choice, the rule permits a union’s representative status to be challenged by an election petition immediately after the union has been voluntarily recognized. Indeed, the rule arguably

invites such a challenge, by requiring employers, as a precondition to receiving the benefit of the recognition and contract bars, to post a notice to employees informing them of their right to file an election petition with the Board. In no other context does the Board require that employees be given notice of their right to change their minds about a recent exercise of statutory rights.¹²² Section 103.21 suggests to employees that the Board considers their choice to be represented suspect and signals to employees that their choice should be reconsidered through the filing of a petition.¹²³

It does so absent any basis to conclude that the union was not, in fact, freely chosen by employees to represent them. To proceed to an election, employees opposed to the union need not allege, much less establish, that the union lacked lawful majority support at the time it was voluntarily recognized. Nor are employees required to present evidence demonstrating that a majority of bargaining-unit employees no longer support the recently recognized union. Rather, a showing that a minority of unit employees (as few as 30 percent) desire an election is enough. An election, in turn, is decided by a majority of voting employees, who may comprise a minority of unit employees. Subject to comments, the Board’s preliminary view is that § 103.21 actually undermines employee free choice by failing to fully respect the lawful designation of the voluntary-recognized union by a majority of bargaining-unit employees.¹²⁴

To be sure, § 103.21 acknowledges that the employer still has a duty to bargain with the voluntarily recognized union. But collective bargaining during the 45-day window period for petitions established by § 103.21 will necessarily proceed (or not) under the cloud cast by the possibility of a challenge to the union’s status, which (if successful) would vitiate any agreement reached. And if an election petition is filed, then bargaining will proceed under the same cloud until the election is held. In such a situation, it seems reasonable to conclude that instead of being “given ample time for carrying out its mandate on behalf of its members,” a union will be “under exigent pressure to produce hot-house results or be turned out”—a concern cited by the Supreme Court in upholding the Board’s rule that the

status of a newly-certified union may not be challenged for one year.¹²⁵ That concern would seem to apply with equal force in the context of voluntary recognition, as the Federal courts have recognized.¹²⁶ The Board’s tentative view—in agreement with the *Lamons Gasket* Board, but subject to comments—is that § 103.21 thus has a significant potential to interfere with effective collective bargaining.¹²⁷ Insofar as § 103.21 might be premised on the view that voluntary recognition based on union-authorization cards is inherently suspect, it would be in obvious tension with the provisions of the Act reflecting Congress’s determination that a lawful—and, indeed, statutorily enforceable—collective-bargaining relationship may be established *without* a Board election.¹²⁸ Indeed, in holding that the Board, under certain circumstances, may *compel* an employer to recognize and bargain with a union whose majority support was demonstrated by authorization cards, the Supreme Court has flatly rejected arguments that union-authorization cards cannot reliably reflect employee free choice—and has noted a “union’s right to rely on cards as a freely interchangeable substitute for elections where there has been no election interference.”¹²⁹

¹²⁵ *Brooks v. NLRB*, 348 U.S. 96, 100 (1954).

¹²⁶ See, e.g., *NLRB v. Cayuga Crushed Stone, Inc.*, 474 F.2d 1380, 1383–1384 (2d Cir. 1973). The Second Circuit there noted with approval the “general Board policy of protecting validly established bargaining relationships during their embryonic stage.” *Id.* at 1384 fn. 5.

¹²⁷ In adopting § 103.21, the Board pointed to the absence of more than anecdotal evidence that the election procedure previously established by the *Dana* decision did, in fact, discourage or delay collective bargaining. 85 FR 18384. Nonetheless, the Board did acknowledge the possibility that the “existence of a pending election petition will cause unions to spend more time campaigning or working on election-related matters rather than doing substantive work on behalf of employees,” but expressed the view that “this is a reasonable trade-off for protecting employees’ ability to express their views in a secret-ballot election.” *Id.* at 18384–18385. The *Lamons Gasket* Board, in contrast, cited the *Dana* experience of unions that filed amicus briefs with the Board, as well as the game-theoretical model of collective bargaining presented by amicus Professor Kenneth Dau-Schmidt. *Lamons Gasket*, supra, 357 NLRB at 747 & fn. 30. We invite public comment on the effect of § 103.21 on collective-bargaining negotiations.

¹²⁸ As explained, sec. 8(a)(5) of the Act requires an employer “to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a),” 29 U.S.C. 158(a)(5), and sec. 9(a), in turn, refers to “[r]epresentatives designated or selected . . . by the majority of the employees” in an appropriate unit. 29 U.S.C. 159(a) (emphasis added). See *Gissel Packing Co.*, supra, 395 U.S. at 596–598.

¹²⁹ See *Gissel Packing Co.*, supra, 395 U.S. at 601–604. The *Gissel* Court noted that in the case before it, “a union’s right to rely on cards as a freely interchangeable substitute for elections where there

¹²² *Lamons Gasket*, supra, 357 NLRB at 743.

¹²³ *Id.* at 744.

¹²⁴ See *Lamons Gasket*, supra, 357 NLRB at 746 (observing that “a more demanding standard is imposed on voluntary recognition than on certification following a Board-supervised election” and citing authority).

¹²¹ *Franks Bros. Co. v. NLRB*, supra, 321 U.S. at 705. See *Lamons Gasket*, supra, 357 NLRB at 739–740, 744–745.

Finally, this proposal to return to the traditional voluntary-recognition bar, as refined in *Lamons Gasket*, is consistent with the Board's preliminary view of the experience to date under § 103.21. That experience provides no evidence that voluntary recognition is suspect (as discussed above) and thus there is nothing to outweigh the reasonable tendency of the current rule to undermine employee free choice (as reflected in the lawful designation of the voluntarily recognized union) and to interfere with effective collective bargaining. Rejecting the *Dana* election procedure, the *Lamons Gasket* Board pointed to the tiny fraction of cases in which, following voluntary recognition of a union, employees ultimately rejected the union in a Board election. According to the Board in *Lamons Gasket*, the data showed that the "proof of majority support that underlay the voluntary recognition [of unions] during the [*Dana* period] was a highly reliable measure of employee sentiment," contrary to the assumption of the *Dana* Board.¹³⁰ Insofar as § 103.21 might be premised on any empirical showing of the rate at which employees reject the union following the posting of the notice prescribed in the current rule, it, too, would seem to lack substantial empirical support.

But in restoring the *Dana* election procedure by adopting § 103.21, the Board did not clearly endorse or reject the premise on which the procedure was originally based. The Board's position arguably was grounded not in administrative experience, but rather in a particular interpretation of the Act, independent of that experience—and so not falsifiable by empirical evidence.¹³¹ Subject to comments, we doubt that the Act's provision for Board elections as one means (but not the exclusive means) for determining employee free choice, coupled with the implicit statutory preference for Board elections (insofar as certain benefits are conferred only on certified unions), were enough to justify restoring the *Dana* procedure, given substantial evidence that permitting an election soon after voluntary recognition almost never results in employees making a *different* choice. Indeed, in adopting § 103.21, the Board

acknowledged that "data from the post-*Dana* period indicates that recognized unions will not often have to jump through the procedural 'hoop' of an election, and those that do will far more often emerge with a reaffirmation of their majority support" ¹³² Put differently, the evidence seems strongly to suggest that the *Dana* procedure is an empty exercise at best, and one which imposes pointless burdens on parties and the Board—or at least that it is not something that would justify the current rule's departure from policies favoring voluntary recognition and encouraging stability in such bargaining relationships. We invite commenters to submit additional empirical evidence to inform our views on this subject.

As noted earlier, the experience under § 103.21 has been entirely consistent with the experience under *Dana*. To date, the current rule has resulted in scant instances of employees actually filing a petition and almost no instances of employees rejecting the voluntarily recognized union. Thus, only 0.4 percent of cases (1 out of 260 included cases) resulted in a petition being filed, and 0.4 percent resulted in a union's loss of representative status. Both data sets show that the number of instances in which the notices have resulted in the filing of a petition or holding an election is vanishingly small—and the cases where the voluntarily recognized union was displaced to be almost nothing. It seems illuminating that the post-§ 103.21 data show no significant change from the post-*Dana* data, suggesting that the low rate of election-petition filing and employee rejection of the voluntarily recognized union is consistent over time. Our preliminary view, accordingly, is that just as the Board's administrative experience under the *Dana* election procedure refuted the rationale offered in *Dana* (as the *Lamons Gasket* Board explained), so, too, does the experience under § 103.21 demonstrate that there was no reason to doubt that voluntarily recognized unions actually enjoy majority support.

In proposing and adopting § 103.21, however, the Board viewed the empirical evidence examined in *Lamons Gasket* very differently. In the notice of proposed rulemaking for § 103.21, the Board found that the post-*Dana* "election statistics . . . support, rather than detract from, the need for a notice and brief open period following voluntary recognition." ¹³³ The Board reiterated this surprising conclusion in the preamble to the final rule and delineated reasons why it deemed the

data with respect to elections actually conducted under *Dana* to support § 103.21.

[T]he [post-*Dana*] statistics showed that (1) *Dana* 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 [s]ection 9(a) certification, including a 1-year bar to further electoral challenge, (3) there was no substantial evidence that *Dana* had any discernible impact on the number of union voluntary-recognition campaigns, or on the success rate of such campaigns, and (4) there was no substantial evidence that *Dana* had any discernible impact on the negotiation of bargaining agreements during the open period or on the rate at which agreements were reached after voluntary recognition.

85 FR 18368.¹³⁴

Preliminarily, we see nothing in the data that would support, let alone compel, discarding long-standing policies that support voluntary recognition in favor of the current rule. As to the first assertion, subject to comments, we are inclined to agree with the *Lamons Gasket* Board that an election loss by the recognized union does not affirmatively suggest that at the time it was recognized, the union lacked majority support. The election, rather, would seem just as likely, if not more so, to be a referendum on the union's accomplishments in bargaining during the brief period after recognition and the result, a consequence, too, of the pre-election campaign. Other post-recognition factors, such as employee turnover or simply a change of employee sentiment, might also be at play. The Board's bar doctrines involving new collective-bargaining relationships, of course, are based on the premise that unions should not be subjected to challenge before a reasonable period for bargaining has elapsed. Section 103.21, in contrast, does not contemplate such a period. On our preliminary view, then, even in the tiny fraction of total voluntary-recognition cases where a recognized union ultimately was ousted, the result says nothing about employee free choice as reflected in the union's original designation by a majority of bargaining-unit employees.

The relevance of the Board's second assertion—pointing out that when

has been no election interference [was] not put in issue"; rather, the Court was only required to "decide whether the cards are reliable enough to support a bargaining order where a fair election probably could not have been held, or where an election that was held was in fact set aside." 395 U.S. at 601 fn. 18.

¹³⁰ *Lamons Gasket*, supra, 357 NLRB at 742.

¹³¹ See 85 FR 18383 (notwithstanding commenter's assertions regarding data, rule "solidly based on and justified by the policy grounds already stated").

¹³² 85 FR 18385.

¹³³ 84 FR 39938.

¹³⁴ Reasons (3) and (4) pertain only to the absence of evidence of select negative consequences of the rule. As explained previously, we will consider additional data on these questions; moreover, we will also consider the probable, reasonable consequences in the absence of sufficient data pointing in either direction.

unions prevailed in a *Dana* election, they consequently gained the benefits of a Board certification—is not clear. The suggestion apparently is that the burden imposed on the union in requiring it to defend its status is mitigated or even outweighed. But unions and the employees who support them have always been free to *choose* to seek a Board election and the benefits of certification. When they seek and gain voluntary recognition from the employer instead—as the Act indisputably permits them to do—the Board presumably should respect that lawful expression of free choice.

The Board also suggested that, notwithstanding the low percentage of cases in which the recognized union was ousted after a *Dana* notice was requested, employees should still be given the option of an election (and informed of that right) because the data still leave substantial ambiguity regarding the validity of voluntary recognition based on majority support.¹³⁵ However, this claim—essentially that every instance of voluntary recognition remains open to doubt concerning employees’ true sentiments, even after notice-requests have been made, unless an election occurs—cannot be squared with the notices in *Dana* and § 103.21 itself. The rule’s necessary premise, like that of *Dana*, is that voluntary recognition is not presumptively *invalid*, and that the notice—by giving employees an option for an election which they may choose or not choose to exercise—merely provides additional assurances before further challenges to the union’s status are (temporarily) foreclosed. But, as the language of the § 103.21 and *Dana* notices indicate, by *not* filing a petition, employees effectively have chosen to reaffirm their original choice to be represented by the union.¹³⁶ In any event, any ambiguity that might exist cannot be said to support the current rule, as the data offer no affirmative suggestion that voluntary recognition is

suspect as a means of ascertaining employee choice.

Finally, for essentially the same reasons, we question the degree to which the Board focused on the very few cases where an election was held and the union was ousted. The Board observed that “the fact that only a small percentage of all *Dana* notices resulted in ending continued representation by the voluntarily recognized union does not mean that the post-recognition open period procedure was unnecessary and should not be restored,” because in “1 out of every 4 *Dana* elections a majority of employees voted to reject continued representation by a voluntarily recognized union.”¹³⁷ Again, our preliminary view is that the Board was fundamentally mistaken in suggesting that employees’ choice not to seek an election after voluntary recognition is of little or no consequence. As stated previously, the notice in *Dana* and that prescribed by § 103.21 make clear that if employees do not seek a Board election, then they have assented to the validity of the voluntary recognition. We question, then, whether it is reasonable to discount cases where employees have declined to seek an election.

In sum, for the reasons offered here, the Board proposes to adopt a rule that effectively rescinds current § 103.21 of the Board’s Rules and Regulations and to replace the existing rule with a new rule that codifies the Board’s traditional voluntary-recognition bar, as refined and articulated in the *Lamons Gasket* decision. The Board again invites public comment on any and all of the issues and matters specifically identified here, as well as on any other issues or matters relevant to the proposed rule.

C. Rescission of § 103.22 of the Board’s Rules and Regulations

The Board proposes, subject to comments, to rescind § 103.22 of the Board’s Rules and Regulations promulgated on April 1, 2020. Once rescinded, the previously effective case-law precedent would govern section 9(a) recognition in the construction industry, such as *Staunton Fuel*, *Casale*, and other cases pertaining to the application of the voluntary-recognition and contract bars in the construction industry.

The Board believes that this change is required because § 103.22 is premised on overruling *Casale* and revoking the limitations period for challenging voluntary recognition in the construction industry, which was not mentioned anywhere in the NPRM as being under consideration by the Board.

Without having provided the required notice, stakeholders and members of the public had no reason to submit comments on this critical issue, which may have affected the Board’s decision to ultimately enact § 103.22.¹³⁸

In the absence of prior public comments on this critical issue, we are concerned that the overruling of *Casale* pursuant to § 103.22 may create an onerous and unreasonable recordkeeping requirement on construction employers and unions.¹³⁹ Where a construction employer chooses to voluntarily recognize a union as the majority representative of its employees, the overruling of *Casale* requires the parties to retain and preserve—indeinitely—extrinsic evidence of a union’s showing of majority support at the time when recognition was initially granted.¹⁴⁰ If, at some point years into

¹³⁸ As our dissenting colleagues recognize, the only reference to this issue in public comments to the 2019 NPRM was by two parties who advocated for the Board to codify *Casale* into its rules, not to abandon it altogether. In fact, there was no party that advocated for abandoning *Casale*, and no party would have known from the 2019 NPRM that doing so was intended. In an earlier Notice and Invitation to File Briefs, the same Board majority that issued the 2020 final rule solicited briefs on not only whether the Board should adhere, modify, or overrule *Staunton Fuel* but also, “[i]f *Staunton Fuel* is modified or overruled, should the Board adhere to, modify, or overrule *Casale Industries*, and, if either of the latter, how?” Notice and Invitation to File Briefs, *Loshaw Thermal Technology, LLC*, 05–CA–15860 (Sept. 11, 2018). The language about adhering, modifying, or overruling *Casale* was conspicuously absent from the 2019 NPRM.

¹³⁹ In analyzing the recordkeeping costs of § 103.22 under the Regulatory Flexibility Act, the April 2020 Board concluded that it may impose a de minimis additional cost on small construction industry labor unions for recordkeeping but that “there is no reason for a small labor organization to implement a record-retention system that is more sophisticated than their normal-course-of-business records retention.” 85 FR 18395. However, as the April 2020 final rule acknowledges, § 103.22 imposes a completely new recordkeeping requirement on construction employers and unions of all sizes. We see no reason to assume that their current records retention processes are adequate for the task imposed on them by § 103.22. Nonetheless, we welcome comments on this issue.

¹⁴⁰ It seems unlikely, as a practical matter, that anything but contemporaneous evidence of majority support from the time of recognition could satisfy the standard set out in § 103.22. In the preamble to the final rule, although the Board declined to define “positive evidence,” the Board stated that “the same contemporaneous showing of majority support that would suffice to establish that employees wish to be represented by a labor organization in collective bargaining with their employer under section 9(a) in non-construction industries will also suffice to establish recognition under section 9(a) in construction-industry bargaining relationships.” 85 FR 18390. Thus, it appears that the Board contemplated that the “positive evidence” the parties are required to retain pursuant to § 103.22 is the contemporaneous showing of majority support. And indeed, even under *Staunton Fuel*, the union’s 9(a) recognition had to be based on it having shown or offered to show evidence of its majority support. 335 NLRB at 720. Because the final rule deemed the parties’

¹³⁵ The Board observed that “as for the . . . cases in which *Dana* notices were requested but no petitions were filed, we know nothing about the reasons for that outcome. Specifically, we know nothing about the reliability of the proof of majority support that underlay recognition in each of these cases, nor do we know why no petition was filed.” 85 FR 18383.

¹³⁶ The § 103.21 notice provides in relevant part: “If no petition is filed within the 45-day window period, the Union’s status as the unit employees’ exclusive bargaining representative will be insulated from challenge for a reasonable period of time, and if [Employer] and [Union] reach a collective-bargaining agreement during that insulated reasonable period, an election cannot be held for the duration of that collective-bargaining agreement, up to 3 years.” The *Dana* notice included a similar provision. 351 NLRB at 443.

¹³⁷ 85 FR 18383.

the future, a party seeks to challenge the union's continued presumption of majority support by filing a representation petition during the duration of a collective-bargaining agreement, in light of the overruling of *Casale* pursuant to § 103.22, the parties will lose the benefit of the Board's longstanding contract-bar rules unless they can successfully show that they continued to retain and preserve that initial showing of majority support.

Notably, pursuant to § 103.22, this burden is borne only by construction employers and unions—a situation that the Board foresaw in *John Deklewa & Sons* when it took the practical but moderate step of requiring construction employers and unions to specify the 9(a) basis for the recognition in written contracts. Nonetheless, as the Board there observed, a construction employer's voluntary recognition of a union based on a showing of majority support among employees was not to be treated less favorably than if granted by a nonconstruction employer, including barring challenges to the validity of the union's initial recognition after more than 6 months had elapsed.¹⁴¹

The current Board is inclined to believe that its contract-bar rules are too critical for promoting stability in labor relations—particularly in the construction industry—to allow them to be subject to needless gamesmanship if a construction employer and union unintentionally fail to adhere to this uniquely burdensome and perpetual recordkeeping requirement. Aware of the Board's contract bar, parties enter into collective-bargaining agreements pursuant to section 9(a) with the expectation that doing so will provide finality as to employees' terms and conditions of employment for a defined time period.¹⁴² This stability is an important benefit of collective-bargaining for employers, unions, and employees alike.¹⁴³ However, in light of the overruling of *Casale* pursuant to

§ 103.22, even successor collective-bargaining agreements are not protected from challenge by the contract bar because a party could still contest a construction employer's initial 9(a) recognition of the union.

The Board is inclined to believe that the overruling of *Casale* pursuant to § 103.22 unjustifiably injects uncertainty and unpredictability into construction-industry labor relations. It makes construction-industry collective-bargaining agreements subject to challenge at any time. Paradoxically, and perversely, it makes the longest lasting collective-bargaining relationships the least stable. The parties' extrinsic evidence of the union's contemporaneous showing of majority support is more likely to become lost or forgotten as more years have elapsed. Collective-bargaining relationships in the construction industry can last for decades. It could be 20 years after an initial grant of voluntary recognition that a petition is filed at a time when the parties' agreement—but for § 103.22—would have barred it from being processed.¹⁴⁴ Relationships ideally characterized by stability are instead plagued by continued uncertainty over whether the parties' relationship will be challenged in the future—potentially for decades.

The Board also is inclined to believe that the problems with overruling *Casale* pursuant to § 103.22 are compounded by requiring parties to litigate what may be very old evidence of the union's initial 9(a) recognition in a representation proceeding—a forum that is not designed for that task. If a party challenges the validity or authenticity of the extrinsic evidence, especially because it may be any number of years old, this will have to occur at the preelection representation hearing. In contrast to an unfair labor practice proceeding, the representation hearing is nonadversarial and does not offer the evidentiary and procedural safeguards that should exist for reviewing that type of evidence, such as applying evidentiary rules or making credibility determinations.¹⁴⁵

¹⁴⁴ For instance, the employer in *John Deklewa & Sons* had recognized the union for 23 years before repudiating the parties' agreement and withdrawing recognition. *Id.* at 1376. Although the April 2020 final rule is to be applied prospectively only, it could still cause significant disruption to longstanding collective-bargaining relationships 20 years into the future for collective-bargaining relationships first formed after April 2020.

¹⁴⁵ See *Paragon Products Corp.*, 134 NLRB at 665 (representation “proceedings are investigatory in character and do not afford a satisfactory means for determining matters which are more properly the subject of adversary proceedings with their accompanying safeguards.”). Compare Board's

Importantly, even if the parties had retained and preserved contemporaneous evidence of the union's initial majority status, it is only going to be so probative of whether the union in fact had majority support. It is not uncommon for parties to dispute the validity of a signed authorization card. The overruling of *Casale* could mean that the Board may have to assess the authenticity of cards that could be any number of years old where signers—especially in the construction-industry where employee turnover is known to be frequent—have long ago left the workplace.¹⁴⁶ As the Supreme Court recognized in *Bryan Manufacturing*, it is imprudent to permit parties to litigate a union's initial recognition outside of the 10(b) period—whether in a preelection representation proceeding or in an unfair labor practice hearing—“after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused.”¹⁴⁷

The Board is also inclined to believe that the procedures in place prior to the overruling of *Casale* pursuant to § 103.22 appropriately granted regional directors discretion to determine whether the evidence adequately showed where the union had been properly granted 9(a) recognition.¹⁴⁸ This is particularly true in the context of a representation case where regional directors could determine whether the union had actually obtained 9(a) status so that a collective-bargaining agreement between the parties would serve as a contract bar to the processing of a petition.¹⁴⁹ Of course, even if the

Rules and Regulations § 102.39 (“The [unfair labor practice] hearing will, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States . . .”), with Board's Rules and Regulations § 102.66(a) (“The rules of evidence prevailing in courts of law or equity shall not be controlling” at a representation hearing); see also *Marian Manor for the Aged & Infirm, Inc.*, 333 NLRB 1084, 1084 (2001) (“[A] preelection hearing is investigatory in nature and credibility resolutions are not made.”).

¹⁴⁶ See *John Deklewa & Sons*, 282 NLRB at 1380 (“Another, important characteristic of the industry was sporadic employment relationships. In construction, an employee or group of employees typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending on various stages of construction.”) (quoting S. Rep. No. 86–187, reprinted in 1 NLRB, Leg. Hist., at 423).

¹⁴⁷ See *Bryan Manufacturing*, 362 U.S. at 419 (quoting H.R. Rep. No. 80–245, at 40).

¹⁴⁸ See *Golden West Electric*, 307 NLRB at 1495 (acting regional director properly administratively dismissed representation petition under the contract bar after finding the parties' relationship governed under sec. 9(a)).

¹⁴⁹ See *G.M.S. Excavators, Inc.*, Case No. 18–RD–125379, slip op. 14–16 (Jun. 3, 2014) (regional director found that a union was not the 9(a)

written memorialization of that showing of support in their contract as always insufficient on its own to prove majority support, the positive evidence that the final rule requires the parties to retain is presumably the union's contemporaneous showing of its majority support to demonstrate the veracity of that contractual language.

¹⁴¹ *John Deklewa & Sons*, 282 NLRB at 1387 fn. 53.

¹⁴² See *Appalachian Shale Products Co.*, 121 NLRB 1160, 1163 (1958) (finding a contract bar only exists where an agreement contains substantial terms and conditions of employment because “real stability in industrial relations can only be achieved where the contract undertakes to chart with adequate precision the course of the bargaining relationship, and the parties can look to the actual terms and conditions of their contract for guidance in their day-to-day problems”).

¹⁴³ See *General Cable Corp.*, 139 NLRB at 1125.

regional director were to find that a contract bar existed, a party is not foreclosed from challenging the union's continued presumption of majority support forever. The absolute longest a party would have to wait before filing a representation petition under the Board's contract-bar rules would be 3 years.¹⁵⁰ But in the absence of *Casale*, and without the evidence of the union's contemporaneous majority support, a collective-bargaining agreement and the union's very recognition could be challenged at any time. It could even be challenged when the processing of a representation petition would entrench employee coercion instead of ameliorating it. If a construction employer and union attempt to masquerade an 8(f) relationship as a lawful 9(a) recognition, § 103.22 attempts to rectify that unlawful 8(a)(2) and 8(b)(1)(A) conduct through a representation petition. But that is not the right medicine for the ailment. Under the Board's statutory framework, unlawful conduct is to be remedied through unfair labor practice proceedings with the attendant evidentiary and procedural safeguards. Moreover, a construction employer found to have violated the law will be ordered to cease and desist from recognizing the union as its employees' collective-bargaining representative and from giving effect to any agreement. An election may thus be a poor method for accurately gauging employee support when it occurs while employees are being unlawfully represented by a purported 9(a) bargaining representative.

Moreover, a filed petition may even have nothing to do with employee free choice. A construction employer that had voluntarily entered into a contract with a union could, at any time during the life of that contract, decide that it does not like the terms that it had agreed to or the collective-bargaining relationship altogether and file an RM petition, hoping to defeat the Board's standard contract bar merely because the union failed to retain and preserve indefinitely the extrinsic evidence from its initial 9(a) recognition.

In overruling *Casale* pursuant to § 103.22, the 2020 Board perplexingly speculated that this was necessary

because parties would presume that a construction employer and union only entered into an 8(f) agreement and, therefore, would not know to file a petition within the first 6 months to challenge a union's 9(a) recognition.¹⁵¹ This Board is inclined to disagree. Although the Board in *John Deklewa & Sons* adopted a rebuttable presumption that a collective-bargaining relationship in the construction industry was established under section 8(f), the Board also explicitly recognized that a union representing construction employees could obtain 9(a) status. Employees and rival unions who wish to challenge an incumbent union during the duration of a contract must know whether the construction employer has recognized the union as the 9(a) representative. And indeed, this is exactly why the unambiguous 9(a) recognition language in the parties' agreement is so important.

Under the law that existed prior to § 103.22, the parties' contract language had to unequivocally state that the construction employer granted the union 9(a) recognition so there could be no doubt if a party wanted to challenge its lawfulness. An employee will know immediately upon cursory review of the contract—after all, the 9(a) recognition must be stated using *unequivocal* language—whether the employer has recognized the union as the majority section 9(a) representative. In the same way that the collective-bargaining agreement grants the employees certain rights that they may want to know about, it also imposes obligations. One of those obligations under *Casale* is that, if the agreement unequivocally states that the union has 9(a) status, a challenge to the union's majority status during the term of the agreement, either through a petition or a charge, must be filed within 6 months. The *Casale* Board understood this to be necessary so that unions representing employees in the construction industry are not treated less favorably than nonconstruction unions. But the *Casale* Board, like the Supreme Court in *Bryan Manufacturing*, also recognized the need for a defined limitations period because the evidence as to whether the union had majority status at the time of the initial recognition becomes increasingly unreliable as more time passes.¹⁵²

¹⁵¹ 85 FR 18391.

¹⁵² In the preamble to § 103.22, the Board stated that courts had expressed doubts regarding sec. 10(b)'s applicability to challenges to a construction-industry union's purported 9(a) status. See *American Automatic Sprinkler Systems*, 163 F.3d 209, 218 fn. 6 (4th Cir. 1998). However, other courts have expressly approved it. See *Triple C Maintenance*, 219 F.3d 1147, 1156–1159 (10th Cir.

The Board is inclined to believe that § 103.22 should be rescinded in toto. In promulgating § 103.22, the Board clearly recognized—albeit after the issuance of its NPRM—that it had to overrule *Casale*. In the preamble to § 103.22, the Board acknowledged that § 103.22 is inconsistent with *Casale*. We presume that the Board would not have enacted § 103.22 without also overruling *Casale*. The Board stated in the preamble that “most significant[]” to its reason for enacting § 103.22 is that requiring an election petition to be filed within 6 months from the initial recognition discounts the importance of employee free choice. In reaching that conclusion, however, the Board did not solicit comments from stakeholders and the public about the effects of overruling *Casale* because the Board did not propose such a monumental modification in its NPRM. The Board failed to give stakeholders and the public the opportunity to comment on—and for the Board to consider—the deleterious and destabilizing impact on collective-bargaining relationships in the construction industry by potentially allowing collective-bargaining agreements to be challenged at any time.

Furthermore, the Board is inclined to believe that the unique nature of section 8(f) and the highly fact-specific circumstances under which parties in the construction industry seek to establish a 9(a) relationship make adjudication—rather than rulemaking—a better method for developing and, when necessary, reconsidering on a case-by-case basis the rules that govern how parties in the construction industry demonstrate a union's 9(a) status. The Board welcomes comments on the suitability of adjudication versus rulemaking in this area.

Accordingly, the Board is inclined to believe, subject to comments, that the overruling of *Casale* and the adoption of § 103.22 does not further the policies and purposes of the Act and should be rescinded.

V. Conclusion

Our dissenting colleagues were part of the Board that issued the April 2020 final rule at a time when the Board consisted of a three-member quorum without any dissenting views.¹⁵³ Our

2000); *NLRB v. Triple A Fire Protection*, 136 F.3d 727, 736–737 (11th Cir. 1998); see also *Sheet Metal Workers' Intern. Assn. Local 19 v. Herre Bros., Inc.*, 201 F.3d 231, 241 (3d Cir. 1999). Notably, the D.C. Circuit has explicitly declined to decide this issue because the Board, in a case where the limitations period was raised, had not relied on sec. 10(b) as a basis for finding that the union's 9(a) status could not be challenged. *Nova Plumbing*, 330 F.3d at 539.

¹⁵³ As mentioned above, then-Member McFerran dissented from the 2019 NPRM that resulted in the

representative and processed a decertification petition where the agreement stated that the union represented employees but not that the union had the support or the authorization of a majority of the employees).

¹⁵⁰ See *Mountaire Farms, Inc.*, 370 NLRB No. 110, slip op. at 1 (“Under the Board's current application of the contract-bar doctrine, a valid collective-bargaining agreement ordinarily is a bar to a representation petition during the term of the agreement, but for no longer than 3 years.”).

dissenting colleagues express many of the same criticisms of the Board's prior blocking-charge policy, voluntary-recognition bar doctrine, and standards for determining whether construction-industry bargaining relationships are governed by section 8(f) or 9(a) that they expressed in the 2020 final rule. We have expressed our preliminary view that the Act's purposes of promoting stable collective bargaining and employee free choice in Board elections are better served by the Board's traditional standards than by the approaches taken in the 2020 final rule.

The Board welcomes public comment on all aspects of its proposed rule. We look forward to receiving and reviewing the public's comments and, afterward, considering these issues afresh with the good-faith participation of all members of the Board.

VI. Dissenting View of Members Kaplan and Ring

Two-and-a-half years ago, the Board issued a final rule ("the 2020 Rule") that made three well-advised changes to our rules and regulations.¹⁵⁴ As discussed in greater detail below, the amendments modified the Board's blocking-charge policy to eliminate the primary cause of delay in the conduct of representation elections; overruled *Lamons Gasket*¹⁵⁵ and reinstated the framework the Board adopted in *Dana Corp.*¹⁵⁶ to afford employees an opportunity to file a petition for a secret-ballot election¹⁵⁷ following their employer's voluntary recognition of a labor organization; and specified the proof of majority support necessary to demonstrate that a bargaining relationship in the construction industry, presumed to have been established under section 8(f) of the Act, has instead been established through voluntary recognition under section 9(a) of the Act.¹⁵⁸ The 2020 Rule, known as the "Election Protection Rule," was designed to "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." 85 FR 18366. In our considered judgment, the 2020 Rule has been a hard-won success. As with the final rule on joint-employer status under the Act, achieving this success required the expenditure of considerable Agency resources to thoroughly consider, analyze, and respond to numerous public comments.

Today, however, with their Notice of Proposed Rulemaking ("NPRM"), the majority sets in motion a project to do it all over again with the express aim of reversing all the progress made just two years ago. Our colleagues point to no changed circumstances as justification for the about-face. To the contrary, this NPRM is simply the product of a new Board majority's disagreement with the 2020 Rule, which they propose to rescind not because they must, but because they can. One unfortunate consequence of this change is needless policy oscillation that tends to upset the settled expectations of the Agency's stakeholders. Worse, the rule our colleagues propose would be clearly inferior to the 2020 Rule, inasmuch as the proposed rule would undermine the very policy of employee free choice on which the 2020 Rule is predicated. Claiming themselves to be the true advocates of employee free choice, our colleagues would reverse all the employee free choice protections embodied in the 2020 Rule. We cannot countenance the majority's unjustified policy reversals and therefore must respectfully dissent. After supplying some general background on Board representation law, we discuss and respond to each of these policy reversals in turn.

A. General 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 able freely and fairly to choose whether to be represented by a labor organization and, if so, which one. E.g., *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969). The Court has observed 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). Importantly, 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). "It is within this democratic framework," the Court continued, "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 Act and in the Board's regulations and caselaw. In addition, the Board's General Counsel maintains a non-binding Casehandling Manual describing representation-case procedures in detail.¹⁵⁹ 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 the union is certified following its selection by a majority of employees in an appropriate bargaining unit in a valid Board election. The Supreme Court approved this certification-year bar in *Brooks v. NLRB*, 348 U.S. 96 (1954). Through adjudication, the Board also created several additional discretionary bars to the timely processing of a properly supported election petition, including the "blocking charges" bar, the voluntary-recognition bar, and the contract bar. Concerned that these additional election bars were unreasonably interfering with employees' statutorily protected rights, the Board refined each one in the 2020 Rule. As further discussed below, the proposed rule imprudently seeks to reverse each of these refinements, at the expense of employee free choice.¹⁶⁰

¹⁵⁹ NLRB Casehandling Manual (Part Two) Representation Proceedings.

¹⁶⁰ The 2020 Rule also revised the standard of proof required to establish a 9(a) bargaining relationship in the construction industry, again to protect employee free choice. As with the election bars, the proposed rule would also undermine the 2020 Rule's protections.

2020 final rule before her prior term expired on December 19, 2019. She was reappointed August 10, 2020, after the publication of the 2020 Rule.

¹⁵⁴ Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships, 85 FR 18366 (Apr. 1, 2020) (codified at 29 CFR 103.20 *et seq.*).

¹⁵⁵ 357 NLRB 934 (2011).

¹⁵⁶ 351 NLRB 434 (2007).

¹⁵⁷ In Board parlance, 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 called RD petitions.

¹⁵⁸ Sec. 8(f) of the Act refers to "an employer engaged primarily in the building and construction industry." 29 U.S.C. 158(f). In the interest of simplicity, throughout this dissent we use the shorthand "construction industry" and "construction employer."

B. Discussion

1. The Blocking-Charge Policy

For decades, the Board's blocking-charge policy was exploited to frustrate the timely exercise by employees of their right to vote—most often, when they sought to vote whether to decertify their incumbent bargaining representative in a secret-ballot election. The policy enabled this by permitting unions to block the processing of a pending decertification petition by filing an unfair labor practice charge, regardless of whether the charge was meritorious. The 2020 Rule modified the blocking-charge policy to facilitate the timely exercise of employees' electoral rights, while at the same time ensuring that no election results can or will be certified where unfair labor practices have interfered with the free exercise of those rights. Today, the majority proposes undoing these changes and resurrecting the pre-2020 Rule blocking-charge policy. While unions will be pleased, employees who have become dissatisfied with their incumbent representative predictably will not—and it is employees to whom the Act gives rights.

a. Background

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,¹⁶¹ 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 the ability of employees to make a free and fair choice concerning representation while the charges remain unresolved. Under this policy, petitioned-for elections can be blocked for months, or even years—and the election may never be held 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).

The adverse impact on employee RD (and employer RM) 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 numerous courts of appeals. See *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.”); *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. Midtown Service Co.*, 425 F.2d 665, 672 (2d Cir. 1970) (“If . . . 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 [e]mployer were later upheld) is preferable to a three-year delay.”); *NLRB v. Minute Maid Corp.*, 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.”); *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.”).

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 obtaining a timely Board-conducted election to resolve the question concerning representation raised by evidence that creates good-faith uncertainty as to the union’s continuing majority support. Accordingly, 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).

Additionally, concerns have been raised about the Board’s regional directors applying the blocking-charge policy inconsistently, 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.”).

¹⁶¹ Except for certain evidentiary requirements, discussed below, that are set forth in § 103.20 of the Board’s Rules and Regulations, the pre-2020 Rule blocking-charge policy was not codified. A detailed description of the prior version of the policy appears in the non-binding NLRB Casehandling Manual (Part Two) Representation, Sec. 11730–11734 (August 2007). In brief, the policy afforded regional directors 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 “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). Sec. 11730.1.

In 2014, the Board engaged in a broad notice-and-comment rulemaking review of the then-current rules governing the representation-election process. Many, if not most, of the changes that were proposed in the February 6, 2014 notice of proposed rulemaking¹⁶² were focused on shortening the time between the filing of a union's RC election petition and the date of the election. The final Election Rule, which adopted 25 of the proposed changes, issued on December 15, 2014, and went into effect the following April. 79 FR 74308 (2014).

Of particular relevance here, the 2014 NPRM included a "Request for Comment Regarding Blocking Charges." The Board did not propose changing the then-current blocking-charge policy, but it invited public comment on whether any of nine possible changes should be made, either as part of a final rule or through means other than amendment of the Board's rules.¹⁶³ Extensive commentary was received both in favor of retaining the existing policy and of revising or abandoning it. The final Election Rule, however, made only minimal revisions in this respect. The 2014 Board majority incorporated, in new § 103.20 of the Board's Rules and Regulations, 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 to the regional director. These revisions were viewed as facilitating the General Counsel's existing practice of conducting expedited investigations in blocking-charge cases. The 2014 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,¹⁶⁴ and asserting that "[i]t advances no policy of the Act for the agency to conduct an election unless employees can vote without unlawful interference."¹⁶⁵ By contrast, dissenting Board Members Miscimarra and Johnson criticized the 2014 majority's failure to make more significant revisions to the blocking-charge policy, contrasting the majority's concern with the 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, which predominantly involve RD or RM petitions challenging an

incumbent union's continuing representative status.

A 2015 review of the final 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."¹⁶⁶

b. The 2020 Rule's Modifications to the Blocking-Charge Policy

To address the concerns with the blocking-charge policy discussed above, and to safeguard employee free choice, the 2020 Rule provided that an unfair labor practice charge would no longer delay the conduct of an election, and it set forth the following rules.

Where an unfair labor practice charge, filed by the party that is requesting to block the election, alleges (1) violations of section 8(a)(1) and 8(a)(2) or section 8(b)(1)(A) of the Act that challenge the circumstances surrounding the petition or the showing of interest submitted in support of the petition, or (2) that an employer has dominated a union in violation of section 8(a)(2) and seeks to disestablish a bargaining relationship, the election will be held and the ballots will be impounded for up to 60 days from the conclusion of the election. If a complaint issues with respect to the charge at any time prior to expiration of that 60-day period, the ballots will continue to be impounded until there is a final determination regarding the complaint allegation and its effect, if any, on the election petition. If the charge is withdrawn or dismissed at any time prior to expiration of that 60-day period, or if the 60-day period ends without a complaint issuing, the ballots will be promptly opened and counted. The 2020 Rule further provides that the 60-day period will not be extended, even if more than one unfair labor practice charge is filed serially.

For all other types of unfair labor practice charges, the 2020 Rule provided that the ballots will be

promptly opened and counted at the conclusion of the election, rather than temporarily impounded. Finally, for all types of charges upon which a blocking-charge request is based, the 2020 Rule clarified that the certification of results (including, where appropriate, a certification of representative) will not issue until there is a final disposition of the charge and a determination of its effect, if any, on the election petition.¹⁶⁷ 85 FR 18369–18370, 18399.

c. Critique of the Majority's Proposed Readoption of the Pre-2020 Rule Blocking-Charge Policy

Demonstrating little concern for the previous abuse of the Board's blocking-charge policy and the inadequacy of the offer-of-proof requirements imposed by the 2014 final Election Rule, our colleagues would simply reverse all that was accomplished in the 2020 Rule and return the Board to what they refer to as the "historical" blocking-charge policy as modified by the Election Rule. Our colleagues ostensibly regard the blocking-charge policy's decades-long endurance as a sufficient justification to resurrect the policy without modification irrespective of its glaring deficiencies. But in stressing the "historical" nature of the blocking-charge policy, the majority largely dismisses the similarly historical abuse of that policy, which also goes back decades. That the "historical" blocking-charge policy persisted for decades hardly signifies that it was wise or just. Board policy and precedent, however historical, need not bind us forever when wrong. As the late Supreme Court Justice Oliver Wendell Holmes, Jr. said: "If truth were not often suggested by error, if old implements could not be adjusted to new uses, human progress

¹⁶⁷ Nothing in the 2020 Rule altered the existing requirements that only a party to the representation proceeding may file the request to block the election process; only unfair labor practice charges filed by that party may be the subject of a request to block; that party must file a written offer of proof as well as the names of witnesses who will testify in support of the charge and a summary of each witness's anticipated testimony; and that party must promptly make available to the regional director the witnesses identified in the offer of proof.

Citing *Rieth-Riley Construction Co., Inc.*, 371 NLRB No. 109 (2022), the majority observes that the 2020 Rule "did not disturb the authority of regional directors to dismiss a representation petition, subject to reinstatement, under the Board's long-standing practice of 'merit-determination dismissals.'" Although we stated our agreement there that regional directors retain this authority "at least where . . . the regional director has found merit to unfair labor practice charges and issued a complaint before the petition was filed," we were forced to dissent because, *inter alia*, our colleagues erroneously affirmed merit dismissals in the face of extraordinary delay and a failure to hold a "causal nexus" hearing. See *Rieth-Riley*, *supra*, slip op. at 8–13 (Members Kaplan and Ring, dissenting).

¹⁶² Representation-Case Procedures, 79 FR 7318.

¹⁶³ 79 FR 7334–7335.

¹⁶⁴ 79 FR 74418–74420, 74428–74429.

¹⁶⁵ 79 FR 74429.

¹⁶⁶ Jeffrey M. Hirsch, *NLRB Elections: Ambush or Anticlimax?*, 64 Emory L.J. 1647, 1664 (2015).

would be slow. But scrutiny and revision are justified.”¹⁶⁸ Regarding the blocking-charge policy, scrutiny and revision were clearly justified.

However well intentioned, the historical blocking-charge policy stifled the exercise by employees of their fundamental right, guaranteed by the Act, to choose whether to be represented by a labor organization and, if so, which one. As the 2020 Rule appropriately concluded, the blocking-charge policy “encourage[d] . . . gamesmanship, allowing unions to dictate the timing of an election for maximum advantage in all elections presenting a test of representative status,” regardless of the type of petition (RD, RC, or RM) filed.¹⁶⁹ 85 FR 18376 & fn. 81. Moreover, the 2020 Rule appropriately concluded that the blocking-charge policy “denie[d] employees supporting a petition the right to have a timely election based on charges the merits of which remain to be

seen, and many of which will turn out to have been meritless.” Id. at 18377. In the meantime, during the extended delay caused by a blocking charge, any momentum in support of a valid petition may be lost, and the employee complement may substantially turn over.¹⁷⁰ Id. at 18367, 18374. Thus, in a very practical sense, “employees who support [RD or RM] petitions are just as adversely affected by delay as employees who support a union’s initial petition to become an exclusive bargaining representative.”¹⁷¹ 84 FR 39930, 39937 (2019).

Contrary to the majority, there is nothing improper in recognizing the drawbacks of the blocking-charge policy and making changes to eliminate them. The Board in the 2020 Rule did precisely that. The proposed rule would undo this necessary progress, elevating history over substance. Illustrative of this point is our colleagues’ heavy reliance on the Fifth Circuit’s positive perceptions of the historical policy nearly fifty years ago.¹⁷² However, other circuit-court cases from that time and much earlier recognized the problems addressed in the 2020 Rule. Indeed, the 2020 Rule observed that “courts of appeals have criticized the blocking charge policy’s adverse impacts on employee RD petitions, as well as the potential for abuse and manipulation of that policy by incumbent unions seeking to avoid a challenge to their representative status.” 85 FR 18367 (citing *NLRB v. Hart Beverage Co.*, 445 F.2d at 420; *Templeton v. Dixie Color Printing Co.*, 444 F.2d at 1069; *NLRB v. Midtown Serv. Co.*, 425 F.2d at 672; *NLRB v. Minute Maid Corp.*, 283 F.2d at 710; *Pacemaker Corp. v. NLRB*, 260 F.2d at 882).

In plotting a return to the “historical” blocking-charge policy, the majority

stresses their view that this policy “enabled the Board to fulfill one of its core obligations: to preserve laboratory conditions for ascertaining employee choice during Board-conducted elections.” Our colleagues claim that “it would undermine employee rights, and would run counter to the Board’s duty to conduct elections in circumstances in which employees may freely choose whether to be represented by a union, if the Board were to require regional directors to conduct, and employees to vote in, a coercive atmosphere.” They add that by “shielding employees from having to vote under coercive conditions, the historical blocking charge policy would seem to be more compatible with the policies of the Act and the Board’s responsibility to provide laboratory conditions for ascertaining employee choice during Board-conducted elections.” In other words, our colleagues view the mere act of *conducting* an election—in the face of unlitigated and unproven accusations¹⁷³—as injurious to employee free choice. This supposed imperative of “shielding employees” from voting *at all* in what the majority deems a “coercive atmosphere”—even though the 2020 Rule guarantees that any coerced electoral result will not be given legal effect—runs like a leitmotif through the majority’s justification for the proposed rule. We disagree that the mere possibility that a choice may be compromised justifies blocking employees from exercising their right to make that choice altogether.

We fully recognize, as has the Supreme Court, that 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

¹⁶⁸ Oliver Wendell Holmes, Jr., *The Common Law* 37 (1881).

¹⁶⁹ The Board has long been aware of this gamesmanship. Thus, Section 11730 of the Board’s August 2007 Casehandling Manual for representation proceedings states that “it should be recognized that the policy is not intended to be misused by a party as a tactic to delay the resolution of a question concerning representation raised by a petition.” Further, the 2014 final Election Rule stated that the Board was “sensitive to the allegation that at times, incumbent unions may abuse the policy by filing meritless charges in order to delay decertification elections,” and it sought to address that issue by adding the offer-of-proof evidentiary requirements in § 103.20 (currently § 103.20(a)) of the Board’s Rules and Regulations. However, § 103.20(a), standing alone, was not adequate to the task of ending gamesmanship through blocking charges. We agree with Professor Hirsch’s observation that the mere offer-of-proof requirement—which the 2020 Rule left undisturbed and which the majority apparently believes is, standing alone, sufficient to address the threats to employee free choice posed by abuse and manipulation—would be “unlikely to change much, if anything.” See 64 Emory L.J. at 1664. The majority’s reliance on *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 228 (5th Cir. 2016), as supporting the original § 103.20 is misplaced. There, the court did not substantively endorse the 2014 Election Rule’s decidedly modest changes to the blocking-charge policy. It merely rejected a facial challenge to the Election Rule based on the plaintiffs’ failure to carry their “high burden” of demonstrating either that the Board lacked authority to promulgate the rule or that the rule was arbitrary and capricious under the Administrative Procedure Act. Id. at 229.

Significantly, the majority largely downplays and dismisses the gamesmanship problem, claiming that “there has been no showing that it was the norm for unions to file frivolous blocking charges to postpone elections in RD or RM cases.” But the majority’s claim begs the question of exactly how much union abuse of the blocking-charge policy they would find sufficient to justify taking action to prevent it. Our colleagues’ suggestion that there is insufficient evidence that frivolous blocking charges are “the norm” would seem to presage the majority’s tolerance of a very substantial burden on employee free choice before even acknowledging, let alone redressing, this harm.

¹⁷⁰ The majority cautions that “the momentum that the [2020 Rule] 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.” But if the momentum truly is “illegitimate” under the hypothetical circumstances the majority describes, then the Board will not certify the election results. If, however, the momentum is in fact legitimate, the 2020 Rule appropriately protects it.

¹⁷¹ As the 2020 Rule recognized, the potential for the blocking-charge policy to delay elections also exists “when employees, instead of filing an RD petition, have otherwise expressed to their employer a desire to decertify an incumbent union representative” and the employer files an RM petition seeking a timely election. Id. at 18367. Consequently, the purported “safe harbor” afforded employers uncertain of a union’s ongoing majority support—filing an RM petition rather than withdrawing recognition (a perilous option)—is often illusory. See *Levitz Furniture Co. of the Pacific*, supra.

¹⁷² See generally *Bishop v. NLRB*, 502 F.2d 1024 (5th Cir. 1974).

¹⁷³ The majority faults the 2020 Rule for its purported “skepticism toward regional director administrative determinations in this context,” which they claim is “in considerable tension with Congress’ decision to authorize regional directors to administratively decide when elections should be conducted in the first place and when the results of elections should be certified in [s]ection 3(b) of the Act.” Our colleagues miss the point. Initially, it warrants mention that section 3(b) authorizes *the Board* to delegate this authority to regional directors, subject to Board review. The Board has done so, and we have no quarrel with that delegation. At issue here is whether the Board should block employees from voting in a Board-supervised election based on an initial administrative determination that has not been fully adjudicated. In our considered view, employee free choice is best served by the 2020 Rule’s procedures permitting employees to vote, and then relying on the relevant administrative determinations to decide whether and when ballots should be impounded (in certain types of cases) or certifications issued. Additionally, promptly holding elections helps prevent employees from mistakenly inferring that unproven unfair labor practice allegations necessarily have merit.

employees.” *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 276 (1973) (internal quotation marks omitted). In this connection, the Board has long held that “[a]n election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammelled choice for or against a bargaining representative.” *General Shoe Corp.*, 77 NLRB 124, 126 (1948). To that end, “[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.” *Id.* at 127. It does not follow, however, that where it has merely been *alleged*—not found—that an employer has engaged in conduct that might affect the freedom of an electoral choice, the answer is to prevent employees from making any choice at all. To begin with, the Board in *General Shoe* emphasized that it had “sparingly” exercised its power to “set an election aside and direct[] a new one,” saving that remedy for election misconduct “so glaring that it is almost certain to have impaired employees’ freedom of choice.” *Id.* at 126 (emphasis added). Board law is therefore clear that employees are to be afforded the opportunity in an election to make a “free and untrammelled choice” of bargaining representative, with “choice” being the operative word.

Collectively choosing to select or reject a bargaining representative through the Board’s electoral processes necessarily entails voting in an election that is eventually certified and given legal effect. Under the *General Shoe* standard, the Board will set aside an election—*i.e.*, deny it legal effect—where employees were denied the opportunity to make a free and uncoerced choice. See *id.* Without an uncoerced and therefore legally valid vote, there can be no effective choice of bargaining representative. In such circumstances, the question of representation raised by the election petition is preliminarily answered but not resolved.¹⁷⁴ Assuming unfair labor

practice charges filed during the pendency of an election petition are subsequently determined to be meritorious, if the election result is not given legal effect—and the 2020 Rule ensures it will not be—then employees’ right to make a free and uncoerced choice *has not been abridged*. In contrast to the 2020 Rule, the proposed rule would indefinitely block employees from registering any choice at all based on charges that have not been (and may never be) found meritorious and that may even have been filed merely to delay an election in hopes of preserving the union’s representative status.

The majority’s claim that the potential for employees to vote in a “coercive atmosphere” necessarily inhibits employee free choice overlooks the fact that under their proposal, employees may be deprived of the opportunity to register any choice at all. The majority “recognize[s] that blocking elections based on nonmeritorious charges may result in some delay,” but asserts that “the benefits of not allowing elections to proceed under the clouds of an unfair labor practice far outweigh any such delay.” In other words, the majority believes that because some unfair labor practice charges prove meritorious and that where this is the case, an election, if allowed to proceed, would be conducted under unfair labor practice “clouds,” *every* election should be blocked whenever a properly supported blocking charge is filed, even though this means that elections will be blocked when there is not a cloud in the sky. This is rather like saying that all baseball games should be delayed

not the case that unfair labor practices alleged in a charge, even if meritorious, will invariably result in a vote against union representation. If the union prevails despite those unfair labor practices, there will be no second election.” *Id.*

Moreover, conducting elections and, in most cases under the 2020 Rule, promptly counting the ballots is likely to facilitate settlement of the relevant unfair labor practice charges, thereby leading to cost savings for the parties and the Board. Contrary to the majority’s claim that the 2020 Rule permits “the worthy administrative goal of promoting settlement” to “trump the fundamental statutory policy” of employee free choice, the 2020 Rule actually promotes *both* the statutory policy of employee free choice and the administrative goal of promoting settlement. The majority’s false dichotomy between these policy aims distorts the 2020 Rule. The majority also speculates that “knowledge of the provisional election outcome may perversely incentivize cases *not* to settle where a party deems that vote tally so valuable to its interests that it makes it efficient to litigate a long-shot legal theory in the unfair labor practice case.” This is nonsense. There is no reason to presume that a party would press forward with a dubious legal theory in an unfair labor practice case—and assume the resulting litigation costs—merely to keep alive the equally dubious hope of obtaining a certification of favorable provisional election results. Hope may spring eternal, but a fool’s hope is an unsound litigation strategy.

indefinitely because some games, if played, would be called on account of rain. We believe the game should proceed unless and until clouds actually gather and rain actually falls—or to drop the simile, we would adhere to the 2020 Rule, permitting elections to proceed and intervening to set aside the results if and when an unfair labor practice charge proves meritorious. Without ascribing motives to our colleagues, we cannot avoid observing that their preferred approach does make it easier for incumbent unions bent on self-preservation to frustrate the will of the majority. Safeguarding employees’ access to the ballot box remains a compelling reason why the amendments to the blocking-charge policy made in the 2020 Rule were (and still are) necessary.

Further, as the 2020 Rule appropriately recognized, “the concerns raised about the harm that employees would suffer by voting in an election that is later set aside are overstated and can be addressed by the prophylactic post-election procedures of certification stays and, in some cases, impounding ballots, set forth in the [2020 Rule].” 85 FR 18378. The effectiveness of these procedures cannot be attacked without calling into question decades of Board decisions. For nearly the entirety of the Act’s existence, the Board has set aside elections based on meritorious objections and has ordered second elections. See, *e.g.*, *Paragon Rubber Co.*, 7 NLRB 965, 966 (1938). In many of those cases, the objectionable conduct was an unfair labor practice. Based on the Board’s extensive experience in handling election objections, it defies reason to suggest that employee free choice in a second election will invariably be affected by a union’s prior election loss set aside based on unfair labor practices. That has not been the case in many rerun elections where employees have voted for union representation in a second or even third election.¹⁷⁵ 85 FR 18378. We therefore disagree with our colleagues that the mere filing of an unfair labor practice charge alleging conduct that, if proven, would create a “coercive atmosphere”

¹⁷⁴ Our colleagues fault the 2020 Rule for requiring the conduct of certain “elections that will not resolve the question of representation because they were conducted under coercive circumstances, . . . [thereby] run[ning] the risk of imposing unnecessary costs on the parties and the Board.” In agreement with the 2020 Rule, we consider “any consequential costs [to be] worth the benefits secured” of safeguarding employee free choice by conducting petitioned-for elections. 85 FR 18378. Indeed, “one of the principal duties of the Board is to resolve questions of representation by holding elections, and that duty is not discharged where the Board does not process a representation petition, especially where there is no legitimate basis for delaying an election.” *Id.* In any event, “it is clearly

¹⁷⁵ The majority overstates the risk of employees refusing to vote for the union in a rerun election after the union’s loss in an initial election held “under coercive conditions” occasioned by a meritorious unfair labor practice. Employees voting in second (or third) elections under noncoercive conditions, *i.e.*, after the unfair labor practices were fully remedied, have repeatedly demonstrated a willingness to consider union representation. In addition, given the Board’s experience in successfully conducting rerun elections, there is no basis for our colleagues’ assumption that doing so consistent with the 2020 Rule will “threaten industrial peace.” By their logic, any rerun election could threaten industrial peace.

as a matter of law imposes a “duty” on the Board not to conduct an election. On the contrary, as noted above, the Board has a duty “to resolve questions of representation by holding elections, and that duty is not discharged where the Board does not process a representation petition, especially where there is no legitimate basis for delaying an election.” *Id.* If the union loses the election and the allegation proves meritorious, the election results are set aside. Thus, any potential “coercive atmosphere” is fully dealt with under the Board’s existing representation rules, including the procedures set forth in the 2020 Rule.¹⁷⁶

The majority additionally claims that “opening and counting ballots submitted under coercive circumstances, yet refusing to certify the results, will, at best, confuse employees and, at worst, actively mislead them by conveying a materially false impression of union support.” But unions will be highly motivated to explain to employees why election results have not been certified and should be disregarded. The reason is easy to understand; apparently our colleagues have less faith in employees’ intelligence than we do. Moreover, despite a regional director’s investigatory determination of merit, the relevant charge may well turn out to have been meritless after a full adjudication before the Board, meaning that the ballots for that case would not have been “submitted under coercive circumstances.” See 85 FR 18377. Similarly, where a regional director’s investigation results in a relevant charge’s dismissal, employee ballots in such a case plainly would not have been “submitted under coercive circumstances,” and it is entirely appropriate that employees promptly learn the election results in that case.

Additionally, our colleagues discount the benefit to employees (and to their confidence in the Board’s processes) of promptly learning the results of an election in which they voted. Where a statutory question of representation exists, employees should be entitled to a prompt answer to that question, even where unfair labor practice charges later deemed meritorious delay the final resolution of the question.

Rejecting the 2020 Rule’s concern with safeguarding employee free choice by conducting elections in the face of meritless unfair labor practice charges, the majority rather audaciously asserts that the historical blocking-charge policy “best preserved employee free choice in representation cases in which petitions are blocked because of concurrent unfair labor practice charges,” even though some employees might never get to vote due to a blocked petition. See, e.g., *Geodis Logistics, LLC*, 371 NLRB No. 102 (2022) (blocking charge delayed elections for four years; employee petitioner no longer employed in unit); *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). Indeed, the passage of time while a charge is blocked, and the attendant turnover in the workforce of employees opposed to a particular union, inures to the benefit of unions attempting to preserve their representative status, at the expense of employee choice. The majority dismisses the 2020 Rule’s concern for such employees by pointing out the obvious fact that some turnover is “unavoidable” over the days and weeks between a petition’s filing and the election. In doing so, our colleagues discount the potential for blocking charges to cause years of delay, during which extensive employee turnover is all too likely.

Taking the debate from the obvious to the absurd, the majority faults the 2020 Rule for failing to “explain why employees who are no longer in the workforce should be given a say in determining whether current employees should be represented during the period when the petition is held in abeyance pending a determination of the merits of the charge.” Of course, this argument misses the point entirely. The point is not that former employees should get a say in current employees’ electoral choice. Rather, to the extent practicable, employees employed at the time a petition is filed should get the opportunity to promptly express a

choice of representative. The majority, by contrast, would rather assist unions facing possible ouster by facilitating election delay while the union waits for its opponents to head for the exits and works to rebuild support among the undecideds. They criticize the 2020 Rule for “prioritiz[ing] speedy elections over employee free choice in order to maximize the likelihood that those employed at the time of the petition filing will be able to vote in an election,” but their criticism rests on a false dichotomy between “speedy elections” and “employee free choice.” It’s not an either/or, but a both/and. The 2020 Rule facilitates prompt elections *and* safeguards employee free choice, for all the reasons we have explained. Moreover, a prompt opportunity for employees to vote in a Board election *itself* safeguards employee free choice.¹⁷⁷ See *NLRB v. A.J. Tower Co.*, 329 U.S. at 331 (observing that “within [the] democratic framework” of section 9(c) of the Act, “the Board must adopt policies and promulgate rules and regulations in order that employees’ votes may be recorded accurately, efficiently *and speedily*” (emphasis added)). Finally, the majority asserts that employee turnover will necessarily occur in the event an unfair labor practice charge proves meritorious and a rerun election is directed. But that result is acceptable where a charge has merit. The goal should be to limit employee turnover resulting from blocking petitions for extended periods based on any and every unproven and potentially meritless allegation of employer conduct that could interfere with employee free choice or taint the petition.

Next, the majority makes the fantastical claim that the 2020 Rule’s modification of the blocking-charge policy to permit elections to be conducted despite pending unfair labor practice charges somehow “creates a perverse incentive for unscrupulous employers to commit unfair labor practices” because, in our colleagues’ estimation, the “predictable results” of such unlawful conduct will be (1) the expenditure of unions’ resources on

¹⁷⁶ The Board also remains free to redress the harm from certain serious unfair labor practices by issuing a general bargaining order. See generally *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Our colleagues claim to have discovered an incongruity between the 2020 Rule “requiring elections in *all* cases no matter the severity of the employer’s unfair labor practices [and] the Supreme Court’s approval in *Gissel* of the Board’s practice of *withholding* an election and issuing a bargaining order” in certain serious cases. No such incongruity exists because, pursuant to the 2020 Rule, elections conducted under coercive conditions based on relevant meritorious unfair labor practices paired with a request to block will not be given legal effect and can be rerun *or*, where circumstances warrant, replaced with an affirmative bargaining order consistent with *Gissel*. See 85 FR 18380 (“If the charge is found to have merit in a final Board determination, we will set aside the election and either order a second election or issue an affirmative bargaining order, depending on the nature of the violation or violations found to have been committed.”).

¹⁷⁷ The majority invites us to re-litigate the reasonable amendments made to the Board’s representation procedures through a prior 2019 rulemaking. See Representation-Case Procedures, 84 FR 69524 (Dec. 18, 2019). We decline this invitation. The unrelated 2019 rulemaking sought to balance the complementary aims of electoral efficiency, transparency, and accuracy. Insofar as our colleagues would juxtapose an extension of the critical period by a few weeks by operation of the 2019 amendments with their proposal here to restore the blocking charge policy’s ability to halt the critical period and delay an election for years, this is a comparison of incommensurables.

elections that “will not reflect the uninhibited desires of the employees,” and (2) “a sense among employees that seeking to exercise their [s]ection 7 rights is futile.” This fallacious parade of horrors leads nowhere. It defies reason that employers would deliberately expose their businesses to unfair labor practice litigation and liability, and the financial consequences thereof, merely to compel unions to expend resources on an election that the union might well win. In any event, such employers would themselves presumably have to commit resources to an election. Additionally, we reject the premise that holding an election (but not immediately certifying the results) in the face of pertinent unfair labor practice charges necessarily imbues employees with a sense of futility regarding the exercise of their section 7 rights—rights that include being able to cast a vote for or against representation in a Board-supervised, secret-ballot election. Indeed, the majority completely discounts the futility that a decertification petitioner and other supporters of that petition must feel when forced to wait for years to vote in an election, assuming they are ever afforded the opportunity to do so. Lastly, the majority effectively presumes an abuse of process that is not known to have occurred, which stands in stark contrast to the recognized abuse of the Board’s processes by unions seeking to preserve their representative status—an abuse that, according to our colleagues, does not merit curative action unless it is shown to be “the norm.”

Finally, our colleagues state that they are “concerned” with claimed errors in certain data considered in the notice of proposed rulemaking preceding the 2020 Rule. The Board appropriately responded to these concerns in the 2020 Rule as follows: “Even accepting those claims as accurate, the remaining undisputed statistics substantiate the continuing existence of a systemic delay that supports our policy choice to modify the current blocking-charge procedure that does not, and need not, depend on statistical analysis.” 85 FR 18377. Further, the Board, quoting the AFL–CIO’s comment, observed that “[b]locking elections delays elections. That is undeniably true and requires no ‘statistical evidence’ to demonstrate.” Id. Finally, the Board reiterated that “anecdotal evidence of lengthy blocking charge delays in some cases, and judicial expressions of concern about this, remain among the several persuasive reasons supporting a change that will assure the timely conduct of elections without sacrificing protections

against election interference.” Id. We agree. As the majority acknowledges, the Board is “free to make a policy choice that does not primarily rely . . . on statistical data” and “may make policy decisions for which the data does not provide the answer.” The Board did so in the 2020 Rule—and now, at the unfortunate expense of the gains in safeguarding employee free choice made there, the majority claims the right to do so in this NPRM.

For all the reasons set forth above, the 2020 Rule’s modifications to the Board’s blocking-charge policy were prompted by real and serious abuses, and they successfully addressed those abuses. Those modifications should be retained. Instead, the majority proposes rescinding them. We cannot join them in taking this step and therefore, we dissent.

2. The Voluntary-Recognition Bar

When it comes to ascertaining whether a union enjoys majority support, a Board-conducted election is superior to union-authorization cards for several reasons, not least of which is that in the former, employees vote by secret ballot, whereas an employee presented with a card for signature makes an observable choice and is therefore susceptible to group pressure. For this reason and others, discussed below, the 2020 Rule reinstated a framework, previously adopted through adjudication, that provides employees a limited window period, following their employer’s card-based voluntary recognition of a union as their bargaining representative, within which to petition for a secret-ballot election, and during which the start of the voluntary-recognition election bar is paused until that window closes without a petition being filed. We believe this aspect of the 2020 Rule appropriately balances the sometimes-competing policies of labor-relations stability and employee free choice. Our colleagues propose throwing out this valuable framework. Because their proposal strikes the wrong balance, at the expense of employee free choice, we dissent.

a. Background

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. at 595–600.

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 three 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. Shortly 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* (finding employer entitled to withdraw recognition after 4 months), with *MGM Grand Hotel*, 329 NLRB 464, 466 (1999) (finding a bar period of 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 negotiations).

In *Dana Corp.*, 351 NLRB 434 (2007), a Board majority reviewed the development of the immediate

recognition-bar policy and concluded that it “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 437.¹⁷⁸

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

The *Dana* majority emphasized “the greater reliability of Board elections” as a principal reason for the announced modification. *Dana Corp.*, 351 NLRB at 438. 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—as the Supreme Court has found—are “admittedly inferior to the election process.” *NLRB v. Gissel Packing Co.*, 395 U.S. at 603. 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.” *Dana Corp.*, 351 NLRB at 438. 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,”¹⁷⁹ 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.” Id. Particularly in circumstances where voluntary recognition is preceded by an employer entering into a neutrality agreement with the union, which may include an agreement to provide the union access to the workplace for organizational purposes, employees may not understand they even have an electoral option or an alternative to representation by the organizing union. Id. “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.” Id. 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. Id. (citing McCulloch, *A Tale of Two Cities: Or Law in Action*, Proceedings of ABA Section of Labor Relations Law 14, 17 (1962)). Lastly, the Board election process provides for post-election review of impermissible electioneering and other objectionable conduct, which may result in the Board invalidating the election results and conducting a second election. Id. at 439. “There are no guarantees of comparable safeguards in the voluntary recognition process.” Id.

In *Lamons Gasket Company*, 357 NLRB 739 (2011),¹⁸⁰ a new Board majority overruled *Dana Corp.* and reinstated the immediate voluntary-recognition election bar. The *Lamons Gasket* 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,¹⁸¹ the majority concluded

that *Dana*’s 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 determined that a return to the immediate recognition-bar policy was warranted, the *Lamons Gasket* majority applied its holding retroactively. In addition, based on the Board’s decision in *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), enfd. 310 F.3d 209 (D.C. Cir. 2002), the majority defined the reasonable period of time during which a voluntary recognition would bar an election as no less than six months and no more than one year from the date of the parties’ first bargaining session. *Lamons Gasket*, supra at 748.¹⁸²

Then-Member Hayes dissented in *Lamons Gasket*,¹⁸³ 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

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.

¹⁸² Under *Lamons Gasket*, the recognition bar takes effect immediately, but the reasonable period for bargaining does not begin to run until the parties’ first bargaining session. Accordingly, the bar period may well continue for more than one year from the date recognition is extended—longer than the certification-year bar following a union election win, which runs from the date the union is certified (assuming the employer does not unlawfully refuse to bargain with the certified union).

¹⁸³ Id. at 748–754.

¹⁷⁸ 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.

¹⁷⁹ Id. at 439.

¹⁸⁰ 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.

¹⁸¹ “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

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." 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). Consequently, the only meaningful empirical evidence came from the Board's own election statistics. In this regard, Member Hayes disagreed with the majority's view that the number of elections held and votes cast against the recognized union proved the *Dana* modifications were unnecessary. He pointed out that 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. Id. at 751.

Under *Lamons Gasket*, the imposition of the immediate recognition bar, followed by the execution of a collective-bargaining agreement resulting in a contract bar,¹⁸⁴ can preclude the possibility of conducting a Board election contesting the initial non-electoral recognition of a union as employees' exclusive bargaining representative for as many as four years. Indeed, because under *Lamons Gasket* the recognition-bar period begins to run only when the parties first meet to bargain, which may be months after recognition is granted, a secret-ballot election may be barred for more than four years.

b. The 2020 Rule's Modifications to the Voluntary-Recognition Bar

The 2020 Rule largely reinstated the *Dana* notice period, including the 45-day open period during which a valid election petition may be filed challenging an employer's voluntary recognition of a labor organization. However, in response to certain comments, the Board modified the *Dana* framework in several respects. First, the *Dana* notice period applies only to voluntary recognition extended on or after the effective date of the 2020 Rule and to the first collective-bargaining agreement reached after such voluntary recognition. Second, the 2020 Rule

clarified that the employer "and/or" labor organization must notify the Regional Office that recognition has been granted. Third, in contrast to the 2019 proposed rule, the 2020 Rule specified where the notice should be posted (i.e., "in conspicuous places, including all places where notices to employees are customarily posted"), eliminated the 2019 proposed rule's specific reference to the right to file "a decertification or rival-union petition" and instead referred generally to "a petition," added a requirement that an employer distribute the notice to unit employees electronically if the employer customarily communicated with its employees by such means, and set forth the wording of the notice. 85 FR 18370, 18399–18400.

c. Critique of the Majority's Proposed Return to the Immediate Voluntary-Recognition Bar

The majority proposes to rescind current § 103.21 of the Board's Rules and Regulations—adopted in the 2020 Rule—and return, purportedly, the Board's recognition-bar jurisprudence to the law as it existed under *Lamons Gasket*, supra, i.e., an immediate recognition bar that lasts a minimum of six months and a maximum of one year, not from the date recognition is granted, but from the date of the parties' first bargaining session—followed, of course, by a contract bar of up to three years if the parties execute a collective-bargaining agreement.¹⁸⁵ Our

¹⁸⁵ We say "purportedly" because the majority appears willing to go further than the *Lamons Gasket* Board in restricting employee free choice. The Board there provided, in accordance with *Smith's Food & Drug Center*, 320 NLRB 844 (1996), that "voluntary recognition of one union will not bar a petition by a competing union if the competing union was actively organizing the employees and had a 30-percent showing of interest at the time of recognition." 357 NLRB at 745 fn. 22. Citing "the importance of stability to newly-established collective-bargaining relationships," the majority seeks public comment regarding "whether the Board should continue to process, consistent with *Smith's Food*, a representation petition filed by a competing union that had a 30-percent showing of interest at the time of recognition or bar the processing of such a petition."

Additionally, the majority takes the unnecessary step of seeking public comment on whether the Board "should adopt as part of the Board's Rules and Regulations a parallel rule to apply in the unfair labor practice context, prohibiting an employer—which otherwise would be privileged to withdraw recognition based on the union's loss of majority support—from withdrawing recognition from a voluntarily-recognized union, before a reasonable period for collective bargaining has elapsed." To do so would reach beyond representation law and have nothing to do with protecting elections, contrary to the very name our colleagues have adopted for their proposed rulemaking. In a different context—regarding Board precedent, discussed below, that permits a sec. 9(a) bargaining relationship in the construction industry to be created based on contract language alone—the

colleagues' reasons for doing so contain few surprises. Predictably, they refuse to acknowledge the 2020 Rule's essential contribution to the statutory policy of safeguarding employee free choice, claiming instead that the *Lamons Gasket* rule allowing no opportunity for a Board-supervised election immediately following a voluntary recognition better serves the freedom of employees to choose their representatives. For reasons explained below, our colleagues err in proposing this counterproductive change.

Initially, based on the Board's statistical data discussed above from the years *Dana* was in effect, as well as similar post-2020 Rule data, the majority asserts that these data "seem[] to show that voluntary recognition almost always reflects employee free choice accurately," such that the 2020 Rule "imposes requirements that burden collective bargaining without producing commensurate benefits in vindicating employee free choice of bargaining representatives." The majority continues that "[s]uch a disproportionate waste of party and Board resources cannot be justified by reference to Federal labor policy, which favors voluntary recognition." There is much to unpack in these noticeably slanted assertions.

Regarding the majority's supposedly data-driven argument that the 2020 Rule fails to "vindicate[] employee free choice" inasmuch as successful electoral overrides of voluntary recognition appear rare, our colleagues fail to say how many electorally overturned voluntary recognitions it would take to warrant retaining the modified *Dana* framework. Might a five percent override rate do so in our colleagues' view? How about ten percent? The majority's position begs the question of how many employees must be effectively disenfranchised and saddled with a bargaining representative lacking majority support before they will leave the current framework alone.

Employees should have the right to test the validity of a voluntary recognition. The Board need not and should not accept possibly unsupported voluntary recognitions at any frequency, particularly considering that a simple procedure to prevent them is available and already in place. In any event, the data showing infrequent overrides of voluntary recognitions cut both ways.

2020 Rule majority, of which we were members, refrained from reaching beyond representation-law limits. Apparently, our colleagues do not share our sense of restraint. Nevertheless, because the majority does not presently propose codifying *Keller Plastics*, supra, we need not consider the merits of this issue now.

¹⁸⁴ Collective-bargaining agreements may bar the processing of an election petition for a period of up to three years, insulating a union from challenges to its majority status during that period. See *General Cable Corp.*, 139 NLRB 1123, 1125 (1962).

Thus, not only do the data show a legally significant error rate, but the majority's characterization of this rate as low suggests that the *Dana* framework undermines neither the voluntary-recognition process nor the statutory policies the majority discusses as supporting it (e.g., "encouraging collective bargaining and preserving stability in labor relations"). Additionally, we agree with the view expressed in the 2020 Rule that the *Dana* framework "serve[s] its intended purpose of assuring employee free choice in all . . . cases at the outset of a bargaining relationship based on voluntary recognition, rather than 1 to 4 years or more later," and that "giving employees an opportunity to exercise free choice in a Board-supervised election without having to wait years to do so is . . . solidly based on and justified by . . . policy grounds." 85 FR 18383.¹⁸⁶ Indeed, the majority acknowledges that "the Board's approach to the voluntary-recognition bar has varied, [and] the Board [and the Federal courts] consistently [have] viewed the issue as presenting a policy choice for the Board to make."

Moreover, the majority distorts the 2020 Rule to claim that the *Dana* framework is a "waste of party and Board resources [that] cannot be justified by reference to [F]ederal labor

policy, which favors voluntary recognition." Our colleagues miss the mark. Even as the 2020 Rule clearly acknowledged that "voluntary recognition and voluntary-recognition agreements are lawful,"¹⁸⁷ both the NLRA and the courts have made plain that a Board-supervised election is "the Act's preferred method for resolving questions of representation." *Id.* Thus, "the election-year bar and the greater statutory protections accorded to a Board-certified bargaining representative implicitly reflect congressional intent to encourage the use of Board elections as the preferred means for resolving questions concerning representation." *Id.* Indeed, our colleagues concede "the implicit statutory preference for Board elections (insofar as certain benefits are conferred only on certified unions)." Additionally, both the Board and the courts have long recognized that secret-ballot elections are superior to voluntary recognition at protecting employees' section 7 freedom to choose, or not choose, a bargaining representative.¹⁸⁸ See, e.g., *Linden Lumber Div. v. NLRB*, 419 U.S. 301, 304 (1974); *NLRB v. Gissel Packing Co.*, 395 U.S. at 602; *Transp. Mgmt. Servs. v. NLRB*, 275 F.3d 112, 114 (D.C. Cir. 2002); *NLRB v. Cayuga Crushed Stone, Inc.*, 474 F.2d 1380, 1383 (2d Cir. 1973); *Levitz Furniture Co. of the Pacific*, 333 NLRB at 727; *Underground Service Alert*, 315 NLRB 958, 960 (1994). As the United States Supreme Court has stated, "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 603.¹⁸⁹

The majority further claims that the notice requirement "invites" the filing of an election petition and that the language of the required notice itself "indicate[s] [that], by *not* filing a petition, employees effectively have chosen to reaffirm their original choice to be represented by the union" and "make[s] clear that if employees do not seek a Board election, then they have

assented to the validity of the voluntary recognition."¹⁹⁰

Contrary to our colleagues, we find no fault in requiring notice to employees that their employer has recognized a particular union and informing them of their right to test that union's support—or to support a different union with the requisite showing of interest—through the statutorily-preferred method of a Board-supervised election. Further, the notice language of the 2020 Rule (§ 103.21 of the Board's Rules and Regulations) clearly informs employees of their right to seek an election for a variety of purposes, not simply to obtain a decertification election. On this point—and contrary, moreover, to the majority's claim that the notice requirement "invites" employees to file a petition—the notice language clearly states that the Board "does not endorse any choice about whether employees should keep the recognized union, file a petition to certify the recognized union, file a petition to decertify the recognized union, or support or oppose a representation petition filed by another union." 85 FR 18400. The 2020 Rule also states that it "does not encourage, much less guarantee, the filing of a petition." *Id.* at 18384. The message is plain: file a petition, don't file a petition, file any one of a variety of petitions—it's all the same to us. Finally, regarding the majority's claim that, by failing to file an election petition within the 45-day window, employees "effectively have chosen to reaffirm their original choice to be represented by the union" and "assented to the validity of the voluntary recognition," our colleagues plainly misapprehend the 2020 Rule's required notice language. The notice merely explains that absent an election petition's filing within the 45-day window period, "the Union's status as the unit employees' exclusive bargaining representative will be insulated from challenge" pursuant to the recognition bar (and also pursuant to the contract bar if a contract is agreed to during the insulated period). *Id.* An employee's failure to challenge the validity of a voluntary recognition by filing a petition is not tantamount to "assenting to the validity" of that voluntary recognition. The notice does

¹⁸⁶ We disagree with our colleagues' suggestion that due to early bargaining accomplishments, pre-election campaigning, or employee turnover, "an election loss by the recognized union does not affirmatively suggest that at the time it was recognized, the union lacked majority support." Even accepting, arguendo, the majority's premise, the collection of authorization cards is similarly asynchronous, yet the majority does not question whether, at the moment of a union's demand for recognition, all employees who signed cards still (or ever did) support the employer's recognition of the union as their exclusive bargaining representative. The possibility that employees who sign authorization cards (or, for that matter, disaffection petitions) will change their minds is very real and has been the cause of some dispute between the Board and reviewing courts. See, e.g., *Johnson Controls, Inc.*, 368 NLRB No. 20 (2019) (discussing employees who sign both a disaffection petition and authorization card); *Struthers-Dunn, Inc.*, 228 NLRB 49, 49 (1977) (holding authorization card not effectively revoked until union notified of revocation), enf. denied 574 F.2d 796 (3d Cir. 1978).

But in any event, our colleagues miss the point here. The *Dana* framework readopted (with modifications) in the 2020 Rule is not designed to cast doubt on the validity of voluntary recognition, but to afford employees the opportunity to test the union's majority support—and the validity of the resulting voluntary recognition—through the statutorily-preferred method of a Board-supervised election. The election process allows a test of majority support at a given moment in time, whereas authorization cards may be gathered over weeks or months without regard to whether the card signers continue to support the union by the time a demand for recognition is made (unless the card signers affirmatively requested the return of their signed cards).

¹⁸⁷ *Id.* at 18381 and cases cited.

¹⁸⁸ 85 FR 18381.

¹⁸⁹ Despite citing *Gissel* for the proposition that union-authorization cards constitute "a freely interchangeable substitute for elections where there has been no election interference," the majority concedes, as it must, that the Court did not reach this issue but found only that the cards were sufficiently reliable "where a fair election probably could not have been held, or where an election that was held was in fact set aside." *Id.* at 601 fn. 18.

¹⁹⁰ In making these claims, the majority relies on the following language from the notice: "If no petition is filed within the 45-day window period, the Union's status as the unit employees' exclusive bargaining representative will be insulated from challenge for a reasonable period of time, and if [Employer] and [Union] reach a collective-bargaining agreement during that insulated reasonable period, an election cannot be held for the duration of that collective-bargaining agreement, up to 3 years."

not indicate that “silence is acceptance,” as can occur under certain circumstances in contract law. It merely informs employees of the legal effect, under longstanding law, of voluntary recognition—a legal effect temporarily delayed to afford employees an opportunity to avail themselves of the Board’s electoral processes, should they wish to do so. Thus, the choice not to file a petition is more akin to a waiver of the legal right to challenge the union’s exclusive-representative status for “a reasonable period of time” under the recognition bar, and up to three more years in the case of the contract bar. See *id.* The majority’s assertions otherwise are aimed at validating their reliance on data apparently demonstrating a low incidence of electoral overrides of voluntary recognitions as compared to the total number of voluntary recognition notices requested over certain time periods.

Finally, the majority claims that the 2020 Rule “undisputedly rejects the premise that newly established bargaining relationships must be given a fair chance to succeed in the context of voluntary recognition,” contrary to the central rationale underlying other Board bar doctrines that protect new bargaining relationships. As a result, our colleagues claim, the 2020 Rule undermines the labor-relations stability necessary to negotiate and administer collective-bargaining agreements between parties to new bargaining relationships established through voluntary recognition. But the 2020 Rule’s 45-day window, which the majority claims is rarely used in any event, hardly rejects the premise that new bargaining relationships must have an opportunity to succeed. After the window closes without a petition being filed, the recognition bar takes effect. Further, if, as the majority claims, “voluntary recognition almost always reflects employee free choice accurately,” it is difficult to ascertain how the 2020 Rule “undermines the stability” of bargaining relationships. The majority cannot have it both ways. If § 103.21’s voluntary-recognition notice procedure affects relatively few bargaining relationships established through voluntary recognition, then the benefit to employee free choice of retaining that procedure clearly outweighs any modest burden caused by a few employees deciding to vindicate their statutory rights through the preferred method of a Board election.¹⁹¹

¹⁹¹ Relatedly, to the extent that a pending election petition might “cause unions to spend more time campaigning or working on election-related matters rather than doing substantive work on behalf of

Moreover, as the 2020 Rule observed, there was “no evidence in the record for this rulemaking that *Dana* had any meaningful impact on the negotiation of bargaining agreements during the open period or on the rate at which agreements were reached after voluntary recognition.” *Id.* at 18384.¹⁹²

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

Under section 9 of the Act, *employees* choose union representation. However, under extant Board precedent applicable to unfair labor practice cases— *Staunton Fuel & Material*, 335 NLRB 717 (2001)—unions and employers in the construction industry can install a union as the section 9(a) representative of the employer’s employees through contract language alone, regardless of whether those employees have chosen it as such, and indeed, even if the employer *has no employees at all* when it enters into that contract.¹⁹³ The 2020 Rule overruled *Staunton Fuel* for representation-case purposes, and the majority now proposes to reinstate it. Nobody can be in suspense as to whether that proposal will be adopted in a final rule, since the majority just reaffirmed *Staunton Fuel* for unfair-labor-practice-case purposes.¹⁹⁴ Readers of the proposed rule will search in vain, however, for a full-throated endorsement of *Staunton Fuel*. Our colleagues largely walk away from *Staunton Fuel*, focusing instead on its procedural sidekick, *Casale Industries*.¹⁹⁵ The reason is not far to seek: the Court of Appeals for the District of Columbia Circuit has rejected *Staunton Fuel*, repeatedly and emphatically.¹⁹⁶ We agree with the D.C. Circuit’s criticisms of that decision, and we would retain this aspect of the 2020 Rule as well.

a. Background

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

employees,” this is “a reasonable trade-off for protecting employees’ ability to express their views in a secret-ballot election.” 85 FR 18384–18385.

¹⁹² Implicitly acknowledging this dearth of evidence, the majority “invite[s] public comment on the effect of § 103.21 on collective-bargaining negotiations.”

¹⁹³ See *Enright Seeding, Inc.*, 371 NLRB No. 127, slip op. at 11 & fn. 8 (2022) (Member Ring, dissenting) (citing cases).

¹⁹⁴ *Enright Seeding*, *supra*.

¹⁹⁵ 311 NLRB 951 (1993).

¹⁹⁶ See *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003); *Colorado Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031, 1038 (D.C. Cir. 2018).

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 labor organizations 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 a stable cohort of 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 evolved with respect to the standard for determining 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); *Ruttman 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 (3d Cir. 1988), *R.J. Smith* and *Ruttman* viewed a section 8(f) agreement as “a preliminary step that contemplates further action for the development of a full bargaining relationship” (quoting from *Ruttman*, 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 the 2020 Rule. 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.

The *Deklewa* Board’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.’” *Golden West Electric*, 307 NLRB 1494, 1495 (1992) (citing *J & R Tile*, supra).¹⁹⁷

However, in *Staunton Fuel & Material*, 335 NLRB at 719–720, the Board, for the first time, held that a union could prove 9(a) recognition by a construction-industry employer 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 Appeals for the Tenth Circuit,¹⁹⁸ the Board held that language in a contract is 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 [s]ection 9(a)’s emphasis on employee choice with [s]ection 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.” Id.

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

¹⁹⁷ In an Advice Memorandum issued after *J & R Tile*, the Board’s 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 [s]ection 8(f).” *In re Frank W. Schaefer, Inc.*, Case 9–CA–25539, 1989 WL 241614.

¹⁹⁸ *NLRB v. Triple C Maintenance, Inc.*, 219 F.3d 1147 (10th Cir. 2000); *NLRB v. Oklahoma Installation Co.*, 219 F.3d 1160 (10th Cir. 2000).

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*, until the 2020 Rule the Board had adhered to *Staunton Fuel*’s holding that certain contract language, standing alone, can establish a 9(a) relationship in the construction industry. Indeed, as noted above, the current majority has recently reaffirmed that holding. See *Enright Seeding, Inc.*, 371 NLRB No. 127 (2022).¹⁹⁹

The D.C. Circuit, for its part, has adhered 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 because 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.” Id. at 1038. Further, the court emphasized that “[t]he unusual [s]ection 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.” Id. at 1039. Accordingly, “[b]ecause the statutory objective is to ensure that only unions chosen by a majority of employees enjoy [s]ection 9(a)’s

enhanced protections, the Board must faithfully police the presumption of [s]ection 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 [s]ection 8(f) pre-hire arrangement by affirmatively choosing a union as their [s]ection 9(a) representative.” Id. 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.’” Id. at 1040 (quoting *Staunton Fuel*, 335 NLRB at 717). 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.” Id.

b. The 2020 Rule’s Modified Requirements for Proof of Section 9(a) Bargaining Relationships in the Construction Industry

The 2020 Rule requires positive evidence that the union unequivocally demanded recognition as the 9(a) majority-supported 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. The Rule also clarifies that collective-bargaining agreement language, standing alone, will not be sufficient to provide the required showing that a majority of unit employees covered by a presumptive 8(f) bargaining relationship have freely chosen the union to be their 9(a) representative. These modifications apply only to voluntary recognition extended on or after the effective date of the 2020 Rule and to any collective-bargaining agreement entered into on or after the date of voluntary recognition extended on or after the effective date of the Rule. Finally, in adopting these modifications, the 2020 Rule overruled *Casale Industries*²⁰⁰ in relevant part, “declin[ing] to adopt a [s]ection 10(b) 6-month limitation on challenging a construction-industry union’s majority status by filing a petition for a Board

election.” 85 FR 18370, 18390–18391, 18400.

c. Critique of the Majority’s Proposal To Rescind § 103.22

The majority proposes to fully rescind § 103.22 of the Board’s Rules and Regulations, which encompasses all the 2020 Rule’s modified requirements for proving a section 9(a) bargaining relationship in the construction industry. The result would be the effective reinstatement of the ill-conceived Board precedents of *Staunton Fuel* and *Casale Industries* for purposes of applying the voluntary-recognition and contract bars in the construction industry. Our colleagues’ reasons for doing so, discussed below, lack merit and do not warrant revisiting the sound policy of the 2020 Rule.

Principally, the majority complains that the 2020 Rule’s overruling of *Casale Industries* “[i]n the absence of prior public comments . . . may create an onerous and unreasonable recordkeeping requirement on construction employers and unions . . . to retain and preserve—indefinitely—extrinsic evidence of a union’s showing of majority support at the time when recognition was initially granted.” First of all, our colleagues are mistaken when they claim that the decision to overrule *Casale Industries* in relevant part was undertaken “in the absence of prior public comments.” In fact, this issue was squarely raised in public comments requesting that the Board “incorporate [in the final rule] a [s]ection 10(b) 6-month limitation for challenging a construction-industry union’s majority status.” 85 FR 18390–18391. The Board thoroughly considered the commenters’ request and responded with a detailed and persuasive explanation of why it declined to incorporate such a limitations period in the 2020 Rule. Id. at 18391. Thus, section 10(b) applies only to unfair labor practices, whereas the 2020 Rule “addresses only representation proceedings—*i.e.*, whether an election petition is barred because a construction-industry employer and union formed a 9(a) rather than an 8(f) collective-bargaining relationship.” Id. “[O]nly if the parties formed a 9(a) relationship could there be an unfair labor practice that would trigger [s]ection 10(b)’s 6-month limitation.” Id.²⁰¹ Accordingly, as the

¹⁹⁹ Member Ring relevantly dissented, explaining that *Staunton Fuel* was wrongly decided and should be overruled for the reasons stated in the 2020 Rule and here. *Enright Seeding, Inc.*, 371 NLRB No. 127, slip op. at 8–14. As Member Ring observed, the Board should, at the least, commit to resolving its long-running and irreconcilable disagreement with the D.C. Circuit by seeking Supreme Court review when that court inevitably denies enforcement of the decision in that case. We hope the majority will do so as part of this rulemaking, once they follow through with their ill-advised proposal to rescind § 103.22.

²⁰⁰ 311 NLRB at 953 (holding that the Board would “not entertain a claim that majority status was lacking at the time of recognition” where “a construction[-]industry employer extends 9(a) recognition to a union, and 6 months elapse without a charge or petition”).

²⁰¹ See also *Brannan Sand & Gravel Co.*, 289 NLRB at 982 (predating *Casale Industries*, and holding that nothing “precludes inquiry into the establishment of construction[-]industry bargaining relationships outside the 10(b) period” because “[g]oing back to the beginning of the parties’ relationship . . . simply seeks to determine the

2020 Rule explained, *Casale Industries* erroneously “begs the question by assuming the very 9(a) status that ought to be the object of inquiry.” *Id.* The Board also appropriately concluded in the 2020 Rule that such a limitations period in this context “improperly discounts the importance of protecting employee free choice.” *Id.*²⁰² Further,

majority or nonmajority[—]based nature of the current relationship and does not involve a determination that any conduct was unlawful”).

²⁰² The majority rejects the 2020 Rule’s concern that “employees and rival unions will likely presume that a construction-industry employer and union entered an 8(f) collective-bargaining agreement” with a term longer than six months, meaning that it is “highly unlikely that they will file a petition challenging the union’s status within 6 months of recognition.” See 85 FR 18391.

According to our colleagues, “[e]mployees and rival unions who wish to challenge an incumbent union during the duration of a contract must know whether the construction employer has recognized the union as the 9(a) representative” based on “the unambiguous 9(a) recognition language in the parties’ agreement” despite the clear legal presumption in favor of an 8(f) bargaining relationship. It strikes us as unreasonable to infer that employees and rival unions would effectively presume the opposite of the legal default relationship in the construction industry. In contrast to our colleagues in the majority, not every employee and rival union will necessarily take at face value the word of the parties to a collective-bargaining agreement with a purported 9(a) recognition clause. See *Nova Plumbing*, 330 F.3d at 537 (observing that “construction companies and unions [could] circumvent both section 8(f) protections and *Garment Workers*’ holding by colluding at the expense of employees and rival unions”).

Moreover, the majority suggests that in situations where an employer and union could not prove majority support contemporaneous with a voluntary recognition, “the Board would be processing a representation petition at a time when the employer had provided the union unlawful assistance under Sec.[.] 8(a)(2) and (1) so that laboratory conditions may not exist to ascertain employees’ true sentiment towards the union.” But the 2020 Rule applies to the determination of whether to process a petition in the representation context, not to the hypothetical adjudication of unalleged unfair labor practices. In any event, the scenario the majority posits would go entirely undiscovered under the proposed rule given that our colleagues would simply take the parties’ word for it that they had established a valid 9(a) relationship. Besides, it is rather rich of our colleagues to express concern about potential unlawful assistance under sec. 8(a)(2), when *Staunton Fuel*, which they propose to reinstate, is an open invitation to construction-industry employers and unions to form 9(a) bargaining relationships without regard to the will of the majority of the employer’s employees, with the predictable result that the parties to those relationships will routinely be in violation of sec. 8(a)(2) and 8(b)(1)(A)—and, if their contract includes union security, of section 8(a)(3) and 8(b)(2) as well. See *Dairyland USA Corp.*, 347 NLRB 310, 312–313 (2006).

The majority further claims that where “a construction employer and union attempt to masquerade an 8(f) relationship as a lawful 9(a) recognition, Sec.[.] 103.22 attempts to rectify that unlawful 8(a)(2) and 8(b)(1)(A) conduct through a representation petition” when the “right medicine for the ailment” is an unfair labor practice proceeding and appropriate cease-and-desist remedial relief. Our colleagues miss the mark once again. Sec. 103.22 does not attempt to remedy

the District of Columbia and Fourth Circuits have expressed doubts regarding the limitations period adopted in *Casale Industries*. See *Nova Plumbing*, 330 F.3d at 539; *American Automatic Sprinkler Systems v. NLRB*, 163 F.3d 209, 218 fn. 6 (4th Cir. 1998). Finally, regarding the supposedly “onerous . . . recordkeeping requirement,” the Board reasonably concluded, and we agree, that although the 2020 Rule “will incentivize unions to keep a record of majority-employee union support[.] . . . such a minor administrative inconvenience [is not] a sufficient reason to permit employers and unions to circumvent employees’ rights.” 85 FR 18392.²⁰³

unfair labor practices with a representation petition and Board-supervised election. Again, the 2020 Rule does not apply to unfair labor practices. Rather, the 2020 Rule protects employee free choice to seek a Board election upon a proper showing of interest where no lawful sec. 9(a) relationship has been formed. Any attendant unfair labor practices—which, again, would typically go undiscovered under the majority’s proposal—are subject to appropriate unfair labor practice proceedings and remedies under current law.

²⁰³ The majority claims that such a need for recordkeeping in the absence of a limitations period will destabilize longstanding collective-bargaining relationships by permitting employers to challenge decades-old voluntary recognitions for which there may be no available supporting evidence of majority status contemporaneous with the sec. 9(a) recognition. This claim is belied by the language of the 2020 Rule itself, which makes clear that its evidentiary requirements for majority-based recognition in the construction industry apply only prospectively. The majority’s related claim that the recordkeeping requirement “could still cause significant disruption to longstanding collective-bargaining relationships 20 years into the future for collective-bargaining relationships first formed after April 2020” ignores the obvious fact that parties forming bargaining relationships after the effective date of the 2020 Rule will have been on notice of the need to retain the relevant records. Under the circumstances, any “disruption” would be self-inflicted.

Further, we reject our colleagues’ suggestion that the absence of a limitations period and any resulting recordkeeping so burdens parties in the construction industry as to be inconsistent with the *Deklewa* Board’s assurance that construction-industry parties do not enjoy a “less favored status” relative to non-construction-industry parties. See *Deklewa*, 282 NLRB at 1387 fn. 53. The 2020 Rule does not treat construction-industry parties differently: voluntary recognitions both outside and within the construction industry must be based on a showing of majority support. But even if it did, evidence supporting this showing is particularly crucial where a party claims that an 8(f) relationship has become a 9(a) relationship. See *Colorado Fire Sprinkler*, 891 F.3d at 1039 (observing that “[b]ecause the statutory objective is to ensure that only unions chosen by a majority of employees enjoy Sec.[.] 9(a)’s enhanced protections, the Board must faithfully police the presumption of Sec.[.] 8(f) status and the strict burden of proof to overcome it”).

We also find it ironic that our colleagues baselessly speculate about the “needless gamesmanship” with the Board’s contract-bar rules that will supposedly result when parties fail to keep adequate records, notwithstanding (1) the majority’s proposal in this rulemaking to return to the

At bottom, the legal presumption of 8(f) status in the construction industry follows from the protections afforded under the second proviso to section 8(f), which provides that an extant 8(f) agreement “shall not be a bar to a petition” for an election under either section 9(c) or 9(e) of the Act. However, once the 8(f) presumption is rebutted and a 9(a) relationship is recognized, the voluntary recognition bar and/or the contract bar may operate to bar election petitions in appropriate circumstances. In other words, a valid 9(a) recognition causes employees to forfeit their rights to invoke the Board’s power to resolve a question of representation during the bar period. Just as a party—or a Federal court acting sua sponte—may at any time during litigation challenge the court’s subject-matter jurisdiction inasmuch as such jurisdiction implicates the court’s power to hear the claim (Fed. R. Civ. Pro. 12(h)(3)), we conclude that a party should be free to file an election petition challenging a construction-industry employer’s claimed 9(a) recognition of an incumbent union—and thereby demand contemporaneous positive evidence of majority support—inasmuch as a default 8(f) relationship potentially masquerading as a lawful 9(a) relationship implicates the Board’s power to resolve a valid question of representation.

B. Conclusion

For all these reasons, we respectfully dissent from this Notice of Proposed Rulemaking to rescind and replace the 2020 Rule. We would leave the 2020 Rule in place and are confident that it will be upheld as valid in the courts. Of course, given that a second round of rulemaking will proceed, we shall consider with open minds all public comments, any developments brought to our attention, and the considered views of our colleagues.

VII. 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

“historical” blocking-charge policy, the gamesmanship under which is well known and has been acknowledged by the Board, and (2) the D.C. Circuit’s concern that “construction companies and unions [could] circumvent both section 8(f) protections and *Garment Workers*’ holding by colluding at the expense of employees and rival unions.” *Nova Plumbing*, 330 F.3d at 537.

jurisdictions, and small organizations, as provided by the [RFA].”²⁰⁴ 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.²⁰⁵ 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.²⁰⁶ The RFA does not define either “significant economic impact” or “substantial number of small entities.”²⁰⁷ 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.”²⁰⁸

Although the Board believes that it is unlikely that the proposed rule will have a significant economic impact on a substantial number of small entities, it seeks public input on this hypothesis and has prepared an IRFA to provide the public the fullest opportunity to comment on the proposed rule.²⁰⁹ 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.²¹⁰

²⁰⁴ E.O. 13272, sec. 1, 67 FR 53461 (“Proper Consideration of Small Entities in Agency Rulemaking”).

²⁰⁵ Under the RFA, the term “small entity” has the same meaning as “small business,” “small organization,” and “small governmental jurisdiction.” 5 U.S.C. 601(6).

²⁰⁶ 5 U.S.C. 605(b).

²⁰⁷ 5 U.S.C. 601.

²⁰⁸ 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>.

²⁰⁹ 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).

²¹⁰ 5 U.S.C. 603(b).

1. Description of the Reasons Why Action by the Agency Is Being Considered and Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

Detailed descriptions of this proposed rule, its purpose, objectives, and legal basis are contained earlier in the **SUMMARY** and **SUPPLEMENTAL INFORMATION** sections and are not repeated here. In brief, the proposed rule aims to better protect the statutory rights of employees to express their views regarding representation by rescinding the Board’s 2020 changes to the blocking charge policy, the voluntary recognition bar doctrine, and the use of contract language to serve as sufficient evidence of majority-supported voluntary recognition under section 9(a) in representation cases in the construction industry.

2. Description of, and Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply

To evaluate the impact of the proposed rule, the Board first identified the universe of small entities that could be impacted by reinstating the blocking charge policy, the voluntary recognition bar doctrine, and the use of contract language to serve as sufficient evidence of voluntary recognition under section 9(a) in representation cases in the construction industry.

a. Blocking Charge and Voluntary Recognition Bar Changes

The changes to the blocking charge policy and voluntary recognition bar doctrine 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 6,102,412 business firms with employees in 2019.²¹¹ Of those, the Census Bureau estimates that about 6,081,544 were firms with fewer than 500 employees.²¹² While this proposed

rule does not apply to employers that do not meet the Board’s jurisdictional requirements, the Board does not have the data to determine the number of excluded entities.²¹³ Accordingly, the Board assumes for purposes of this analysis that all of the 6,081,544 small business firms could be impacted by the proposed rule.

The changes to the blocking charge policy and voluntary recognition bar doctrine will also impact 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.”²¹⁴ The Small Business Administration’s (“SBA”) small business standard for “Labor Unions and Similar Labor Organizations” (NAICS #813930) is \$14.5 million in annual receipts.²¹⁵ In 2017, there were 13,137 labor unions in the U.S.²¹⁶ Of

Department of Commerce, Bureau of Census, 2019 USB Annual Data Tables by Establishment Industry, Data by Enterprise Employment Size, <https://www.census.gov/data/tables/2019/econ/susb/2019-susb-annual.html> (from downloaded Excel Table entitled “U.S. & States, 6-digit NAICS” found at https://www2.census.gov/programs-surveys/susb/tables/2019/us_state_6digitnaics_2019.xlsx). Consequently, the 500-employee threshold is commonly used to 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).

²¹³ 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: (1) 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); (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); and (3) employers subject to the Railway Labor Act, such as interstate railroads and airlines, 29 U.S.C. 152(2).

²¹⁴ 29 U.S.C. 152(5).

²¹⁵ 13 CFR 121.201.

²¹⁶ The Census Bureau only provides data about receipts in years ending in 2 or 7. The 2022 data

Continued

these, 12,875 (98% of total) are definitely small businesses according to SBA standards because their receipts are below \$10 million.²¹⁷ And, 89 additional unions have annual receipts between \$10 million and \$14,999,999.²¹⁸ Since the Board cannot determine how many of those 89 labor union firms fall below the \$14.5 million annual receipt threshold, it will assume that all 89 are small businesses as defined by the SBA. Therefore, for the purposes of this IRFA, the Board assumes that 12,964 labor unions (98.7% of total) are small businesses that could be impacted by the proposed rule.

The number of small entities likely to be specially impacted by the proposed rule, however, is much lower. First, the blocking charge policy 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 dismissing the petition. This occurs only in a small percentage of the Board's cases. For example, between July 31, 2018 and July 30, 2020, the last two-year period during which the original blocking charge policy was in effect, there were 162 requests that an unfair labor practice charge block an election (i.e., an average of 81 per year). Assuming each request involved a distinct employer and labor organization, the Board's blocking charge policy affected an average of 162 entities per year, which is only .000026% of the 6,081,544 small entities that could be subject to the Board's jurisdiction.²¹⁹

Second, the number of small entities likely to be specially impacted by the voluntary recognition bar doctrine is also low. Since the modified voluntary recognition bar became effective on July 31, 2020, the Board has tracked the

has not been published, so the 2017 data is the most recent available information regarding receipts. See U.S. Department of Commerce, Bureau of Census, 2017 SUBS Annual Data Tables by Establishment Industry, Data by Enterprise Receipts Size, <https://www.census.gov/data/tables/2017/econ/subs/2017-susb-annual.html> (from downloaded Excel Table entitled "U.S., 6-digit NAICS" found at https://www2.census.gov/programs-surveys/subs/tables/2017/us_6digitnaics_rcptsize_2017.xlsx (Classification #813930—Labor Unions and Similar Labor Organizations)).

²¹⁷ Id.

²¹⁸ See id.

²¹⁹ Under the current rule regarding blocking charges, which has been effective since July 31, 2020, there were 3,867 petitions filed and 66 requests that unfair labor practice charges block an election, which means only 132 entities of the 6,081,544 small entities (.000021%) that could be subject to the Board's jurisdiction have been affected by the policy.

number of requests for notices used to inform employees that a voluntary recognition had taken place and of their right to file a petition for an election. On average, the Board has received 130 requests per year for those notices. Assuming each request was made by a distinct employer and involved at least one distinct labor union, only 260 entities of any size were affected. Even assuming all 260 of those entities met the SBA's definition of small business, they would account for only .000042% of the 6,081,544 small entities that could be subject to the Board's jurisdiction.

b. Restoration of the Use of Contract Language To Serve as Sufficient Evidence of 9(a) Recognition in Representation Cases in the Construction Industry

The Board believes that restoring the use of contract language to serve as sufficient evidence of majority-supported voluntary recognition under section 9(a) in representation cases in the construction industry is only relevant to employers engaged primarily in the building and construction industry and labor unions of which building and construction employees are members. The need to differentiate between voluntary recognition under section 8(f) of the Act versus section 9(a) is unique to entities engaged in the building and construction industry because section 8(f) applies solely to those entities. Of the 701,477 building and construction-industry employers classified under the NAICS Section 23 Construction,²²⁰ between 688,291 and

²²⁰ 13 CFR 121.201. 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

691,614 fall under the SBA "small business" standard for classifications in the NAICS Construction sector.²²¹ The Department of Labor's Office of Labor-Management Standards (OLMS) provides a searchable database of union annual financial reports.²²² 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 of which building and construction employees are members. In its 2019 IRFA, the Board identified 3,929 labor unions primarily operating in the building and construction industry that met the SBA "small business" standard of annual receipts of less than \$7.5 million.²²³ Although unions that do not primarily operate in the building and construction industry could still be subject to the proposed rule if they seek to represent employees engaged in the building and construction industry, comments received in response to the 2019 IRFA did not reveal that the Board failed to consider any additional small labor unions, including those representing employees engaged in the building and construction industry, or any other

Contractors; 238990: All Other Specialty Trade Contractors. See U.S. Department of Commerce, Bureau of Census, 2019 SUBS Annual Data Tables by Establishment Industry, https://www2.census.gov/programs-surveys/subs/tables/2019/us_state_6digitnaics_2019.xlsx.

²²¹ The Board could not determine a definitive number of construction-industry firms that are small businesses because the small business thresholds for the relevant NAICS codes are not wholly compatible with the manner in which the Census Bureau reports the annual receipts of firms. For example, the small business threshold is \$16.5 million in annual receipts for NAICS codes 238110–238990 and \$19.5 million in annual receipts for NAICS code 238290. But the Census Bureau groups together all firms with annual receipts between \$15 million and \$19,999,999. And, for NAICS codes 236115–237130 and 237310–237990, the small business threshold is \$39.5 million in annual receipts, but the Census Bureau groups together firms with annual receipts between \$35 million and \$39,999,999. See 13 CFR 121.201; U.S. Department of Commerce, Bureau of Census, 2017 SUBS Annual Data Tables by Establishment Industry, Data by Enterprise Receipts Size, <https://www.census.gov/data/tables/2017/econ/subs/2017-susb-annual.html> (from downloaded Excel Table entitled "U.S., 6-digit NAICS" found at https://www2.census.gov/programs-surveys/subs/tables/2017/us_6digitnaics_rcptsize_2017.xlsx (Classification #813930—Labor Unions and Similar Labor Organizations)).

²²² U.S. Department of Labor, Office of Labor-Management Standards, Online Public Disclosure Room, Download Yearly Data, Union Reports, Yearly Data Download for 2022, https://olmsapps.dol.gov/olpdr/?_ga=2.218681689.137533490.1665060520-1600335935.1665060520#Union%20Reports/Yearly%20Data%20Download/.

²²³ 84 FR 39955 & fn. 136. The small business threshold for labor unions has since increased to include entities with annual receipts of less than \$14.5 million. 13 CFR 121.201.

categories of small entities that would likely take special interest in a change in the standard for using contract language to prove majority-supported voluntary recognition.²²⁴ Therefore, at this time, the Board assumes that this portion of the proposed rule could only affect 695,543 of the 6,081,544 small entities that could be subject to the Board's jurisdiction.

The Board is also unable to determine how many of those 691,614 small building and construction-industry employers elect to enter voluntarily into a 9(a) bargaining relationship with a labor union and use language in a collective-bargaining agreement to serve as evidence of the labor union's 9(a) status. However, to the extent it is an indicator of the number of building and construction-industry employers that enter into a 9(a) bargaining relationship with a small labor union, 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 building and construction industry employers and unions. As the Board noted in its 2019 IRFA, between October 1, 2015 and September 30, 2017, only two cases required the Board to determine whether a collective-bargaining agreement was governed by 8(f) or 9(a).²²⁵ Since October 1, 2017, the issue has only come before the Board once.²²⁶

3. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule

The RFA requires an agency to determine the amount of "reporting,

recordkeeping and other compliance requirements" imposed on small entities.²²⁷ The Court of Appeals for the District of Columbia Circuit has explained that this provision requires an agency to consider direct burdens that compliance with a new regulation will likely impose on small entities.²²⁸

We believe that the proposed rule imposes no capital costs for equipment needed to meet the regulatory requirements; no direct costs of modifying existing processes and procedures to comply with the proposed rule; no lost sales and profits directly resulting from the proposed rule; no changes in market competition as a direct result of the proposed rule and its impact on small entities or specific submarkets of small entities; no extra costs associated with the payment of taxes or fees associated with the proposed rule; and no direct costs of hiring employees dedicated to compliance with regulatory requirements.²²⁹ Instead, the proposed rule should help small entities conserve resources that they might otherwise expend by participating in an election under the current rules that would be blocked under the proposed rule or by engaging in a representation case proceeding that would have otherwise been barred by a voluntary recognition. And, the proposed rule removes the information collection, recordkeeping, and reporting requirements that the 2020 Rule imposed on small entities. Accordingly, for the purposes of the IRFA, and subject to comments, the Board assumes that the only direct cost to small entities will be reviewing the rule.

To become generally familiar with the proposed reversions to the traditional blocking charge policy and voluntary recognition bar doctrine, we estimate that a human resources or labor relations specialist at a small employer may take at most ninety minutes to read the text of the rule and the supplementary information published in the **Federal Register** and to consult with an attorney.²³⁰ We estimate that an

attorney would bill the employer for a one hour consult.²³¹ Using the Bureau of Labor Statistics' estimated wage and benefit costs, we have assessed these costs to be between \$171.04 and \$177.44.²³²

For the limited number of small employers and unions representing employees in the construction industry that will endeavor to become generally familiar with all three changes to the rule—including the portion of the rule that restores the use of contract language to serve as sufficient evidence of majority-supported voluntary recognition under section 9(a) in representation cases in the construction industry—we estimate that a human resources or labor relations specialist may take at most two hours to read all three changes and the supplementary information published in the **Federal Register** and to consult with an attorney. We estimate that an attorney would only bill the employer for a one-hour consult.²³³ Thus, the Board has assessed labor costs for small employers and unions representing employees in the construction industry to be between \$194.84 and \$203.38.²³⁴

The Board is not inclined to find the costs of reviewing and understanding the rule to be 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.²³⁵ Other criteria to be considered are 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

²²⁴ The Board has identified the following unions as primarily operating in the building and construction industry: 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 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 still welcome as to any labor union not listed that would be affected by the proposed rule.

²²⁵ 84 FR 39955.

²²⁶ *Enright Seeding, Inc.*, 371 NLRB No. 127 (2022).

²²⁷ See 5 U.S.C. 603(b)(4), 604(a)(4).

²²⁸ 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.").

²²⁹ See SBA Guide at 37.

²³⁰ Data from the Bureau of Labor Statistics indicates that employers are more likely to have a human resources specialist (BLS #13-1071) than to have a labor relations specialist (BLS #13-1075). Compare Occupational Employment and Wages, May 2021, 13-1075 Labor Relations Specialists, found at <https://www.bls.gov/oes/current/oes131075.htm>, with Occupational Employment and Wages, May 2021, 13-1071 Human Resources

Specialists, found at <https://www.bls.gov/oes/current/oes131071.htm>.

²³¹ The Board based its preliminary estimates of how much time it will take to review the proposed rule and consult with an attorney on the fact that the proposed rule returns to the pre-2020 rule standard, which most employers, human resources and labor relations specialists, and labor relations attorneys are already knowledgeable about if relevant to their businesses.

²³² For wage figures, see May 2021 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 2021, average hourly wages for labor relations specialists were \$37.05 and for human resources specialists were \$34. The same figure for a lawyer (BLS # 23-1011) is \$71.17. Accordingly, the Board multiplied each of those wage figures by 1.4 and added them to arrive at its estimate.

²³³ The Board estimates that a labor relations attorney would require one hour to consult with a small employer or labor union about all three rule changes.

²³⁴ See fn. 232.

²³⁵ See SBA Guide at 18.

competitive ability, particularly against larger firms) and whether the cost of the proposed regulation will eliminate more than 10 percent of the businesses' profits, exceed one percent of the gross revenues of the entities in a particular sector, or exceed five percent of the labor costs of the entities in the sector.²³⁶ The minimal cost to read and understand the rule will not generate any such significant economic impacts.

Because the direct compliance costs do not exceed \$203.38 for any one entity, the Board has no reason to believe that the cost of compliance is significant when compared to the revenue or profits of any entity. However, the Board welcomes input from the public regarding its calculations, initial conclusions, or additional direct costs of compliance not identified by the Board.

4. An Identification, to the Extent Practicable, of All Relevant Federal Rules Which May Duplicate, Overlap, or Conflict With the Proposed Rule

The Board has not identified any Federal rules that conflict with the proposed rule. It welcomes comments that suggest any potential conflicts not noted in this section.

5. Description of Any Significant Alternatives to the Proposed Rule Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

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 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.²³⁷ The SBA has described this step as "[t]he keystone of the IRFA," because "[a]nalyzing alternatives establishes a process for the agency to evaluate proposals that achieve the regulatory goals efficiently and effectively without unduly burdening small entities, erecting barriers to competition, or stifling innovation."²³⁸ The Board

considered two primary alternatives to the proposed rule.

First, the Board considered taking no action. Inaction would leave in place the revised blocking charge policy, which we preliminarily believe, subject to comments, requires regional directors to conduct elections under potentially coercive conditions, and the modified voluntary recognition bar, which we preliminarily believe unfairly signals to employees that the Board views with suspicion their choices regarding representation and could hinder first contract bargaining. Additionally, inaction would place a unique burden on construction employers and unions to retain indefinitely proof of a union's showing of majority support. However, for the reasons stated in sections I through III above, the Board finds it desirable to revisit these policies. 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 definition of "small business." Also, if a large employer entered into a bargaining relationship with a small labor union, both entities would be exempted, further undermining these much-needed policy shifts. Additionally, because the Board considers the proposed rules to better protect employees' statutory rights, an exemption would adversely affect employees at all small entities. If small entities were exempt from the restored, historical blocking charge policy, a large swath of employees covered by the Act would be required to participate in elections held under coercive conditions. If small entities were exempt from the restored voluntary recognition bar, those employers and labor unions would have additional requirements for reporting and notice-posting. And, if small entities were exempt from the return to the use of contract language to serve as sufficient evidence of a 9(a) relationship in representation cases in the construction industry, they would be required to retain evidence of a union's majority status indefinitely. Further, it seems unlikely that drawing this distinction would be a permissible interpretation of the relevant statutory provisions.

Moreover, given the very small quantifiable cost of compliance, it is possible that the burden on a small business of determining whether it falls 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.²³⁹ As the Supreme Court has noted, "[t]he [NLRA] is [F]ederal legislation, administered by a national agency, intended to solve a national problem on a national scale."²⁴⁰ As such, exempting or creating an exception for small entities 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 when they solicit a "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). The PRA only applies when such collections are "conducted or sponsored by those agencies." 5 CFR 1320.4(a).

The proposed rules do not involve a collection of information within the meaning of the PRA. Even if the proposed rules were construed to require disclosures of information to the NLRB, third parties, or the public, such disclosures would only occur in the course of the Board's administrative proceedings. For example, a party could file an unfair labor practice charge and request that the charge block the processing of a representation proceeding. Or, a party could raise in a representation proceeding that an employer has already voluntarily recognized a particular union. However, the PRA provides that collections of information related to "an administrative action or investigation involving an agency against specific

²³⁹ However, there are standards that prevent the Board from asserting authority over entities that fall below certain jurisdictional thresholds. This means that extremely small entities outside of the Board's jurisdiction will not be affected by the proposed rule. See 29 CFR 104.204.

²⁴⁰ *NLRB v. Nat. Gas Util. Dist. of Hawkins Cty.*, 402 U.S. 600, 603–04 (1971) (quotation omitted).

²³⁶ *Id.* at 19.

²³⁷ 5 U.S.C. 603(c).

²³⁸ *Id.* at 37.

individuals or entities” are exempt from coverage. 44 U.S.C. 3518(c)(1)(B)(ii). A representation proceeding under section 9 of the Act, as well as an investigation into an unfair labor practice under section 10 of the Act, are administrative actions covered by this exemption. The Board’s decisions in these proceedings are binding on and thereby alter the legal rights of the parties to the proceedings and thus are sufficiently “against” the specific parties to trigger this exemption.²⁴¹

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

List of Subjects in 29 CFR Part 103

Colleges and universities, Election procedures, Health facilities, Jurisdictional standards, Labor management relations, Music, Remedial Orders, Sports.

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:

²⁴¹ Legislative history indicates Congress wrote this exception to broadly cover many types of administrative action, not just those involving “agency proceedings of a prosecutorial nature.” See S. REP. 96–930 at 56, as reprinted in 1980 U.S.C.C.A.N. 6241, 6296. For the reasons more fully explained by the Board in prior rulemaking, 79 FR 74307, 74468–69 (2015), representation proceedings, although not qualifying as adjudications governed by the Administrative Procedure Act, 5 U.S.C. 552b(c)(1), are nonetheless exempt from the PRA under 44 U.S.C. 3518(c)(1)(B)(ii).

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.

Whenever any party to a representation proceeding files an unfair labor practice charge together with a request that it block the processing of the petition to the election, or whenever any party to a representation proceeding requests that its previously filed unfair labor practice charge block the further processing of a petition, 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 processing of a petition shall also promptly make available to the regional director the witnesses identified in its offer of proof. 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 or would be inherently inconsistent with the petition itself, and thus would require that the processing of the petition be held in abeyance absent special circumstances, the regional director shall continue to process the petition and conduct the election where appropriate.

- 3. Revise § 103.21 to read as follows:

§ 103.21 Voluntary-recognition bar to processing of election petitions.

(a) An employer’s voluntary recognition of a labor organization as exclusive bargaining representative of a unit of the employer’s employees, based

on a showing of the union’s majority status, bars the processing of an election petition for a reasonable period of time for collective bargaining between the employer and the labor organization.

(b) A reasonable period of time for collective bargaining, during which the voluntary-recognition bar will apply, is defined as no less than 6 months after the parties’ first bargaining session and no more than 1 year after that date.

(c) In determining whether a reasonable period of time for collective bargaining has elapsed in a given case, the following factors will be considered:

(1) Whether the parties are bargaining for an initial collective-bargaining agreement;

(2) The complexity of the issues being negotiated and of the parties’ bargaining processes;

(3) The amount of time elapsed since bargaining commenced and the number of bargaining sessions;

(4) The amount of progress made in negotiations and how near the parties are to concluding an agreement; and

(5) Whether the parties are at impasse.

(d) In each case where a reasonable period of time is at issue, the burden of proof is on the proponent of the voluntary-recognition bar to show that further bargaining should be required before an election petition may be processed.

(e) This section shall be applicable to an employer’s voluntary recognition of a labor organization on or after [EFFECTIVE DATE OF FINAL RULE].

§ 103.22 [Removed]

- 4. Remove § 103.22.

Dated: October 28, 2022.

Roxanne L. Rothschild,
Executive Secretary.

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