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: Final rule.

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) hereby rescinds and replaces the amendments 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 rescinds an amendment governing the filing and processing of petitions for a Board-conducted representation election in the construction industry. The Board believes that the amendments made in this final rule 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: This rule is effective September 30, 2024.

FOR FURTHER INFORMATION CONTACT: Roxanne Rothschild, Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570–0001, (202) 273–2917 (this is not a toll-free number), 1–866–315–6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Introduction & Overview of the Rulemaking

As set forth more fully below, on April 1, 2020, the Board made various amendments to its rules and regulations governing blocking charges, the voluntary-recognition bar doctrine, and 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) (''the April 2020 rule'').

First, the April 2020 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 April 2020 rule, regional directors generally were required for the first time since the Act was declared constitutional to conduct an election even when an unfair labor practice charge and blocking request had been filed. 85 FR 18370, 18375. Moreover, under the April 2020 rule, regional directors generally were further required to immediately open and count the ballots, except in a limited subset of cases where the ballots would 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 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 April 2020 rule abandoned *Lamons Gasket Co.,* 357 NLRB 934 (2011), and returned to the approach taken previously by the Board in *Dana Corp.,* 351 NLRB 434 (2007). Under the April 2020 rule, neither an employer's voluntary recognition of a union, nor the first collective-bargaining agreement executed by the parties after recognition, bars 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 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, 18391.[2]

The April 2020 rule became effective on July 31, 2020. See *Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships,* 85 FR 20156 (April 10, 2020) (delaying effective date from June 1, 2020 to July 31, 2020).

On November 4, 2022, the Board issued a Notice of Proposed Rulemaking proposing to rescind and replace the three amendments to its rules and regulations made by the April 2020 rule. See *Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships,* 87 FR 66890 (November 4, 2022). The Board set an initial comment period of 60 days, with 14 additional days allotted for reply comments. 87 FR 66890. Thereafter the Board extended these deadlines by thirty days. See *Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships,* 87 FR 73705 (December 1, 2022). The comments are summarized and addressed in detail below.

The effect of the instant final rule, which adopts the NPRM proposals with several modifications, discussed below, is to return the law in each of those areas to that which existed prior to the adoption of the April 2020 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. More

[1] However, as discussed more fully below, the April 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.'' See *Rieth-Riley Construction Co., Inc.,* 371 NLRB No. 109 (2022).

[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 rule, 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.''

specifically, under the instant rule, regional directors once again have authority to delay an election when a party to the representation proceeding requests that its unfair labor practice charge block an election, provided the request is supported by an adequate offer of proof, the party agrees to promptly make its witnesses available, and no exception is applicable. The final rule restores the Board's prior applicable law regarding the blocking charge policy. For the sake of clarity, the final rule codifies the basic contours of the historical blocking charge policy, as well as the pre-April 2020 requirements contained in 29 CFR 103.20 in full.[3] The final rule rescinds current Section 103.21 and codifies the traditional voluntary-recognition bar, as refined in *Lamons Gasket* to define the reasonable period for collective bargaining that sets the duration of the bar. Lastly, the final rule rescinds current Section 103.22 in toto and returns to the Board's previously effective caselaw precedent, such as *Staunton Fuel* and *Casale Industries,* governing the application of the voluntary recognition bar and contract bar in the construction industry. After carefully considering the comments on the NPRM and the views of the April 2020 Board, we conclude that these 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.[4]

[3] Accordingly, the Board expects that the General Counsel will restore the provisions addressing blocking charges contained in the NLRB Casehandling Manual (Part Two), Representation Proceedings to those that existed prior to April 2020 rule.

[4] The Board's intention is that the actions taken in this final rule be treated as separate and severable. In the Board's view, set forth more extensively below, the 2020 rule fails to fully promote the Act's policies. The Board's rescissions of the portions of the 2020 rule that address the blocking charge policy and the voluntary-recognition bar doctrine are intended to be independent of its promulgation of the final rule text addressing these subjects. If all or portions of the final rule text promulgated here were deemed invalid, the Board would nevertheless adhere to its decision to rescind the 2020 rule's provisions addressing the blocking charge policy and the voluntary-recognition bar doctrine. In that event, the Board's view is that the historical blocking charge policy, which was developed through adjudication, would again be applied and developed consistent with the precedent that was extant before the 2020 rule was promulgated, unless and until the policy were revised through adjudication. Likewise, the Board's view is that the voluntary-recognition bar would revert to a caselaw doctrine, reflected in the controlling decision that preceded the 2020 rule, *Lamons Gasket,* supra, 357 NLRB 934, insofar as permissible, subject to change through adjudication.

II. Substantive 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 register a free and untrammeled 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 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 Steamship 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,[5] the Board has instituted 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

[5] 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. Petitions to deauthorize union-security provisions are classified as UD petitions.

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.'').[6]

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 rule radically altered each of those policies, and the instant rule restores the status quo ante.

A. Blocking Charge Policy

1. The Board's Historical Blocking Charge Policy; Its Rationale and Application

As the Board acknowledged in the notice of proposed rulemaking that culminated in the April 2020 rule, the blocking charge policy dates back to the early days of the Act. See *Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships,* 84 FR 39930, 39931 (Aug. 12, 2019). See also *United States Coal & Coke Co.,* 3 NLRB 398, 399 (1937). Indeed, prior to the April 2020 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.[7]

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 rule, 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 representation proceeding, and the charge alleged conduct that, if proven, would interfere 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).[8]

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. 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 organization's showing of interest was obtained through threats or force, allegations that an employer's

[6] 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'').

[7] See generally *The Developing Labor Law* 561–563 (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 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 the instant rule, in discussing the blocking charge policy as it existed prior to the April 2020 rule, we often cite to older editions of the Developing Labor Law and to versions of 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 April 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.

[8] 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 required the charging party to both file a request to block accompanied by a sufficient offer of proof and to promptly make its witnesses available. Casehandling Manual Section 11730.2 (January 2017).

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).[9] 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).[10]

2. The Blocking Charge Policy and the Board's December 2014 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) (''the December 2014 rule''). As the Board acknowledged when adopting the April 2020 rule (85 FR at 18376–18377), the Board also made certain modifications to the blocking charge policy as a part of its December 2014 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 at 74419; 29 CFR 130.20. The December 2014 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 at 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 at 74419–74420.

Two Board members dissented from the December 2014 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 at 74456.

The Board majority rejected the dissenters' proposal to conduct elections in all cases involving Type I charges. The December 2014 rule explained that the dissenting Board Members had not identified any compelling reason to abandon a policy continuously applied since 1937. 79 FR at 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 December 2014 rule. See *Associated Builders & 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

[9] 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).

[10] 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 Assn.,* 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).

effective date of the April 2020 rule, 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 the 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 84 FR 39930, 39937–39938. 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 that led to the April 2020 final rule 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 2019 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. 84 FR 39946 fn. 71, 39947 fn. 74.

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 39943–39944 & fn. 63; available at *https://www.nlrb.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, Section 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.nlrb.gov/guidance/memos-research/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, attached to GC Memorandum 19–02, available at *https://www.nlrb.gov/guidance/memos-research/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.'' 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, [currently] available at *https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-7583/member-mcferran-dissent-appendix.pdf.* 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, 39947 fn. 74.

The majority did not correct the errors before issuing the 2019 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. 85 FR 18366.[12] The April 2020 rule differed from the 2019 NPRM. Unlike the 2019 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 April 2020 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, 18399. The April 2020 rule also provided that notwithstanding a request to block based on a pending charge alleging certain specified types of Type 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 remain impounded pending a final determination by the Board). 85 FR 18369–18370, 18374, 18399. In short, under the April 2020 rule, a blocking charge request normally does not delay an election, and only rarer still delays the count of the ballots. 85 FR 18370, 18375, 18399. Nevertheless, the April 2020 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 virtually all elections involving blocking charges essentially for the reasons contained in the 2019 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 2019 NPRM and in the Bloomberg law article, supra fn. 11, the Board stated in the final rule:

> 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 blocking charge amendments became effective on July 31, 2020. See 85 FR 20156.

B. The Voluntary-Recognition Bar

1. The Historical Development of the Voluntary-Recognition Bar

The NPRM carefully examined the historical development of the voluntary-recognition bar, culminating in the adoption of the April 2020 final rule and the Board's experience under that rule. 87 FR 66895–66898. We briefly summarize that discussion here.

Voluntary recognition of unions by employers, based on the union's majority support among employees, is firmly grounded in the provisions and policies of the National Labor Relations Act. The explicit policies of the Act, expressed in Section 1, are to ''encourage[e] the practice and procedure of collective bargaining'' and to ''protect[ ] the exercise by workers of . . . designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment.'' 29 U.S.C. 151. The Act expressly endorses ''practices fundamental to the *friendly adjustment* of industrial disputes arising out of differences as to wages, hours, or other working conditions.'' Id. (emphasis added). Section 8(a)(5) of the Act accordingly 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

[11] After issuance of the NPRM, Bloomberg Law analyzed the data cited by the Board Majority in support of the 2019 NPRM and found that the Board Majority's empirical assertions were flawed. See Alex Ebert and Hassan A. Kanu, ''Federal Labor Board Used Flawed Data to Back Union Election Rule,'' *Bloomberg Law* (Dec. 5, 2019), available at *https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X1NF9E1C000000?bna_news_filter=daily-labor-report* (''[A] Bloomberg Law review of data supporting the rulemaking found dozens of cases in which the board overstated the length of delays attributable to blocking charges over the last three years—overshooting the mark in one instance by more than 12 years, and in another by five years.'' Id. ''The board's data overcounted delays in more than one-third of cases—55 in all—in which they said blocking charges were filed.''). 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.

designated or selected . . . by the majority of the employees'' in an appropriate unit. 29 U.S.C. 159(a) (emphasis added). Finally, Section 9(c)(1)(A)(i) provides that employees seeking union representation may file an election petition with the Board if they allege ''that their employer *declines to recognize* their representative.'' 29 U.S.C. 159(c)(1)(A)(i) (emphasis added).

Thus, as the Supreme Court has observed, an employer may lawfully choose to recognize a union as the representative of its employees, based on a showing that a majority of employees have designated the union, as opposed to insisting on a Board-conducted representation election.[13] Once an employer voluntarily recognizes a majority-supported union, the union becomes the exclusive bargaining representative of employees, and the employer has a duty to bargain with it.[14] The Act does not impose any procedural restrictions on voluntary recognition beyond the requirement that the union have majority support.[15] Nor does the Act suggest in any way that a lawfully recognized union lacks the same full authority to represent workers as a Board-certified union. Both are the exclusive representative of employees with whom the employer must bargain.[16]

In 1966, the Board instituted the voluntary-recognition bar doctrine, temporarily insulating a recognized union from challenge to its representative status for a reasonable period for collective bargaining and so protecting the newly formed bargaining relationship.[17] The principle that a rightfully established bargaining relationship must be given a ''fair chance to succeed'' before being tested had already been recognized by the Supreme Court,[18] which had also endorsed the Board's adoption of a certification bar, insulating a Board-certified union from challenge for one year.[19] The voluntary-recognition bar doctrine was modeled on existing bar doctrines protecting not only bargaining relationships established by Board certification of a union following an election, but also relationships established by a Board order in an unfair labor practice case or by an unfair labor practice settlement.[20]

The Board's voluntary-recognition bar doctrine became well established over the next 40 years.[21] It was upheld by every federal court of appeals presented with the issue on review, as reflected in decisions from the District of Columbia, Second, Third, Sixth, Seventh, and Ninth Circuits.[22] In 1988, for example, the Court of Appeals for the District of Columbia Circuit explained that whatever advantages an election may have to determine employee support for a union, ''an employer's voluntary recognition of a majority union also remains 'a favored element of national labor policy.' '' [23]

In 2007, however, the decision of a divided Board in *Dana Corp.,* supra, 351 NLRB 434, undercut the doctrine. *Dana* imposed new preconditions for application of the voluntary-recognition bar, introducing a notice-and-election procedure. Under that procedure, after voluntarily recognizing a union, employers were required to post a notice informing employees of their right to file a decertification-election petition, or to support a rival union's representation petition, within 45 days. A petition supported by at least 30 percent of bargaining-unit employees would be processed by the Board, leading to an election. In other words, no allegation or evidence that the recognized union lacked majority support, whether at the time it was recognized or thereafter, was required. Only if no election petition were filed within the 45-day period following the notice posting would the voluntary-recognition bar apply.

The *Dana* Board majority acknowledged that voluntary recognition was ''undisputedly lawful'' under the Act [24] and that ''[s]everal courts of appeals ha[d] endorsed the [existing] recognition-bar doctrine.'' [25] But it asserted that ''[t]here is good reason to question whether [union-authorization] card signings [used to

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[13] *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575, 595–597 (1969); *United Mine Workers,* 351 U.S. at 72 fn. 8.

[14] See, *e.g., Brown & Connolly, Inc.,* 237 NLRB 271, 275 (1978), enfd. 593 F.2d 1373 (1st Cir. 1979).

[15] If the union lacks majority support, measured by the number of employees in the bargaining unit, then the employer's voluntary recognition violates Sec. 8(a)(2) of the Act, which makes it an unfair labor practice for an employer ''to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.'' *International Ladies' Garment Workers' Union* v. *NLRB (Bernhard-Altmann),* 366 U.S. 731, 733 fn. 2, 738 (1961). Notably, to be certified by the Board through an election, a union need only win a majority of *voting employees,* regardless of the size of the bargaining unit. *RCA Mfg. Co.,* 2 NLRB 159, 177–178 (1936).

[16] To be sure, a union that has been certified by the Board as the result of an election enjoys certain specific protections and privileges—related to protecting their representative status, including from challenges by rival unions—that are not extended to voluntarily recognized unions. Thus, Sec. 9(c)(3) of the Act, in providing that another Board election may not be held for twelve months after a valid election, effectively insulates a certified union from a rival's challenge for that period. In addition, the Act confers on certified unions: (1) protection against recognitional picketing by rival unions under Sec. 8(b)(4)(C); (2) the right to engage in certain secondary and recognitional 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).

No other provision of the Act treats certified unions and recognized unions differently, and certainly not with respect to their role as bona fide representatives of a bargaining unit. Reading into the Act any broader Congressional intent to treat recognized unions less favorably would be unwarranted. See *United Mine Workers,* supra, 351 U.S. at 73 (addressing statutory consequences of union's failure to comply with certain since-repealed requirements and observing that the ''very specificity of the advantages to be gained and the express provision for the loss of these advantages imply that no consequences other than those so listed shall result from noncompliance'').

[17] *Keller Plastics Eastern, Inc.,* 157 NLRB 583 (1966) (establishing voluntary-recognition bar for unfair labor practice cases); *Universal Gear Service Corp.,* 157 NLRB 1169 (1966) (applying voluntary-recognition bar in unfair labor practice case), enfd. 394 F.2d 396 (6th Cir. 1968); *Sound Contractors Assn.,* 162 NLRB 364 (1966) (establishing voluntary-recognition bar for representation cases).

[18] *Franks Bros. Co.* v. *NLRB,* 321 U.S. 702, 705 (1944) (upholding bargaining order against employer, despite union's loss of majority support, and observing that ''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'').

[19] *Brooks* v. *NLRB,* 348 U.S. 96, 100 (1954) (upholding certification bar and endorsing principle that ''[a] union should be given ample time for carrying out its mandate on behalf of its members, and should not be under exigent pressure to produce hot-house results or be turned out'').

[20] *Keller Plastics,* supra, 157 NLRB at 586–587. The *Keller Plastics* Board observed:

> [L]ike 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 587.

[21] For cases applying the voluntary-recognition bar during this period, see, *e.g., Universal Gear Service Corp.,* supra, 157 NLRB 1169; *Montgomery Ward & Co.,* 162 NLRB 294 (1966), enfd. 399 F.2d 409 (7th Cir. 1968); *Blue Valley Machine & Mfg. Co.,* 180 NLRB 298 (1969), enfd. in relevant part 436 F.2d 649 (8th Cir. 1971); *Broad Street Hospital & Medical Center,* 182 NLRB 302 (1970), enfd. 452 F.2d 302 (3d Cir. 1971); *Timbalier Towing Co.,* 208 NLRB 613 (1974); *Whitemarsh Nursing Center,* 209 NLRB 873 (1974); *Rockwell International Corp.,* 220 NLRB 1262 (1975); *Brown & Connolly, Inc.,* supra, 237 NLRB 271; *Ford Center for the Performing Arts,* 328 NLRB 1 (1999); *MGM Grand Hotel, Inc.,* 329 NLRB 464 (1999); and *Seattle Mariners,* 335 NLRB 563 (2001).

[22] See, *e.g., Exxel/Atmos, Inc.* v. *NLRB,* 28 F.3d 1243, 1247–1248 (D.C. Cir. 1994); *NLRB* v. *Cayuga Crushed Stone, Inc.,* 474 F.2d 1380, 1383–1384 (2d Cir. 1973); *NLRB* v. *Frick Co.,* 423 F.2d 1327, 1332 (3d Cir. 1970); *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, 398 (6th Cir. 1968).

[23] *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)).

[24] 351 NLRB at 436.

[25] Id. at 441.

demonstrate a union's majority support] accurately reflect employees' true choice concerning union representation.'' [26] The *Dana* Board accordingly justified the new notice-and-election procedure by concluding that the ''immediate post[-]recognition imposition of an election bar does not give sufficient weight to the protection of the statutory rights of affected employees to exercise their choice on collective bargaining representation through the preferred method of a Board-conducted election.'' [27]

Four years later, in *Lamons Gasket,* decided in 2011, the Board reversed the *Dana* decision, abandoned its novel notice-and-election procedure, and reinstated the traditional voluntary-recognition bar with one significant modification. For the first time, the Board defined the reasonable period for bargaining that established the length of the voluntary-recognition bar. It fixed the period at no less than six months, but no more than one year, and incorporated the multifactor test used by the Board to determine the analogous period when an employer has been ordered to bargain with a union.[28]

The *Lamons Gasket* Board carefully refuted the rationale of the *Dana* decision. It observed that, as demonstrated by the Act's provisions, Congress had endorsed the practice of voluntary recognition and had not subordinated it to the election process as a means for employees to exercise free choice concerning union representation.[29] It pointed to the Board's administrative experience under the *Dana* notice-and-election procedure, observing that experience refuted the *Dana* Board's skepticism that voluntarily recognized unions actually had majority support among employees: in only 1.2 percent of the cases in which a *Dana* notice was requested did employees ultimately decertify a voluntarily recognized union through an election.[30] It characterized the *Dana* notice-and-election procedure as inviting employees to reconsider their choice to be represented, which inappropriately suggested ''that the Board considers their choice . . . suspect.'' [31] It explained that the voluntary-recognition bar doctrine was consistent with the Board's other bar doctrines, all of which ''share the same animating principle: that a newly created bargaining relationship should be given a reasonable chance to succeed before being subject to challenge.'' [32] Finally, the *Lamons Gasket* Board pointed out that by creating a period of uncertainty about the union's representative status, the *Dana* notice-and-election procedure unnecessarily interfered with the bargaining process and made successful bargaining less likely.[33]

2. The April 2020 Amendments to the Voluntary-Recognition Bar

Lamons Gasket remained Board law for nine years [34] until it was overruled by the Board's 2020 rule, which essentially reinstated and codified the *Dana* notice-and-election procedure as Section 103.21 of the Board's Rules and Regulations, 29 CFR 103.21. Under the 2020 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's justification for the 2020 rule adhered closely to the rationale of the *Dana* decision. The Board described elections as the statutorily preferred method for resolving questions concerning representation, citing Section 9(c)(3) of the Act (which prohibits a new election for the year following a valid election) and the specific statutory advantages granted only to Board-certified unions.[35] It noted that the Board did not supervise the recognition process and rejected the notion that the Act's unfair labor practice provisions were sufficient to address coercive conduct related to voluntary recognition.[36] Elections had the advantage of ''present[ing] a clear picture of employee voter preference at a single moment,'' the Board claimed. The reinstituted *Dana* notice-and-election procedure, the Board added, did not restrict or limit voluntary recognition or the bargaining obligations that follow from recognition. According to the Board, the new rule was also supported by the possibility that a recognized union would reach a collective-bargaining agreement during the bar period, triggering the separate, long-established contract-bar doctrine and extending the period during which the union's representative status could not be challenged.[37] These arguments, first advanced in *Dana,* had been persuasively addressed by the *Lamons Gasket* decision, which the 2020 rule overruled.

In overruling *Lamons Gasket,* the 2020 rule Board acknowledged the administrative experience under the *Dana* notice-and-election procedure (only 4.65 percent of *Dana* notices resulted in election petitions, and employees decertified voluntarily recognized unions in only 1.2 percent of cases in which a *Dana* notice was requested), but rejected the view that the *Dana* procedure had been revealed as unnecessary.[38] Instead, the Board focused on the fact that when a *Dana* election *was* held, the union was decertified about one-quarter of the time, and declined to infer—from the more than 95 percent of *Dana* notice cases in which *no* election petition was filed—that voluntarily recognized unions typically have majority support.[39] There was no evidence, the Board observed in turn, that the *Dana* procedure had discouraged voluntary recognition or discouraged or delayed collective bargaining.[40] In the Board's view, the cost to recognized unions of diverting resources from bargaining to campaigning was outweighed by the benefit of permitting employees to vote in an election.[41]

3. The 2022 Proposed Rule

In the NPRM, the Board explained that it ''propose[d] to rescind the current § 103.21 of the Board's Rules and

[26] Id. at 439.

[27] Id. at 434.

[28] 357 NLRB at 748 & fn. 34 (citing *Lee Lumber & Building Material Corp.,* 334 NLRB 399 (2001), enfd. *310 F.3d 209 (D.C. Cir. 2002)*).

[29] Id. at 740–742.

[30] Id. at 742.

[31] Id. at 744.

[32] Id. That principle was especially applicable in the case of bargaining relationships established voluntarily, the Board noted, because the Act not only explicitly promotes collective bargaining, but also encourages workplace cooperation, without government intervention, to avoid labor disputes. Id. at 746 (citing, inter alia, *H.K. Porter Co.* v. *NLRB,* 397 U.S. 99, 103 (1970)) (''The object of th[e] Act was not to allow governmental regulation of the terms and conditions of employment, but rather to insure that employers and their employees could work together to establish mutually satisfactory conditions.'').

[33] Id. at 747.

[34] During that period, no judicial decision had cast doubt on *Lamons Gasket* or questioned the long-established, judicially approved voluntary-recognition bar.

[35] 85 FR 18381.

[36] Id.

[37] Id.

[38] Id. at 18383.

[39] Id.

[40] Id. at 18384.

[41] Id. at 18385.

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.*'' [42] The Board stated its preliminary view that ''restoring the voluntary-recognition bar, in its more traditional form . . . 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.'' [43]

In explaining its preliminary support for rescission of the 2020 rule and codification of *Lamons Gasket,* the Board observed that experience under existing Section 103.21 ''seems to show that voluntary recognition almost always reflects employee free choice accurately.'' [44] If Section 103.21 were premised on suspicion of voluntary recognition, in turn, it would be ''in obvious tension'' with the Act itself and with the Supreme Court's *Gissel* decision, which permit lawful—and enforceable—bargaining relationships to be established without a Board election.[45] The Board noted, among other things, that: (1) several federal appellate courts had endorsed the voluntary-recognition bar, while none had rejected it; and (2) the 2020 Board had argued neither that the voluntary-recognition bar was irrational or inconsistent with the Act, nor that the current notice-and-election procedure was compelled by the Act.[46] The Board invoked the traditional, judicially-approved rationale for the recognition-bar doctrine: that, like other bar doctrines, it served to promote collective bargaining by protecting a bargaining relationship until it had a fair chance to succeed.[47] The Board expressed its initial view that the existing notice-and-election procedure ''has a significant potential to interfere with effective collective bargaining'' by subjecting a recognized union to challenges to its status as it sought to bargain or to administer a first collective-bargaining agreement.[48]

The Board also observed that the current rule permits such a challenge without evidence that the recognized union—which was required to show majority support in the bargaining-unit as a whole—had not been freely chosen and without a showing that it had since lost majority support in the unit.[49] Indeed, the union could lose its representative status based on an election decided by a majority of voting employees that might comprise a minority of unit employees.[50] That process thus tended to undermine, not promote, employee free choice, in the Board's preliminary view.[51]

Finally, the Board addressed its experience under the notice-and-election procedure restored by Section 103.21. It expressed the preliminary view that this ''experience provides no evidence that voluntary recognition is suspect'' and thus that the current rule would seem to have a reasonable tendency both to ''undermine employee free choice (as reflected in the lawful designation of the voluntarily recognized union) and to interfere with effective collective bargaining.'' [52] Examining the relevant data, the Board suggested it showed ''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.'' [53] This tentative conclusion, the Board observed, was entirely consistent with the relevant data developed under the original *Dana* notice-and-election procedure.[54] The Board explained why, in line with the *Lamons Gasket* decision, it was inclined to disagree with the 2020 Board's dismissal of the data under *Dana.*[55] In any case, the Board observed, the ''data offer no affirmative suggestion that voluntary recognition is suspect as a means of ascertaining employee choice.'' [56]

In the interest of transparency, we provide in quarterly detail the administrative data made available since the NPRM issued, which is consistent with prior data cited in the NPRM and in the *Lamons Gasket* decision.[57] We have placed this new data in the administrative record, but we do not rely on it as a basis for the final rule. We also provide a consolidated tally of all experience based on data practicably available from the inception of the 2020 rule until the issuance of this final rule.[58]

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[42] 87 FR 66909. The proposed rule was limited to the representation-case context; the Board invited comment on whether the final rule should extend to unfair labor practices cases as well, *e.g.,* case where an employer is alleged to have violated Sec. 8(a)(5) by withdrawing recognition from a union, before a reasonable period for bargaining has elapsed. Id. The Board also specifically invited comment on whether it should adhere to the Board's decision in *Smith's Food,* supra, 320 NLRB 844, reaffirmed in *Lamons Gasket,* which governs situations in which a rival union files an election petition following the employer's voluntary recognition of another union. 87 FR 66910. Finally, the Board invited comment on the reasonable period for bargaining defined in the proposed rule and the effect of Sec. 103.21 on the collective-bargaining process. Id.

[43] Id.

[44] Id.

[45] Id. at 66910.

[46] Id. at 66909–66910.

[47] Id. at 66910. As noted previously, the Board specifically invited public comment on how the final rule should define a reasonable period for collective bargaining, establishing the duration of the voluntary-recognition bar. Id.

[48] Id.

[49] Id.

[50] Id.

[51] Id.

[52] Id. at 66911. The Board ''invite[d] commenters to submit additional empirical evidence to inform our views on this subject.'' Id.

[53] Id. The Board observed that ''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.'' Id. In the NPRM, the Board provided a quarter-by-quarter description of the administrative data from the inception of the 2020 rule through June 30, 2022. Id. at 66898. For this period, 260 requests for notices following voluntary recognition were filed with the Board. Id. In those cases, one election petition was subsequently filed, and no elections were held. In the one case where a petition was filed, the union disclaimed interest after its filing. Id. Thus, only 0.4 percent of recognition-notice requests resulted in election petitions and 0 percent of notices resulted in actual elections. If we count the union's disclaimer as equivalent to a decertification following an election loss, then employees opted not to retain the voluntarily recognized union in only 0.4 percent of the total cases in which recognition notices were requested. Id.

[54] Id. at 66911.

[55] Id. at 66911–66912.

[56] Id. at 66912.

[57] Since the issuance of the NPRM, NLRB FOIA data has been migrated to a new website. The new location for the previously listed data from the NPRM is: *https://www.securerelease.us/public-reading-room/agency/1509aa51-5edc-4d54-af75-f29074bde82c/component/794f2cd1-e0e1-466d-bb26-919fe5283155,* under the following file names: 2024–NLFO–00812–VR Cases Received Calendar Year 2020.xlsx; 2024–NLFO–00812–VR Cases Received Calendar Year 2021.xlsx; 2024–NLFO–00812–VR Cases Received Calendar Year 2022.xlsx. Note that, although the files are organized by calendar year, the files include tabs that contain the quarterly (or other incrementation) data under which the data was analyzed in the NPRM.

[58] The administrative data show as follows:

For the period from July 1, 2022, through September 30, 2022, administrative data shows 54 voluntary recognition notice requests in NLRB regions. None resulted in a petition being filed. However, in one case a petition was withdrawn under unknown circumstances.

For the period from October 1, 2022 through December 31, 2022, there were 52 notice requests. In two instances decertification petitions were filed. In one of these, the union disclaimed interest and in the other the union prevailed 14–8 in an election.

For the period from January 1, 2023 through March 31, 2023, there were 39 notice requests. In one instance a petition was dismissed and the notice pulled because of the union's lack of cards and in another the matter was closed because of the union's lack of cooperation.

For the period from April 1, 2023 through June 30, 2023, 92 notice requests occurred. In one case a decertification petition was dismissed for lack of a showing of interest. In another, the recognized union apparently stepped aside to allow another union to process its petition.

During the period from July 1, 2023 through September 30, 2023, there were 51 notice requests and no petitions filed. Two notice requests were

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

1. The Board's Historical Treatment of 9(a) Recognition in the Construction Industry

As discussed in greater detail in the NPRM, in response to the unique characteristics of the construction industry, Congress amended the Act in 1959 to adopt Section 8(f), which provides a limited exception to the Act's Section 9(a) requirement that a union must have majority support among the employees in an appropriate unit to be recognized as the exclusive collective-bargaining representative. Section 8(f) permits a construction employer and a union to enter into a prehire agreement establishing the union as the exclusive collective-bargaining representative, even where the union does not have the support of a majority of the construction employer's employees under Section 9(a).

In the seminal case of *John Deklewa & Sons,* the Board set forth a framework for applying Section 8(f) to further the dual Congressional objectives that prompted its enactment: ''attempt[ing] to lend stability to the construction industry while fully protecting employee free choice principles.'' 282 NLRB 1375, 1388 (1987), enfd. sub nom. *Iron Workers Local 3* v. *NLRB,* 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

As recounted in the NPRM, the *Deklewa* Board was mindful of a critical principle underlying Section 8(f): unions representing employees in the construction industry should not be treated less favorably than unions in other industries, including with regard to permitting a construction employer to be able to voluntarily recognize a union with majority support as its employees' 9(a) representative. Id. at 1387 fn. 53. Unions with majority support may choose to seek 9(a) recognition because, unlike where there is only an 8(f) relationship, it would allow them to enjoy the full panoply of rights and obligations available to unions serving as the exclusive collective-bargaining representative of employees in all other industries, including the irrebuttable presumption of majority support during the first three years of the contract and a rebuttable presumption of majority support at other times such as at the contract's expiration. Id. at 1385, 1387. Consequently, the Board in *Deklewa* adopted a rebuttable presumption that a collective-bargaining relationship in the construction industry is established under Section 8(f), but provided that a union asserting 9(a) status could rebut that presumption. Id. at 1385 fn. 41. For the 8(f) relationship to become a 9(a) relationship, a union—like unions representing employees in nonconstruction industries—must demonstrate a ''clear showing of majority support'' from the unit employees. Id. at 1385–1387 & fn. 53. Thus, both within the construction industry and outside it, establishing a bargaining relationship under Section 9(a) requires a proffered showing of majority support for the union.

Because Section 8(f) uniquely permits, in the construction industry, voluntary recognition in the absence of majority support, the Board has sought to avoid uncertainty over whether a grant of recognition is pursuant to Section 8(f) or 9(a) by requiring that 9(a) recognition in the construction industry be supported by positive evidence acknowledging a union's 9(a) status, such as agreed-upon language in a collective-bargaining agreement. *J & R Tile, Inc.,* 291 NLRB 1034, 1036 (1988) (''[A]bsent a Board-conducted election, the Board will require positive evidence that the union sought and the employer extended recognition to a union as the 9(a) representative of its employees before concluding that the relationship between the parties is 9(a) and not 8(f).''); see also *Golden West Electric,* 307 NLRB 1494, 1495 (1992) (finding positive evidence of a 9(a) relationship where the parties' voluntary recognition agreement unequivocally stated that the union claimed it represented a majority of employees and the employer acknowledged this was so, despite conflicting evidence as to whether the employer saw the union's authorization cards).

In *Staunton Fuel & Material, Inc.,* supra, the Board defined the minimum requirements for what must be stated in a written recognition agreement or a contract clause in a collective-bargaining agreement for it to suffice as evidence of a union having attained 9(a) status. 335 NLRB at 719–720. The Board in *Staunton Fuel,* following the approach of the Tenth Circuit, 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.'' Id. at 719–720 (citing *NLRB* v. *Triple C Maintenance, Inc.,* 219 F.3d 1147, 1154 (10th Cir. 2000), and *NLRB* v. *Oklahoma Installation Co.,* 219 F.3d 1160 (10th Cir. 2000)). Outside of the construction industry, where there is no 8(f) recognition, no similar evidentiary formality is needed for voluntary recognition because there is no need to distinguish presumptive 8(f) recognition from 9(a) majority recognition.

Significantly, the contract language attesting to a construction employer's 9(a) recognition of a union neither itself bestows 9(a) status nor substitutes for a union showing or offering to show evidence of its majority support. It does, however, provide a contemporaneous, written memorialization that a union had majority support at the time of the initial 9(a) recognition. Relying on the contract language is much preferable to trying to ascertain years in the future, should the union's 9(a) status later be challenged, whether the purported majority support had existed at the inception of the 9(a) relationship—in some cases many years before a dispute over a union's status has arisen—when evidence may no longer be easily available as witnesses and documents may disappear over time. Instead, the Board and the parties can look to the language adopted as a part of the parties' agreement to confirm that majority support existed when the 9(a) relationship was initially established.

Moreover, the Board in *Staunton Fuel* recognized that contract language can

apparently withdrawn, but no additional detail was provided.

For the period from October 1, 2023 through December 31, 2023, the administrative data shows that 69 notices were requested and no petitions were filed.

For the period from January 1, 2024 through March 31 2024, the administrative data shows that 59 notices were requested and no petitions were filed.

We discount the three instances where the notice request was withdrawn and/or the notice matter was closed (given the lack of information as to why this occurred in each case), conservatively construe the disclaimer case and the case where the matter was closed because the union appeared to lack cards as cases where the notice posting resulted in a change in representative status, and count the cases of a union victory and a decertification petitioner's lack of sufficient signatures as cases where the notice posting failed to effect a change in status.

Thus, we have the following totals: 413 notice requests, possibly leading to a change in representative status in 2 cases, *i.e.,* less than one percent (0.5%), of the total number.

The data is publicly available at the following URL: *https://www.securerelease.us/public-reading-room/agency/1509aa51-5edc-4d54-af75-f29074bde82c/component/794f2cd1-e0e1-466d-bb26-919fe5283155,* under the following files (which, for 2022 and 2023, are internally organized by tabs corresponding to each calendar quarter): 2024–NLFO–00812–VR Cases Received Calendar Year 2022.xlsx; 2024–NLFO–00812–VR Cases Received Calendar Year 2023.xlsx; 2024–NLFO–01446-final-VR cases received 1–1–2024 thru 3–31–2024.xlsx.

only serve as evidence of a union's 9(a) status if it is true. Because contract language alone would not necessarily evidence a union's majority support where there are questions about its veracity, the Board in *Staunton Fuel* left open the possibility that an employer could challenge the union's majority support within the 10(b) period. Id. at 720 & fn. 14. *Staunton Fuel* did not alter the Board's longstanding practice of considering all available evidence bearing on the nature of the parties' bargaining relationship where the contract language alone is not conclusive of whether the parties intended to establish a 9(a) rather than an 8(f) relationship. Id. at 720 fn. 15.

As the District of Columbia Circuit has recognized, if other evidence casts doubt on the assertion that the union enjoyed majority support at the time the employer purportedly granted 9(a) recognition, the contract language necessarily fails to satisfy its intended purpose and cannot be relied upon to demonstrate 9(a) status. For instance, in *Nova Plumbing, Inc.* v. *NLRB,* the District of Columbia Circuit reasoned that language in a collective bargaining ''cannot be dispositive at least where, as here, the record contains strong indications that the parties had only a section 8(f) relationship.'' 330 F.3d 531, 537 (D.C. Cir. 2003). The court pointed to strong evidence in the record that contradicted the contract language. Id. at 533. Subsequently, in *M & M Backhoe Service, Inc.* v. *NLRB,* the District of Columbia Circuit distinguished *Nova Plumbing* to uphold 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. 469 F.3d 1047, 1050 (D.C. Cir. 2006).

Six years after *M & M Backhoe,* in *Allied Mechanical Services, Inc.* v. *NLRB,* the District of Columbia Circuit quoted the *Nova Plumbing* court but, in doing so, added emphasis to specify that the contract language cannot be dispositive of a union's 9(a) status in situations where the record contains contrary evidence. 668 F.3d 758, 766 (2012). More recently, in *Colorado Fire Sprinkler, Inc.* v. *NLRB,* the District of Columbia Circuit 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. 891 F.3d 1031, 1040–1041 (D.C. Cir. 2018). 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 Section 9(a) status.'' Id. at 1041.

In *Enright Seeding, Inc.,* the Board noted that neither *Nova Plumbing* nor *Colorado Fire Sprinkler* involved situations where the court rejected the union's claim of 9(a) status based solely on contract language because in both cases other evidence existed calling into question the union's majority status. 371 NLRB No. 127, slip op. at 4 fn. 18 (2022). However, responding to both court decisions, the Board clarified that ''contractual language can only serve as evidence of a union's 9(a) majority representation if it is true.'' Id. at 5. ''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 alone is insufficient to demonstrate the union's 9(a) status.'' Id. at 3–4.

As the Board noted in the NPRM, where there has been unlawful 9(a) recognition of a minority union, *Staunton Fuel* does not change longstanding Board precedent that an employer—regardless of whether a construction employer or a nonconstruction employer—engages in ''unlawful support.'' See *Bernhard-Altmann,* 366 U.S. at 738 (''The law has long been settled that a grant of exclusive recognition to a minority union constitutes unlawful support in violation of [Section 8(a)(2)], because the union so favored is given 'a marked advantage over any other in securing the adherence of employees.' '') (quoting *NLRB* v. *Pennsylvania Greyhound Lines,* 303 U.S. 261, 267 (1938)). Even if done in good faith, an employer violates Section 8(a)(2) and (1) by extending 9(a) recognition to a union that does not enjoy majority support, and the union's acceptance of such recognition in these circumstances violates Section 8(b)(1)(A). See *Joseph Weinstein Electric Corp.,* 152 NLRB 25, 39 (1965) (finding a construction employer's 9(a) recognition of and entering into an agreement with a union that does not enjoy majority support unlawful under Section 8(a)(2) and (1) and 8(b)(1)(A)).

Because an employer voluntarily recognizing a union and entering into a collective-bargaining agreement creates a contract bar of up to 3 years, no question of representation can be raised during that time. Thus, an employee or a rival union that seeks to challenge the propriety of the recognition generally cannot do so in a representation proceeding; rather, that allegation must be investigated and adjudicated in an unfair labor practice proceeding. If the Board finds that the employer entered into an agreement with a union that was a minority representative, the Board will remedy the violation by ordering the employer to cease recognizing the union and to repudiate the collective-bargaining agreement. See, *e.g., Bear Creek Construction Co.,* 135 NLRB 1285, 1286–1287 (1962) (ordering a construction employer that provided unlawful assistance to a union in obtaining membership applications and checkoff authorization cards to cease and desist from recognizing the union as its employees' collective-bargaining representative and giving effect to the parties' agreement).

With this safeguard against employer and union collusion in place, *Staunton Fuel* promotes critical federal labor law policies, including protecting employee free choice while fostering stability in collective-bargaining relationships. It also prevents construction employers from evading their duties under bargaining relationships that they entered into voluntarily and challenging an initial grant of 9(a) recognition from years earlier, since evidence confirming the union's majority support may no longer be available. After all, memories fade and the witnesses and documents pertinent to the initial 9(a) recognition disappear over time. Thus, *Staunton Fuel* furthers the policies of the Act and those set forth in *Deklewa.*

As recounted in the NPRM, six years after issuing *Deklewa,* the Board in *Casale Industries* fashioned a limitations period for challenging an initial grant of 9(a) recognition by relying on the same basic tenet from *Deklewa* discussed above—that unions representing construction-industry employees should be treated no less favorably than those representing nonconstruction-industry employees. The Board explicitly incorporated 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,* 362 U.S. 411, 419 (1960), barring a challenge to a union's majority support if more than 6 months had elapsed from when it was initially granted recognition. 311 NLRB 951, 953 (1993).

The Court in *Bryan Manufacturing* based its decision on not only the statutory language of Section 10(b) of the Act but also the practical need for a time restriction on anyone—employers, unions, and employees—

from challenging a union's initial recognition. 362 U.S. at 416–417. 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.'' Id. at 419.

The *Casale* Board concluded that the same interests acknowledged by the Court in *Bryan Manufacturing* should prevail in construction-industry representation cases: ''[P]arties in nonconstruction industries, who have established and maintained a stable Section 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.'' 311 NLRB at 953 (citing *Deklewa,* 282 NLRB at 1387 fn. 53); see also *NLRB* v. *Triple A Fire Protection, Inc.,* 136 F.3d 727, 737 (11th Cir. 1998), cert. denied 525 U.S. 1067 (1999).

2. The April 2020 Amendments to 9(a) Recognition in the Construction Industry

In the April 2020 rule, the Board adopted the proposed language from its August 12, 2019 NPRM to overrule *Staunton Fuel,* regarding the purported sufficiency of contract language alone to establish a 9(a) bargaining relationship. The April 2020 rule required, in the representation context, that parties retain additional positive evidence, beyond the parties' contract language, of the union's majority support at the time of its initial 9(a) recognition if they seek to rely on either the Board's voluntary recognition bar or contract bar in response to a challenge to the union's presumption of majority support. Moreover, under the April 2020 rule, a regional director must process a representation petition, even if a construction employer had provided unlawful assistance to a union by granting it 9(a) recognition despite the union's lack of majority support. The election would be held but, because of the unremedied unfair labor practices by the construction employer having granted and the union having accepted unlawful assistance, there would not be the laboratory conditions necessary to ascertain employees' uncoerced sentiments towards the union.

Moreover, even though the August 12, 2019 NPRM made no mention whatsoever of altering the bedrock principle from *Bryan Manufacturing,* reiterated in *Casale,* that a challenge cannot be made to a union's initial recognition by a construction employer after 6 months had elapsed, the Board's April 2020 rule stated in the preamble that it was overruling *Casale* ''to the extent that it is inconsistent with the instant rule'' and 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) recognition to a union and 6 months elapse without a petition.'' 85 FR 18391. The practical effect of the Board's unanticipated overruling of *Casale* in the April 2020 rule was to require a construction employer and a union to retain any and all evidence of the union's initial majority support indefinitely because—no matter how much time had passed—a party would never be time-barred from challenging the union's 9(a) status by asserting that the union lacked majority support when it was initially granted 9(a) recognition.

3. The 2022 Proposed Rule

In the Board's November 4, 2022 NPRM, the Board proposed to rescind Section 103.22 in toto and to have the Board's previously effective caselaw precedent, such as *Staunton Fuel, Casale,* and other cases pertaining to the application of the voluntary recognition bar and contract bar in the construction industry govern 9(a) recognition in the construction industry. The Board stated in the NPRM that it preliminarily believed that this change may be required because Section 103.22 is premised both on overruling *Casale* and on revoking the limitations period for challenging voluntary recognition in the construction industry, neither of which were disclosed anywhere in the August 12, 2019 NPRM as steps under consideration by the Board. In the absence of the required notice in the August 12, 2019 NPRM, stakeholders and members of the public had no reason to submit comments on these critical related issues. As a result, the Board expressed its concern in the November 4, 2022 NPRM that the lack of public notice—and therefore a lack of commentary—may have affected the Board's ultimate decision to enact Section 103.22, especially in light of Section 103.22's resultant imposition of an onerous and unreasonable recordkeeping requirement on construction employers and unions.

III. Procedural Background

A. Pending Litigation Challenging the April 2020 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 lacked 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, at the time, was pending decision by the District of Columbia Circuit in another case (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 would be decided. On January 17, 2023, the D.C. Circuit rejected the argument that district courts lack subject-matter jurisdiction over challenges to Board rules that are exclusively concerned with representation elections. *AFL–CIO* v. *NLRB,* 57 F.4th 1023, 1027, 1032–1034 (D.C. Cir. 2023). On January 31, 2023, pursuant to the parties' joint motion, *AFL–CIO II* was further stayed. Within 14 days of the issuance of the final rule or by September 28, 2023 (whichever occurs sooner), the parties were required to file a joint status report advising whether any disputes remain. On September 26, 2023, the parties jointly moved for a further stay of the litigation through March 31, 2024. Following the parties' April 1, 2024 joint status report, on April 18, 2024, United States District Judge Beryl A. Howell extended the stay of the litigation until fourteen days after issuance of this final rule, or until October 14, 2024, whichever occurs sooner.

B. Rulemaking Petitions Seeking Rescission of the April 2020 Rule

Meanwhile, 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 Section 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 Section 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 Section 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 Section 103.21 of the April 2020 rule, which allows the Board to process decertification petitions received within 45 days of an employer's voluntary recognition of a union as its employees' exclusive bargaining representative. UNITE HERE's 2022 petition also expressed its support for the 2021 rulemaking petition filed by AFL–CIO and NABTU regarding the other amendments contained in the April 2020 rule.

C. The Notice of Proposed Rulemaking

As noted, on November 4, 2022, the Board issued a Notice of Proposed Rulemaking proposing to rescind the three amendments to its rules and regulations made by the April 2020 rule and to replace two of the amendments with different regulatory language. See *Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships,* 87 FR 66890 (November 4, 2022). The NPRM set forth the Board's preliminary view that the Board's historical blocking charge policy, as amended by the December 2014 rule, better serves the Act's policies than the April 2020 blocking charge amendments, and therefore proposed to rescind the April 2020 blocking charge amendments and return to the pre-April 2020 blocking charge policy regulatory language. 87 FR 66891, 66902–66909. The NPRM also set forth the Board's preliminary view that the voluntary-recognition bar as articulated in *Lamons Gasket* better serves the policies of the National Labor Relations Act than did the April 2020 rule, and therefore proposed to rescind the April 2020 amendments governing the filing and processing of petitions for a Board-conducted representation election following an employer's voluntary recognition of a union as the majority-supported collective-bargaining representative of the employer's employees, and to codify pre-April 2020 rule case law in this area. 87 FR 66890–66891, 66909–66912. The NPRM also set forth the Board's preliminary view that rescission of Section 103.22 of the April 2020 rule governing Section 9(a) recognition in the construction industry was required because that section was premised on overruling *Casale,* but revoking the limitations period for challenging voluntary recognition in the construction industry was not mentioned anywhere in the 2019 NPRM as being under consideration by the Board, and because the previously effective case law would better serve the policies of the Act. 87 FR 66891, 66912–66914. The NPRM proposed that 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. 87 FR 66912.

After carefully considering the comments, which are summarized and addressed in detail below, as well as the views expressed by the April 2020 Board, we have decided, for the reasons set forth below, to rescind the 2020 amendments and to adopt the proposed amendments to the blocking charge policy and voluntary-recognition bar doctrine regulatory language, with certain modifications described further below.

IV. Statutory Authority To Engage In This Rulemaking

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].'' [59]

[59] 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 the instant rule, we treat these terms as interchangeable.

These provisions include Sections 1, 7, 8, and 9 of the Act, 29 U.S.C. 151, 157, 158, and 159, respectively discussed in relevant part in Section II.A., B., and C., above. The amendments made by the instant rule implicate these provisions of the Act, and Section 6 grants the Board the authority to promulgate rules that carry out those provisions. In addition, Section 9(c), 29 U.S.C. 159(c)(1), specifically contemplates rules governing representation-case procedures, stating that elections will be held ''in accordance with such regulations as may be prescribed by the Board.'' 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 Sections 6 and 9 as authorizing the instant rulemaking proceeding.

V. The Amendments in This Rulemaking

A. Rescission of the April 1, 2020 Blocking Charge Amendments and Return to Pre-April 2020 Blocking Charge Policy

1. Comment Overview

The Board received a number of comments from interested organizations, a member of Congress, labor unions, and individuals regarding its proposal to rescind the changes made by the April 2020 rule to the Board's blocking charge policy. We have also considered the views of our dissenting colleague.

Comments in favor of the proposed rule make both process-oriented and substantive arguments. Some commenters argue that the Board should rescind the April 2020 rule because of its serious procedural flaws. They cite, inter alia, the April 2020 Board's failure to correct the faulty data contained in the 2019 NPRM that led to the April 2020 rule and the April 2020 rule's adoption of amendments that were not a logical outgrowth of the NPRM, both of which commenters claim impaired the integrity of the rulemaking process (and the public's ability to intelligently evaluate and comment on the proposed rule), and rendered the final rule arbitrary and capricious.[60] At least one

[60] See, *e.g.,* comments of The American Federation of Labor & Congress of Industrial Organizations (''AFL–CIO'') and North America's

comment points out that the April 2020 Board's failure to correct the faulty data contained in its NPRM has infected this rulemaking because commenters on the instant NPRM continue to rely on that faulty data.[61] The same commenter also charges that the April 2020 Board failed to respond to substantive well-supported comments.[62]

As for the substance, many comments in favor of the proposed rule argue that returning to the Board's historical blocking charge policy, as amended by the December 2014 rule, is appropriate because it better protects employee free choice by enabling regional directors to shield employees from having to vote under coercive conditions.[63] Commenters claim that the April 2020 rule constitutes ''a betrayal'' of the Board's statutory responsibility to ensure free and fair elections and ''an abdication'' of the Board's responsibility to preserve laboratory conditions because the April 2020 Rule requires regional directors to conduct elections under coercive conditions.[64] Some commenters relatedly argue that the April 2020 rule must be rescinded because it allows for such absurd results as requiring the Board to conduct an election notwithstanding overwhelming evidence of egregious unfair labor practices that would necessitate setting aside any election that was held, and which can lead to petitioners withdrawing their petitions.[65]

Some commenters also argue that the April 2020 rule wastes governmental and party resources by requiring regional directors to conduct, and the parties and employees to participate in, elections that will be set aside on account of the coercive conditions, and that holding an election under those coercive circumstances further taints any rerun election.[66] At least one comment notes that the blocking charge policy was publicly endorsed by the Agency's regional directors, the Board officials who are charged with administering the policy in the first instance.[67]

Many commenters in favor of the proposed rule also argue that the April 2020 Board failed to demonstrate a need or reasoned basis for its amendments. For example, some comments note that the April 2020 Board mischaracterized the blocking charge policy by suggesting that unfair labor practice charges automatically blocked elections.[68] Commenters further note that the December 2014 rule adopted certain provisions that enable regional directors to swiftly dispose of nonmeritorious blocking requests that could delay elections, and that, as the April 2020 Board acknowledged, the number of blocked elections declined after the December 2014 rule went into effect.[69]

Commenters further note that the April 2020 Board did not deny that the majority of decertification petitions—as well as the majority of employer-filed RM petitions and initial organizing RC petitions—are never blocked and that the merit rate for blocking charges was substantially higher than the merit rate for unfair labor practice charges generally.[70] They also point out that the filing of meritorious blocking charges by definition provides no support for the April 2020 Board's decision to substantially eliminate the blocking charge policy.[71] And some comments argue that ''the 2020 majority made no effort whatsoever to separate well-founded blocking charges from baseless blocking charges or, in other words, merited delay from unmerited delay.'' [72] In fact, commenters further claim that the April 2020 Board failed to substantiate its repeated claim that unions knowingly file meritless charges to delay their ouster in the decertification context.[73] Some commenters argue that the April 2020 Board's concern—that the blocking charge policy robs the election petition of momentum by depriving employees of a prompt election—ignores that the momentum may be the product of unfair labor practices.[74] These commenters further argue that concerns about a petition's momentum cannot justify the April 2020 Board's decision to eliminate the ability of regional directors to delay elections in the initial organizing context, because petitioners may obtain a prompt election if they so desire under the blocking charge policy notwithstanding their filing of unfair labor practice charges.[75]

Commenters in favor of the NPRM also argue that, although the April 2020 rule results in elections taking place sooner, the April 2020 rule does not necessarily expedite the effectuation of employees' choice. They note that the April 2020 rule expressly provides that the certification of the results of the election is delayed until the merits of the charge are determined. Accordingly, in their view, the April 2020 rule simply shifts the adjudication of unfair labor practices from before the election until after the election.[76] At least one commenter relatedly argues that the April 2020 rule ignores the frustration that employees feel in not having their votes effectuated until the merits of the charge are determined. This commenter claims that the blocking charge policy makes it more likely that the election that is held will in fact count, by

Building Trades Unions (''NABTU'') (collectively ''AFL–CIO/NABTU''); AFL–CIO/NABTU reply comments; National Nurses United (''NNU''); International Union of Operating Engineers (''IUOE''); Service Employees International Union (''SEIU'').

[61] See reply comments of AFL–CIO/NABTU.

[62] See comments of AFL–CIO/NABTU.

[63] See comments of American Federation of State, County and Municipal Employees (''AFSCME''); AFL–CIO/NABTU; General Counsel Jennifer A. Abruzzo (''GC Abruzzo''); Brotherhood of Railroad Signalmen (''Railroad Signalmen''); Center for American Progress (''CAP''); Economic Policy Institute (''EPI''); NNU; joint comment filed by the Los Angeles County Federation of Labor, AFL–CIO, International Brotherhood of Teamsters Locals 848, 572, 396, and 63 and UNITE HERE Local 11 (collectively the ''LA Federation''); SEIU; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO (''UA''); United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO/CLC (''USW'').

[64] See comments of EPI; LA Federation; NNU; SEIU.

[65] See comments of SEIU; AFL–CIO/NABTU; LA Federation.

[66] See comments of AFL–CIO/NABTU (initial and reply); AFSCME; EPI; GC Abruzzo; LA Federation; NNU; SEIU; UA; USW. In the view of these commenters, simply holding a rerun election does not fully and completely remedy the holding of an election in which employees were forced to cast their votes on the question concerning representation in an atmosphere of coercion. The commenters explain that this is so because there is a substantial risk that the tainted election will compound the effects of the unfair labor practices: an employee who voted against union representation under the influence of the employer's unlawful conduct is unlikely to reconsider the issue and change their vote in the rerun election. Commenters such as UA support this by citing academic research finding that decisionmakers ''who have expressly committed to a position on an issue are often reluctant to change that position when asked to make that decision again,'' a phenomenon known as status quo bias. Moreover, according to the AFL–CIO/NABTU, which agrees that it is psychologically difficult for employees to change their votes even if the ballots are impounded, ''[t]he tainted votes that the 2020 Rules require regional directors to conduct affect a second election . . . all the more so when the ballots are opened and counted'' as they are in the vast majority of cases under the April 2020 rule. The AFL–CIO/NABTU comment points to studies showing the impact (on voter turnout and choice) of disclosing early returns and exit poll results while the polls remain open in political elections. NNU claims that this taints future rerun elections by inaccurately depicting the bargaining unit's support for the union and which can deter employees from choosing to vote in a rerun election.

[67] See comments of GC Abruzzo.

[68] See comments of AFL–CIO/NABTU; SEIU.

[69] See comments of AFL–CIO/NABTU; AFSCME; GC Abruzzo; LA Federation; SEIU; UA.

[70] See comments of AFL–CIO/NABTU; GC Abruzzo; LA Federation; SEIU.

[71] See AFL–CIO/NABTU; LA Federation; SEIU.

[72] Comments of AFL–CIO/NABTU. See also comments of SEIU.

[73] See comments of AFL–CIO/NABTU; SEIU.

[74] See comments of AFL–CIO/NABTU; GC Abruzzo; NNU; SEIU.

[75] See id.

[76] See comments of AFL–CIO/NABTU; LA Federation; USW.

enabling regional directors to delay elections until the merits of a pending charge alleging misconduct are determined.[77]

Still other commenters argue that the April 2020 rule's requirement that the Board conduct elections in virtually all cases does not comport with the Supreme Court's holding in *Gissel* and makes it harder to obtain a remedial bargaining order, particularly in the context of Section 10(j) litigation.[78]

On the other hand, both our dissenting colleague and commenters opposed to the proposed rule urge the Board to adhere to the April 2020 rule's blocking charge provisions. Because the pre-April 2020 blocking charge policy delayed elections, commenters claim that the policy interferes with employees' Section 7 rights and/or is antidemocratic and interferes with employees' constitutional rights of free assembly and association.[79] Some commenters also claim the blocking charge policy is racist,[80] can impose a collective-bargaining representative on employees without the employees having the chance to vote for representation in the first place,[81] and infringes on workers' alleged ''statutory right to hold decertification elections at any time outside of 12 months following a previous NLRB-supervised election.'' [82] Other commenters claim that by denying employees a prompt vote, the policy unfairly punishes employees for the misconduct of their employer and ignores their desires.[83] Commenters additionally argue that the blocking charge policy not only makes it harder for employees to leave a union but forces them to pay dues to the union they wish to decertify after the collective-bargaining agreement expires.[84] At least one commenter argues that because the workforce can turn over during the period of time while the merits of the blocking charge are being determined, the blocking charge policy can disenfranchise employees and undermine the goal of confining the pool of eventual voters to those employed at the time the question concerning representation arises.[85] Our dissenting colleague also advances a similar argument.

Some commenters go so far as to suggest that the blocking charge policy can disenfranchise the entire unit by preventing unit employees from *ever* exercising their right to vote against union representation.[86] Some commenters, along with our dissenting colleague, further argue that the policy disenfranchises employees based on a mere administrative determination made by a regional director, rather than by the Board itself following an unfair labor practice hearing, and that regional director practice varied widely resulting in substantial inconsistency in application of the blocking charge policy.[87]

Commenters offer additional arguments against returning to the pre-April 2020 blocking charge policy, including claims that it rendered illusory the ability of employers to file RM petitions, that it unjustifiably treated decertification petitioners worse than petitioning unions in an initial organizing context by only allowing unions to proceed to an election, and that the April 2020 rule better accords with Section 8(a)(2), which forbids an employer to grant recognition as an exclusive bargaining representative to a union that represents a minority of bargaining-unit employees.[88] Both our dissenting colleague and some commenters additionally argue that judicial criticism of the blocking charge policy counsels against returning to it.[89]

Our dissenting colleague, along with many commenters opposed to the proposal, also argue that because the blocking charge policy can substantially delay elections based on mere allegations of unfair labor practices, the policy incentivizes the filing of meritless or frivolous charges, particularly in the decertification context where employees are seeking to rid themselves of their incumbent union representative.[90] At least one commenter argues that although the

[77] See comments of USW.

[78] See comments of GC Abruzzo; NNU.

[79] See, *e.g.,* comments of Associated Builders and Contractors (''ABC''); Virginia Foxx, Chairwoman, Committee on Education and the Workforce (''Chairwoman Foxx''); U.S. Chamber of Commerce (''Chamber''); the Coalition for a Democratic Workplace (''CDW''); HR Policy Association (''HRPA''); National Right to Work Legal Defense Foundation (''NRTWLDF''); Marvin Graham (''Graham''); Rachel Greszler (''Greszler''); John Weber (''Weber''); Julius Scaccia (''Scaccia''); David L. Chaump (''Chaump''); Trent Bryden (''Bryden''); Jennifer Christiano (''Christiano''); Clark Coleman (''Coleman''); William Fedewa (''Fedewa''); Pierre Giani (''Giani''); Sam Gompers (''Gompers''); Leonard Mead (''Mead''); Kenneth Morris (''Morris''); Anonymous 143; Anonymous 83; Anonymous 106; Anonymous 113; Anonymous 123; Anonymous 152; Anonymous 76. Scaccia appears to suggest that that the Board should outline a specific time frame for elections similar to the regular election cycles in the political arena.

[80] See comments of Bryden.

[81] See, *e.g.,* comments of Chaump.

[82] See, *e.g.,* comments of Anonymous 83; Anonymous 106; Anonymous 113; Anonymous 123; Anonymous 152; Anonymous 76; Paul Andrews; Kenneth Bailey; Donald Barefoot; Barry Barkley; Kathleen Brown; Howard Butz; Dawn Castle; Kenneth Chase; John Churchill; Marvin Graham; Annette Craig; Julie D'Alessandro; Richard Damico; Daniel De La O; John-G Donovan; Edward Farrow; William Fedewa; R.E. Fox; John Gaither; Rachel Hughes; Gary Kirkland; Alan Goldberg; Robert Henes; Ron Hinds; Irene Holt; Marta Howard; Deborah Hurd; Insignia Design Lrd; Jeffrey Kilgariff; Chuck Kirkhuff; Fred Lambing; Mark Larsen; Terrence Linderman; Philip Martin; Charles Maurhoff; Mike Mayo; Daniel McCormack; Kevin McLaughlin; Tim Modert; Gwen Myers; Mike O'Donnell; Richard Park; James Pearce; John Raudabaugh; Saul Raw; Craig Root; Mary Ellen Rozmus; Lorraine Schukar; Randy Schultz; Dane Smith; Kathy Stewart; Elizabeth Turner; George Zolnoski.

[83] See, *e.g.,* comments of ABC; NRTWLDF; Anonymous 143; Anonymous 83; Anonymous 106; Anonymous 113; Anonymous 123; Anonymous 152; Anonymous 76; Paul Andrews; Kenneth Bailey; Donald Barefoot; Barry Barkley; Kathleen Brown; Howard Butz; Dawn Castle; Kenneth Chase; John Churchill; Graham; Annette Craig; Julie D'Alessandro; Richard Damico; Daniel De La O; John-G Donovan; Edward Farrow; R.E. Fox; John Gaither; Allan Gardiner; Rachel Hughes; Gary Kirkland; Alan Goldberg; Robert Henes; Ron Hinds; Irene Holt; Marta Howard; Deborah Hurd; Insignia Design Lrd; Jeffrey Kilgariff; Chuck Kirkhuff; Fred Lambing; Mark Larsen; Terrence Linderman; Philip Martin; Charles Maurhoff; Mike Mayo; Daniel McCormack; Kevin McLaughlin; Tim Modert; Gwen Myers; Mike O'Donnell; Richard Park; James Pearce; John Raudabaugh; Saul Raw; Craig Root; Mary Ellen Rozmus; Lorraine Schukar; Randy Schultz; Dane Smith; Kathy Stewart; Elizabeth Turner; George Zolnoski.

Our dissenting colleague makes a slightly different version of this argument, contending that ''a prompt opportunity for employees to vote in a Board election *itself* safeguards employee free choice.''

[84] See comments of Chairwoman Foxx; Chamber; NRTWLDF; Scaccia.

[85] See, *e.g.,* comments of CDW.

[86] See comments of CDW; HRPA; NRTWLDF.

[87] See, *e.g.,* comments of CDW; HRPA. On the other hand, the NRTWLDF comments suggest that there was no variation; in its experience, regional directors invariably and automatically blocked elections immediately upon the filing of *any* union-filed unfair labor practice charge. See comments of NRTWLDF.

[88] See comments of CDW; NRTWLDF reply comments; Paul Andrews; Anonymous 143; Anonymous 83; Anonymous 106; Anonymous 113; Anonymous 123; Anonymous 152; Anonymous 76; Kenneth Bailey; Donald Barefoot; Barry Barkley; Kathleen Brown; Howard Butz; Dawn Castle; Kenneth Chase; John Churchill; Marvin Graham; Annette Craig; Julie D'Alessandro; Richard Damico; Daniel De La O; John-G Donovan; Edward Farrow; R.E. Fox; John Gaither; Allan Gardiner; Rachel Hughes; Gary Kirkland; Alan Goldberg; Robert Henes; Ron Hinds; Irene Holt; Marta Howard; Deborah Hurd; Insignia Design Lrd; Jeffrey Kilgariff; Chuck Kirkhuff; Fred Lambing; Mark Larsen; Terrence Linderman; Philip Martin; Charles Maurhoff; Mike Mayo; Daniel McCormack; Kevin McLaughlin; Tim Modert; Gwen Myers; Mike O'Donnell; Richard Park; James Pearce; John Raudabaugh; Saul Raw; Craig Root; Mary Ellen Rozmus; Lorraine Schukar; Randy Schultz; Dane Smith; Kathy Stewart; Elizabeth Turner; George Zolnoski.

Our dissenting colleague also takes the view that the historical blocking charge policy rendered the RM petition safe harbor under *Levitz* illusory and that it treated decertification petitioners less favorably than unions in an initial organizing context.

[89] See comments of ABC; CDW; Chamber; NRTWLDF.

[90] See, *e.g.,* comments of ABC; CDW; Chairwoman Foxx; Chamber; Christiano; Graham; HRPA; NRTWLDF; Scaccia.

NPRM complained about the April 2020 rule imposing unnecessary costs on the parties and the Agency by requiring the Agency to conduct elections that will not count, the NPRM ignored that the blocking charge policy imposes unnecessary costs on the parties and the Agency by incentivizing parties to file nonmeritorious unfair labor practice charges that have to be investigated.[91]

Both our dissenting colleague and many commenters argue that there is no need to return to the pre-April 2020 blocking charge policy to protect employee rights even in cases where the concurrent charges are meritorious. Thus, they note that the April 2020 rule withholds the certification of the results of an election until the merits of the concurrent unfair labor pace charges are determined, thereby allowing for a rerun election (or a bargaining order) if the Board finds, after an unfair labor practice hearing, that a party has in fact committed unfair labor practices that interfered with the election that was conducted notwithstanding the pendency of the unfair labor practice charge.[92] Both our dissenting colleague and at least one commenter argue that there is no need to return to the Board's historical blocking charge policy to protect employee free choice, because the Board's recent decision in *Rieth-Riley Construction Co.,* supra, 371 NLRB No. 109, permits regional directors to dismiss petitions rather than conduct elections in the face of concurrent unfair labor practice charges when they believe that employer conduct has interfered with laboratory conditions.[93]

Some commenters complain that the NPRM contained no data analyzing the effect of the April 2020 amendments, that the April 2020 rule has succeeded in its goal of permitting employees to vote promptly without interfering with the employees' Section 7 rights to register a free and untrammeled choice for or against union representation, and that absent proof of a spike in the number of elections being set aside under the April 2020 amendments, it would be unreasonable for the Board to rescind the April 2020 amendments.[94] According to some commenters, the Board would be engaging in needless policy oscillation if it rescinds the April 2020 rule, which would threaten the legitimacy of the Agency.[95]

At least one commenter argues that if the Board decides to reinstate the pre-April 2020 blocking charge policy, it should include a provision allowing decertification petitioners to intervene as full parties in blocking charge litigation to protect and effectuate their statutory right to an election.[96]

2. Explanations for Adoption of NPRM Proposal To Return to the Pre-April 2020 Blocking Charge Policy; Responses to Blocking Charge Comments

Having carefully considered the comments, the views of the April 2020 Board, and the views of our dissenting colleague, we have determined, consistent with the NPRM, that returning to the Board's historical blocking charge policy, as modified by the December 2014 rule, represents a better balance of the Board's statutory interests in protecting employee free choice, preserving laboratory conditions in Board-conducted elections, and resolving questions concerning representation expeditiously than does the April 2020 rule, which at times requires regional directors to conduct elections under coercive circumstances. 87 FR 66903. The final rule restores and codifies the historical blocking charge policy, as modified by the December 2014 rule. Under the final rule, we shall once again permit regional directors to delay the processing of an election petition at the request of a party who has filed a charge alleging conduct that would interfere with employee free choice in an election or conduct that is inherently inconsistent with the petition itself—provided that the party simultaneously files an adequate offer of proof and agrees to promptly make its witnesses available, and provided no exception is applicable—until the merits of the charge can be determined.

We agree with the views of the commenters who oppose the NPRM (and with the April 2020 Board and our dissenting colleague) that, under ordinary circumstances, the Board should conduct elections expeditiously. Nevertheless, 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. In our considered judgment, the April 2020 rule runs counter to the policies of the National Labor Relations Act by requiring regional directors to conduct, and employees to vote in, elections in a coercive atmosphere that interferes with employee free choice. Many comments agree.[97] We note in this regard that the April 2020 Board itself acknowledged that the April 2020 rule *does* at times require regional directors to conduct elections in coercive circumstances that interfere with employee free choice, over the objections of charging parties who are parties to the representation proceeding. 85 FR 18370 & fn. 10, 18378–18380. Thus, the April 2020 Board acknowledged that under its rule, the regional director shall continue to process the petition and conduct the election despite the filing of a blocking request and 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 affected the election. 85 FR 18370, 18378–18380. 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 an unfair labor practice complaint issued within 60 days of the election) if the unfair labor practice charges are found to have merit. 85 FR 18369–18370, 18378–18380.

We also note that several of the commenters who oppose the proposed rule implicitly acknowledge this as well; thus, for example, the HRPA states that it ''does not imply that all such [blocking] charges are meritless.'' [98] In short, it cannot be denied that under the April 2020 amendments, regional directors *are* required to run—and employees, unions, and employers *are* required to participate in—some elections conducted under coercive conditions that interfere with employee free choice. 85 FR 18370, 18378–18380. And because the April 2020 rule requires regional directors to run—and employees, unions, and employers to participate in—some elections that will not resolve the question of representation, the April 2020 rule

[91] See comments of NRTWLDF.

[92] See, *e.g.,* comments of CDW; Chairwoman Foxx; Chamber; NRTWLDF (initial and reply). At least one commenter relatedly attacks then-Member McFerran's analysis of blocking charge data in the dissent to the 2019 NPRM that led to the April 2020 rule by claiming that she should not have deemed charges meritorious if they resulted in a settlement. See comments of NRTWLDF.

[93] See comments of NRTWLDF (initial and reply).

[94] See comments of CDW; NRTWLDF (initial and reply).

[95] See comments of CDW; Chamber.

Our dissenting colleague similarly criticizes the majority's decision to rescind the April 2020 rule on the grounds that doing so may spur policy oscillation and disserve the Agency's stakeholders. We address this argument in greater detail in Section VII, below.

[96] See comments of NRTWLDF.

[97] See, *e.g.,* comments of AFL–CIO/NABTU; AFSCME; CAP; EPI; GC Abruzzo; LA Federation; NNU; Railroad Signalmen; SEIU; UA; USW.

[98] See also comments of CDW, Chairwoman Foxx, Chamber, and NRTWLDF, acknowledging that under the April 2020 rule, the Board can order a rerun election in those cases where elections were conducted under coercive circumstances over the objections of the charging party.

imposes unnecessary costs on the parties and the Board. We also conclude, in agreement with several commenters,[99] that the April 2020 rule's position—that nothing is more important under the Act and its policies than having employees vote without delay in virtually 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. See *General Shoe Corp.,* 77 NLRB at 127 (''In 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.''); *Mark Burnett Productions,* 349 NLRB at 706 (''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.'').

The April 2020 rule also creates perverse incentives for employers to commit unfair labor practices. By requiring the Board to conduct elections in all cases where Type I unfair labor practice conduct has occurred and many cases where Type II unfair labor practice conduct has occurred, the 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 free choice of the employees; and (2) to create a sense among employees that seeking to exercise their Section 7 rights is futile. This possibility may well induce unions to forego the Board's electoral machinery in favor of recognitional picketing and other forms of economic pressure, potentially exacerbating industrial strife and risking contravening the statutory policy favoring ''eliminat[ing] the causes of certain substantial obstructions to the free flow of commerce.'' 29 U.S.C. 151.[100]

It is not surprising that although the Board's application of the blocking charge policy in a particular case had occasionally been criticized, no court invalidated the policy itself during the more than eight decades that it had been in effect. 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).[101] We find further support for our decision to return to the pre-April 2020 blocking charge policy in the fact that the April 2020 Board had jettisoned that policy even though the Agency's regional directors—the career officials who are charged with administering the policy in the first instance—had publicly endorsed the policy. 87 FR 66904 & fn. 105.

We also agree with the comments filed by AFL–CIO/NABTU, LA Federation, and USW that argue that, although the April 2020 rule certainly results in many elections being held more promptly in the face of concurrent unfair labor practice charges than they would have been held under the pre-April 2020 blocking charge policy, the April 2020 rule does not necessarily result in the employees' choice being effectuated in a significantly shorter period of time. This is so because, as the April 2020 Board conceded, the certification of the results of the election conducted under such circumstances must still await a determination of the merits of the unfair labor practice charge.[102] And it takes the same amount of time to determine the merits of an unfair labor practice charge whether the charge is investigated before the election or after the election. For example, under the April 2020 rule, the results of a promptly held decertification election are set aside if the charge is ultimately found to be meritorious. Then, a new election is conducted after the unfair labor practice is remedied. Only then can employees' choice actually be effectuated. The situation is thus the same as under the pre-April 2020 blocking charge policy, when a meritorious charge blocked the election until the unfair labor practice was remedied. As for cases involving nonmeritorious charges, even under the April 2020 rule, the incumbent union will not actually be decertified until the charge is ultimately determined to lack merit—despite the employees having voted in the decertification election.[103] Moreover, it stands to reason that the representation proceedings that were blocked the longest under the pre-April 2020 blocking charge policy were those cases litigated before administrative law judges, then the Board, and then the courts of appeals, rather than the cases

[99] See, *e.g.,* comments of EPI; LA Federation; NNU; SEIU.

[100] Commenters such as NNU share this concern.

[101] 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 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.

Our dissenting colleague criticizes our ''heavy reliance on the Fifth Circuit's positive perceptions of the historical policy fifty years ago.'' We find this criticism puzzling. *Bishop* remains good law. In addition, the language quoted above persuasively articulates the policy justifications militating in favor of our decision to return to the historical blocking charge policy.

[102] See 85 FR 18370 (''Finally, for all types of charges upon which a blocking-charge request is based, the final rule clarifies 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.''); 29 CFR 103.20(d) (April 1, 2020) (''For all charges described in paragraphs (b) or (c) of this section, 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.'').

[103] The same is true in elections held in the context of an initial organizing campaign. Elections will be set aside if the charges that are subject of requests to block are meritorious, and the results of the elections will not be certified until the charges that are subject of requests to block are determined to be nonmeritorious.

involving nonmeritorious charges that can be weeded out administratively at the regional level. The same is true under the April 2020 rule. In short, the actual resolution of the question of representation can take a substantial period of time under the April 2020 rule, even though an election was promptly held.

For the reasons set forth below, the arguments of the April 2020 Board and the commenters opposing the NPRM do not persuade us that we should continue to adhere to the April 2020 rule.

a. Comments Regarding the Effect of Delay on the Petition's Momentum and the Pre-Election Narrative

Like the April 2020 Board, our dissenting colleague and many commenters opposed to the NPRM emphasize the obvious: that the blocking charge policy causes delays in conducting elections. From this, they argue that the blocking charge policy impedes employee free choice.[104] However, the conclusion of the April 2020 Board, our colleague, and the commenters does not necessarily follow from their premise. To the contrary, we 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 Furniture Co. of the Pacific,* 333 NLRB 717, 728 fn. 57 (2001) (emphasis in original). We thus agree with the observation of the December 2014 Board 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. After all, if the circumstances surrounding an election interfere with employee free choice, then, contrary to the April 2020 rule, it plainly is *not* ''efficient'' to permit employees to cast ballots ''speedily'' because the ballots cast in such an election cannot be deemed to ''accurately'' reflect employees' true, undistorted desires. 85 FR 18367, 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, provided the charging party files election objections (or a request to block). 85 FR 18370, 18378–18380.

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, 18379, 18393 (finding it appropriate to issue the April 2020 Rule ''[f]or all the reasons set forth . . . [in the April 2020 preamble] and in the NPRM[.]''). See also 84 FR 39937. Our dissenting colleague reiterates this view. However, 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 2019 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' true desires and therefore should not be conducted. 84 FR 39944. Indeed, the momentum that the April 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, 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. Notwithstanding the impact of delay on the decertification petition's momentum, we think the delay is justified to safeguard employee free choice.[105]

We also note that the April 2020 rule applies to petitions filed in initial organizing campaigns, not just to petitions filed in the decertification context. The April 2020 Board's concern about the blocking charge policy's negatively impacting a petition's momentum has little persuasive force where blocking charges are filed by a petitioning union in the initial organizing context. Because the final rule restores the December 2014 rule's

[104] See 85 FR 18366, 18367, 18372–18373, 18375–18380, 18393. See also, *e.g.,* comments of ABC; CDW; Chairwoman Foxx; Chamber; HRPA; NRTWLDF; Graham; Greszler; Weber; Scaccia; Bryden; Christiano; Giani; Morris; Anonymous 143; Anonymous 83; Anonymous 106; Anonymous 113; Anonymous 123; Anonymous 152; Anonymous 76.

[105] We also find unpersuasive the April 2020 Board's claim that its amendments are superior to the pre-April 2020 blocking charge policy because the April 2020 rule allows the balloting to occur when the parties' respective arguments are ''fresh in the mind[s] of unit employees.'' 84 FR 39937–39938, 85 FR at 18379, 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). Thus, all the April 2020 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 disagree with the April 2020 Board's view that its amendments 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 18379, 18393. As then-Member McFerran pointed out in her dissent to the 2019 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 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 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.

The April 2020 Board also suggested that employees would be less frustrated or confused under its amendments—which provide that elections will be held with the ballots being promptly opened and counted in the vast majority of cases involving requests to block, notwithstanding that the results of the election will nevertheless not be certified until there has been a final disposition of the unfair labor practice charge and a determination of its effects on the petition by the Board—than they would be under the pre-April 2020 blocking charge policy, which delays the election itself until the merits of the charge are determined. 85 FR 18367, 18370, 18379–18380, 18393. See also 84 FR 39937–39938. We reject that speculative proposition. Permitting employees to vote and opening and counting ballots, yet delaying the certification of the results, might very well equally frustrate employees who must await the outcome of the Board's investigation of the charge to learn whether the results of the election will be certified and, at worst, actively mislead them by conveying a materially false impression of the level of union support. 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 rule until the merits of the charge have been determined. In any event, the April 2020 rule also did not address the frustration that is felt by employees who, under the April 2020 rule, are required to vote under coercive circumstances. See comments of GC Abruzzo; LA Federation; NNU; SEIU; UA.

changes to the historical blocking charge policy, an election cannot be delayed on the basis of a concurrent charge filed by a union unless the union requests that its charge block the petition. 29 CFR 103.20 (Dec. 15, 2014); Casehandling Manual Section 11730 (January 2017).[106] In other words, a petitioner in the initial organizing context can indeed obtain a prompt election notwithstanding its unfair labor practice charge. On the other hand, if the petitioner requests that its charge delay the election, then the petitioner obviously believes that the employer's unfair labor practices have already halted the petition's momentum. In short, the April 2020 Board's concern cannot justify depriving regional directors of the authority to delay elections in the initial organizing context at the request of petitioners.[107]

b. Comments Regarding Rieth-Riley and the Availability of a Rerun Election

Both our dissenting colleague and many comments filed in opposition to the NPRM also argue that there is no need to return to the pre-April 2020 blocking charge policy to protect employee rights even when meritorious unfair labor practice charges have been filed prior to an election. We disagree. We are not persuaded by the NRTWLDF's comments that there is no need to return to the Board's pre-April 2020 blocking charge policy because the Board's recent decision in *Rieth-Riley Construction Co.,* 371 NLRB No. 109 (2022), permits regional directors to dismiss petitions rather than conduct elections in the face of concurrent unfair labor practice charges ''when they believe employer conduct has interfered with laboratory conditions.'' [108] To begin, we find the argument to be a non sequitur; as the Board noted in *Rieth-Riley,* the merit-determination dismissal process was itself merely an ''aspect of the blocking charge policy.'' Id., slip op. at 1. The Casehandling Manuals in effect prior to both the 2014 Rule and the 2020 Rule explicitly set forth merit-determination dismissals as part of the blocking charge policy. See, *e.g.,* Casehandling Manual Sections 11730.1, 11730.2, 11730.3 (August 2007) (noting that Type II blocking charges may cause a petition to be dismissed after a determination as to their merit, whereas Type I charges result in petition being held in abeyance until the charge is dismissed or remedied); Casehandling Manual Sections 11730.1, 11730.2, 11730.3 (January 2017) (same). In short, the instant rule simply restores the status quo that existed prior to the April 2020 rule (*i.e.,* it maintains the merit-determination dismissal procedure while also restoring the other aspects of the blocking charge policy, which for example permit regional directors to hold petitions in abeyance based on Type I charges).

In any event, we conclude that *Rieth-Rile*y's merit-determination dismissal procedure alone does not adequately protect employee rights. To begin, the merit-determination dismissal procedure does not permit a regional director to dismiss a petition rather than conduct an election whenever the director finds merit to charges alleging conduct that would interfere with laboratory conditions. Rather, as the Board's decision in *Rieth-Riley* makes clear, and as the NRTWLDF recognizes elsewhere in its comments, the merit-determination dismissal procedure is available ''only with respect to a Type II charge,'' *i.e.,* a charge alleging conduct that if proven is ''inherently inconsistent with the petition.'' 371 NLRB No. 109, slip op. at 3. Thus, the merit-determination dismissal procedure is not available in cases involving Type I charges that allege conduct that would merely interfere with employee free choice in an election were one to be held, and this is true even if the director has found merit to the Type I charge. Indeed, under the current legal regime, regional directors are required to conduct elections and open and count the ballots in cases where Type I charges are pending, even if the regional director has found merit to the charges. In other words, regional directors are required to conduct elections in the initial organizing context even if the regional director has found merit to a charge alleging, for example, that an employer has promised benefits if its employees vote against union representation and has threatened to close the plant if the employees vote in favor of union representation. Regional Directors are also required to conduct decertification elections even if, for example, a regional director has found merit to a charge alleging that after the filing of the decertification petition, the employer promised employees benefits if they vote against the incumbent union and threatened adverse consequences if they vote for continued representation. And this is so, as the comments filed by SEIU and AFL–CIO/NABTU note, even if the employer *admits* engaging in the unlawful conduct. Thus, notwithstanding the Board's decision in *Rieth-Riley,* regional directors currently *are* required to conduct elections even when the employer has committed Type I unfair labor practices that interfere with employee free choice and destroy laboratory conditions.

Moreover, in our view, and contrary to our dissenting colleague's position, the merit-determination dismissal procedure does not even adequately protect employee rights in all cases where Type II charges have been filed. Thus, as the Board unanimously held in *Rieth-Riley,* the merit-determination dismissal procedure is available only when there has been a determination by the Regional Director that the Type II charge has merit. 371 NLRB No. 109, slip op. at 3 (merit-determination dismissals ''hinge on [the Regional Director's] determination . . . that [the Type II] unfair labor practice charge has merit''). Thus, as the AFL–CIO/NABTU point out in their reply comment, where the regional director has not had sufficient time to investigate the charge and make a merit determination, the merit-determination dismissal procedure is not available even for Type II charges, and the regional director is required to run an election.

Many commenters [109] also agree with the April 2020 Board (85 FR 18378–18380) that there is no need for the blocking charge policy because the Board may always throw out the results of the first election and conduct a rerun election if the Board finds, after an unfair labor practice hearing, that a party has in fact committed unfair labor practices that interfered with the election that was conducted notwithstanding the pendency of the unfair labor practice charge(s). They posit that a rerun election fully protects employee free choice. They reason that, because the second election will not be conducted until the employer has complied with the Board's traditional remedies for the unfair labor practice conduct found to have interfered with employee free choice, employees will be able to exercise free choice for or against union representation when the rerun election is held.[110]

[106] Similarly, as commenters such as AFL–CIO/NABTU and NNU note, under the pre-December 2014 blocking charge policy, a union in an organizing context could request to proceed to an election notwithstanding its charge.

[107] Of course, if an employer files a charge against a petitioning union with an adequately supported request to block, then the election in the initial organizing context may indeed by delayed. But, just as is the case with regard to blocking charges filed in the decertification context, we think the delay here is justified to protect employee free choice.

[108] Our dissenting colleague takes a similar position, arguing that *Rieth-Riley* ''undermines the justification for returning to'' the historical blocking charge policy.

[109] See, *e.g.,* comments of CDW; Chairwoman Foxx; Chamber; NRTWLDF.

[110] Our dissenting colleague similarly argues that because ''the Board's traditional remedies are

We are not persuaded by these comments. To begin, during the more than eight decades that the blocking charge policy was in effect, the Board never viewed its authority to rerun elections as obviating the need for the policy. This is not surprising. The Board is tasked with ensuring free and fair elections, and the Board's goal is to conduct elections under conditions as nearly ideal as possible. We undermine that goal when we require employees to vote under coercive circumstances that interfere with free choice.[111]

Moreover, in our considered policy judgment, a return to the pre-April 2020 status quo better protects employee rights by putting the unit employees in a position that more closely approximates the position that the unit employees would have been in had no party committed unfair labor practices interfering with employee free choice, than the position employees are put in under the April 2020 rule. Had no party committed unfair labor practices, employees would not be forced to vote in an atmosphere of coercion. However, as the 2020 Board conceded (85 FR 18378, 18379, 18380), its amendments, by definition, sometimes require employees to vote under coercive circumstances by requiring the regional director to conduct elections over the objections of the charging party in virtually all cases involving pending unfair labor practice charges. This means that when a rerun election is conducted after the charged party takes all the remedial 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 December 2014 rule (79 FR 74418–74419) and as several commenters note,[112] 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 may well be unlikely to change their votes in the rerun election even if they vote in the second election. See *Savair Mfg. Co.,* 414 U.S. at 277–278. To make matters even worse, the April 2020 rule's additional requirement that the ballots be immediately opened and counted following the election (except in a very limited subset of cases) means that, following a loss, the union will also have to convince employees (including those employees who voted in favor of the union in the first election) that it is worth voting for the union—and to risk incurring retaliation from their employer—even though employees will know that the union already lost the earlier election. This is something the union normally would not have had to do under the pre-April 2020 blocking charge policy, because the regional director would not have held an election until the unfair labor practice was remedied. Put simply, when the Board sets aside an election because of employer unfair labor practice conduct, it does not erase the memory of that election outcome and the illegalities that led to it being set aside; after all, the posting of the remedial notice reminds employees of those illegalities.[113]

Indeed, we find it significant that the April 2020 rule itself implicitly conceded that employees and the union they seek to represent them are in fact harmed when the employees are required to vote under coercive circumstances, even though the first election will not count and they will be permitted to vote in a second election if a request to block or objections are filed. Thus, the April 2020 Board 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. Moreover, the rule expressly justified requiring that the ballots be opened and counted in all cases involving Type I misconduct and many cases involving Type II misconduct on the ground that keeping the ballots secret would fail to provide an adequate disincentive for unions to file blocking charges in the context of a decertification election. 85 FR 18379–18380. The April 2020 Board relied on the premise that the immediate opening and counting of the ballots in the vast majority of cases provides a disincentive for unions to file meritless charges seeking to block the election because tallying the ballots reveals to employees that the union is acting against their wishes. 85 FR 18379–18380. Thus, under April 2020 rule's 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.

We further note that the position of commenters critical of the proposed rule—that elections should be held in virtually all cases (no matter the severity of the employers' unfair labor practices) because of the availability of a rerun election—is difficult to square with the Supreme Court's approval in *Gissel* of the Board's practice of *withholding* an election or rerun 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 (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through [union authorization] cards would, on balance, be better protected by a bargaining order . . . . '' *Gissel Packing Co.,* 395 U.S. at 591–592, 610–611, 614–615.[114] As the Court explained,

> If the Board could enter only a cease-and-desist order and direct an election or a rerun [election] . . . where an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election to be set aside . . . it would in effect be rewarding the employer and allowing him 'to profit from [his] own wrongful refusal to bargain,' . . . while at the

perfectly capable of dissipating the coercive effects of unfair labor practices so as to permit a free and fair election in all but extreme cases,'' the majority should not ''assume that the Board's traditional remedies for pertinent unfair labor practices will necessarily be inadequate to ensure a fair rerun election in those cases where an initial election was held but later set aside under the 2020 Rule.''

[111] It also bears mentioning that, as discussed in greater detail below, the Board lacks authority to conduct a rerun election in the absence of election objections (or a request to block), which may not be filed or may be withdrawn even if the election was/is scheduled to be conducted under coercive circumstances. Thus, the commenters and our dissenting colleague ignore the real possibility that the only election that is conducted under the April 2020 rule will be the election conducted under coercive circumstances.

[112] See, *e.g.,* comments of AFL–CIO; LA Federation; NNU; UA.

[113] The NRTWLDF's reply comment questions any reliance on *Savair,* supra. It notes that employees will have voted by secret ballot election in the first election (that ends up getting set aside because of the unlawful conduct) and will again vote by secret ballot in the rerun election. However, because the ballots cast in the first election conducted under coercive circumstances are in fact opened and tallied in the vast majority of cases under the April 2020 rule, the employees do in fact know how a majority of their colleagues have voted before the second election. It is insufficient to argue, as our dissenting colleague does, that ''opening and counting ballots reveals only *collective* union sentiment at a moment in time, not *individual* union sentiments.'' In every case, employees obviously know how they themselves voted in the first election.

[114] See comments of NNU.

same time severely curtailing the employees' right freely to determine whether they desire a representative. The employer could continue to delay or disrupt the election processes and put off indefinitely his obligation to bargain; and any election held under these circumstances would not be likely to demonstrate the employees' true, undistorted desires.

Id. at 610–611. And this applies equally in the decertification context. See *Bishop,* 502 F.2d at 1029 (''Nor is the situation necessarily different where the decertification petition is submitted by employees instead of the employer or a rival union. Where a majority of the employees in a unit genuinely desire to rid themselves of the certified union, this desire may well be the result of the employer's unfair labor practices. In such a case, the employer's conduct may have so affected employee attitudes as to make a fair election impossible.'').[115]

For similar reasons, we reject the NRTWLDF's contention in its comments that it would be internally inconsistent for the Board to conclude in this rulemaking that employee free choice is not adequately protected via the rerun election process.[116] The Board has historically deemed it appropriate, outside the *Gissel* bargaining order and blocking charge contexts, to conduct a rerun election following a finding of objectionable misconduct after the employer has fully complied with the Board's traditional remedies for the unfair labor practice conduct found to have interfered with employee free choice. However, the fact that under the Board's limited remedial authority the Board can (absent a showing of a card majority) only conduct a second election after the unfair labor practice conduct—that interfered with the initial election—has been remedied certainly does *not* mean that requiring employees to vote under coercive conditions and then giving them a second chance to vote puts the employees and the labor organization at issue in the position that most closely approximates the position they would have occupied had no party committed unfair labor practices.

c. Comments Regarding the Pre-April 2020 Blocking Charge Policy's Reliance on Mere Administrative Determinations Made by Regional Directors and Alleged Inconsistent Application of That Policy

Both the dissenters to the 2022 NPRM and the April 2020 Board also found fault with the pre-April 2020 blocking charge policy because it permitted 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, especially since there is always the possibility that the Board could ultimately conclude, contrary to the regional director, that the charge lacks merit. 87 FR 66918 fn.173; 85 FR at 18367, 18377, 18393).[117] Our

[115] The April 2020 Board itself acknowledged that its rule in some cases requires the regional director to hold an election, notwithstanding that following the election the Board will set it aside and issue a *Gissel* bargaining order—rather than conduct a rerun election—because a fair rerun election cannot be held. 85 FR 18380. Our dissenting colleague similarly acknowledges that the Board also may need to ''redress the harm from certain serious unfair labor practices by issuing a general bargaining order.'' In our view, no valid statutory purpose is served by requiring the Board to conduct an election in such circumstances. Moreover, requiring the Board to conduct elections in such circumstances plainly wastes party and agency resources.

Long after the close of the comment period, the Board issued its decision in *Cemex Construction Materials, Pacific, LLC,* holding in part that an employer violates Sec. 8(a)(5) and (1) by refusing to recognize, upon request, a union that has been designated as the Sec. 9(a) representative by the majority of employees in an appropriate unit unless the employer promptly files a petition pursuant to Sec. 9(c)(1)(B) of the Act (an RM petition) to test the union's majority status or the appropriateness of the unit, assuming that the union has not already filed an RC petition pursuant to Sec. 9(c)(1)(A). 372 NLRB No. 130, slip op. at 25–26 & fn. 141 (2023), rev. pending, Case 23–2302 (9th Cir.). *Cemex* also held, however, that ''if the employer commits an unfair labor practice that requires setting aside the election, the petition (whether filed by the employer or the union) will be dismissed, and the employer will be subject to a remedial bargaining order.'' Id. slip op. at 26–27 (an employer ''may not insist on an election, by refusing to recognize and bargain with the designated majority representative, and then violate the Act in a way that prevents employees from exercising free choice in a timely way.''). Thus, ''if the Board finds that an employer has committed unfair labor practices that frustrate a free, fair, and timely election, the Board will dismiss the election petition and issue a bargaining order, based on employees' prior, proper designation of a representative for the purpose of collective bargaining pursuant to Sec[.] 9(a) of the Act.'' Id. slip op. at 28–29.

No commenter has requested the Board to reopen the comment period for the purpose of addressing *Cemex.* We would reject any suggestion that *Cemex* eliminates the need for the Board to return to the pre-April 2020 blocking charge policy. To be sure, both *Cemex* and the Board's pre-April 2020 blocking charge policy are designed to protect the Sec. 7 rights of employees to freely choose whether to be represented for purposes of collective bargaining and the integrity of the Board's election process by shielding employees from having to vote, and the Board from having to conduct elections, under coercive circumstances. See *Cemex,* 372 NLRB No. 130, slip op. at 27–28, 34 fn. 179 (because the ''new standard will more effectively disincentivize employers from committing unfair labor practices prior to an election . . . , this standard will advance the Board's interest in 'provid[ing] a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.' . . . Similar concerns about the importance of 'provid[ing] a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees,' . . . prompted the Board to issue a notice of proposed rulemaking to solicit public input on the desirability of restoring its historical blocking charge policy. See *Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships,* 87 [FR] 66890, 66902–66903 (Nov. 4, 2022).'') (internal citations omitted). However, by definition, *Cemex* only applies where the Union can establish that majority support by authorization cards or other means and where the Union has demanded recognition on the basis of that majority support. By contrast, a union may petition for an election based merely on a 30 percent showing of interest. See Casehandling Manual Section 11023.1 (August 2007). Thus, in some cases where a union has petitioned for an election and the employer has committed unfair labor practices that would interfere with employee free choice in an election were one to be held (or where an employer that has filed an RM petition commits unfair labor practices that interfere with employee free choice), a *Cemex* bargaining order will not be available.

We further note that, as the Board acknowledged in *Cemex,* ''[m]any unions may prefer pursuing certification following a Board election[—rather than invoking *Cemex*—] as certification confers certain benefits on unions. These include: Sec. 9(c)(3)'s 1-year nonrebuttable presumption of majority status; Sec. 8(b)(4)(C)'s prohibition against recognitional picketing by rival unions; Sec. 8(b)(4)(D)'s exception to restrictions on coercive action to protect work jurisdiction; and Sec. 8(b)(7)'s exception from restrictions on recognitional and organizational picketing. See also *Gissel,* 395 U.S. at 598–599 & fn. 14 (1969) (''A certified union has the benefit of numerous special privileges which are not accorded unions recognized voluntarily or under a bargaining order[.]''). *Cemex,* 372 NLRB No. 130, slip op. at 25 fn. 140.

In our considered policy judgment, restoration of the pre-April 2020 blocking charge policy provides a measure of protection to employees and unions that would prefer Board certification as well as to the unit employees in those cases where unions have petitioned for an election with an adequate showing of interest (but one that falls of short of a majority) or without demanding recognition from the employer. And for the reasons explained at length above, the pre-April 2020 blocking charge policy also provides a measure of protection to unit employees in the context of decertification elections (and employer-filed RM petitions).

[116] See comments of NRTWLDF. As noted above, our dissenting colleague also points to the availability of a rerun election as a basis for preferring the April 2020 rule.

[117] Some comments echo this concern. See, *e.g.,* comments of CDW; HRPA. Many comments similarly complain that union officials should not be allowed to delay or block workers' right to hold decertification votes using ''unproven 'blocking charges.' '' See, *e.g.,* comments filed by Paul Andrews; Anonymous 143; Anonymous 83; Anonymous 106; Anonymous 113; Anonymous 123; Anonymous 152; Anonymous 76; Kenneth Bailey; Donald Barefoot; Barry Barkley; Kathleen Brown; Howard Butz; Dawn Castle; Kenneth Chase; John Churchill; Marvin Graham; Annette Craig; Julie D'Alessandro; Richard Damico; Daniel De La O; John-G Donovan; Edward Farrow; R.E. Fox; John Gaither; Allan Gardiner; Rachel Hughes; Gary Kirkland; Alan Goldberg; Robert Henes; Ron Hinds; Irene Holt; Marta Howard; Deborah Hurd; Insignia Design Lrd; Jeffrey Kilgariff; Chuck Kirkhuff; Fred Lambing; Mark Larsen; Terrence Linderman; Philip Martin; Charles Maurhoff; Mike Mayo; Daniel McCormack; Kevin McLaughlin; Tim Modert; Gwen Myers; Mike O'Donnell; Richard Park; James Pearce; John Raudabaugh; Saul Raw; Craig Root; Mary Ellen Rozmus; Lorraine Schukar; Randy Schultz; Dane Smith; Kathy Stewart; Elizabeth Turner; George Zolnoski.

dissenting colleague reiterates this position. In our view, this argument does not constitute a persuasive reason for declining to return to the pre-April 2020 blocking charge policy. To begin, we find the criticism internally inconsistent. The NPRM dissenters were part of a unanimous Board holding that the April 2020 rule did not do away with the merit-determination dismissal procedure. See *Rieth-Rile*y, supra, 371 NLRB No. 109, slip op. at 1, 3, 8. Thus, even under the April 2020 rule, a petition could be dismissed—thereby blocking an election—based on a mere ''administrative determination'' by the regional director that a complaint should issue so long as the complaint concerned a Type II charge, notwithstanding that the Board could ultimately conclude, contrary to the regional director, that the charge lacked merit. No reasoned explanation has been offered for deferring to the regional director's administrative determination as to the merits of those kinds of Type II charges, but not to the regional director's administrative determination concerning the merits of other kinds of unfair labor practice charges that would warrant setting aside an election or dismissing a petition. Indeed, under the statutory scheme, it is the regional directors, on behalf of the General Counsel, who make the initial determination as to the merits of *all* unfair labor practice charges. And of course, as the December 2014 Board noted (79 FR 74334), the courts have recognized that regional directors have expertise in deciding what constitutes objectionable conduct—*i.e.,* conduct that would interfere with employee free choice in an election. See, *e.g., NLRB* v. *Chicago Tribune Co.,* 943 F.2d 791, 794 (7th Cir. 1991), cert. denied, 504 U.S. 955 (1992).

The District of Columbia Circuit's decision in *Allied Mechanical Services, Inc.* v. *NLRB,* supra, 668 F.3d at 761, 771, 773, provides further support for the notion that the April 2020 Board's distrust of regional directors' 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 Section 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 thus reasoned:

> It is therefore 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.[118]

Moreover, as then-Member McFerran pointed out in her dissent to the 2019 NPRM, this criticism ignores 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). Indeed, the April 2020 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 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)).[119]

[118] Although it opposes returning to the pre-April 2020 blocking charge policy, the NRTWLDF argues that if a decertification election is to be blocked, that block ''should at least be based on a Regional Director's formal merit determination, not mere allegations made by a self-interested union attempting to delay or prevent its potential ouster.'' Our dissenting colleague similarly attempts to minimize the role of the offer-of-proof requirement, arguing that ''the reliance on offers of proof and witness availability requirements alone are insufficient to curb known union abuse of blocking charges.'' Of course, these arguments ignore that a petition is not blocked based on ''mere allegations'' of unlawful conduct. Rather, as shown, under the pre-April 2020 blocking charge policy to which we return, a request to block based on an unfair labor practice charge must be supported by an adequate offer of proof, filed simultaneously with the blocking request, providing the names of the witnesses who will testify in support of the charge and a summary of each witness's anticipated testimony. 29 CFR 103.20 (Dec. 15, 2014). Moreover, the policy to which we return specifies that the regional director should continue to process the petition and conduct the election where appropriate—notwithstanding the blocking request—if the 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. 29 CFR 103.20 (Dec. 15, 2014). We expect regional directors to adhere to these requirements. In other words, an offer of proof is insufficient if, for example, it merely states in conclusory fashion that a named witness will testify about alleged but unspecified unlawful employer assistance to the decertification petitioner; specifics regarding the assistance must be provided in the offer of proof. In any event, we decline the suggestion of the commenter and our dissenting colleague that we should deprive regional directors of the authority to delay elections based on unfair labor practice charges supported by adequate offers of proof unless the regional director has made a formal merit determination. Although there is no prehearing discovery in unfair labor practice proceedings, regional investigations of unfair labor practice charges are not perfunctory affairs; they involve several steps, including the taking of affidavits of the charging party's witnesses, attempts to obtain corroborating evidence, the solicitation of the position of the alleged wrongdoer, including obtaining affidavits from the charged party's witnesses if the charged party agrees to make its witnesses available in a timely manner, and legal research. See, *e.g.,* NLRB Casehandling Manual (Part 1) Unfair Labor Practice Proceedings, Sections 10052.3, 10052.5, 10052.8, 10054.2, 10054.3, 10054.4, 10054.8, 10058.2, 10060, 10064 (February 2023); NLRB, FY 2022 Performance and Accountability Report 26, available at *https://www.nlrb.gov/reports/agency-performance/performance-and-accountability* (last visited September 28, 2023) (noting that in FY 2022 only 41.2 percent of unfair labor practice charges were found to have merit by the regional directors). Thus, it obviously takes some time before a regional director can make a formal merit determination regarding an unfair labor practice charge. In FY 2022, the average time between charge filing and regional disposition was 84.4 days. See GC MEMORANDUM 23–06, p. 2, available at *https://www.nlrb.gov/guidance/memos-research/general-counsel-memos.* We believe that where parties have filed sufficient offers of proof in support of their blocking requests and no exceptions are applicable, regional directors should have the authority to delay elections, notwithstanding they have not had sufficient time to make formal merit determinations. Adoption of the commenter's suggestion would require regional directors to conduct elections in circumstances where conduct has occurred that has a tendency to interfere with employee free choice, or which is inherently inconsistent with the petition itself, simply because the regional director was not yet able to make the requisite merit determination. This would undermine employee free choice and contravene the Board's duty to conduct elections under conditions as nearly ideal as possible.

[119] Nor did the April 2020 amendments do away with the Board's longstanding practice of permitting regional directors to set aside elections based on their administrative approval of an informal settlement agreement providing for a rerun election (but containing a nonadmissions clause), even though there has been no posthearing finding by the Board of merit to the charge.

Continued

Our dissenting colleague and some commenters [120] also invoke the April 2020 Board's complaint (85 FR 18367, 18379, 18393) that regional directors had not applied the blocking charge policy consistently. However, after reviewing the comments and the April 2020 rule, we do not find that justification persuasive. The April 2020 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. Nor do the commenters. In any event, because parties were entitled to file requests for Board review of regional director decisions to block elections based on either Type I or Type II charges when the pre-April 2020 blocking charge policy was in effect, we believe that the Board has the ability to correct any erroneous blocking determinations made by regional directors. See 29 CFR 102.71(b) (2011); Casehandling Manual Sections 11730.7, 11733.2(b) (January 2017). Accordingly, we do not believe that a return to the blocking charge policy as it existed prior to the April 2020 rule will create a widespread problem where petitions that would normally be blocked in some regions would normally be processed to election in other regions.

d. Comments That the Pre-April 2020 Blocking Charge Policy Deprives Employees of the Ability To Vote and Renders Illusory RM Petitions; That This Rulemaking Is Intended To Protect the Institutional Interests of Labor Organizations Rather Than Employee Free Choice; and That the Pre-April 2020 Blocking Charge Policy Punishes Employees for the Misconduct of Others

We also reject the premise of many commenters, our dissenting colleague, and the April 2020 Board that the April 2020 rule's amendment requiring elections to be held in virtually all cases involving requests to block is necessary to preserve employee free choice in those cases where petitions would have been blocked by nonmeritorious charges under the pre-April 2020 blocking charge policy. While we recognize that the pre-April 2020 blocking charge policy can delay elections pending the investigation of the merits of the blocking charges, we believe that the benefits of permitting regional directors to block elections—where they are presented with blocking requests that are supported by adequate offers of proof and where they conclude that no exceptions are applicable—outweigh any such delay. In our considered policy judgment, the Board's blocking charge policy as it existed prior to the effective date of the April 2020 rule best preserves employee free choice in representation cases. We note that because the historical blocking charge policy provided for the regional director to resume processing the representation petition to an election if the blocking charge was found to lack merit, employees in those cases would be afforded the opportunity to vote whether they wish to be represented, thus preserving employee free choice.[121] However, unlike the April 2020 rule, 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 strikes us as 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, it is the Board's historical blocking charge policy to which we return, not the April 2020 rule requiring elections in virtually all cases involving requests to block, that best protects employee free choice in the election process.[122]

We reject as simply incorrect the suggestion of some commenters [123] and the April 2020 Board (85 FR 18366–18367, 18377) 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. 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., Sections 11732; 11733.2. Moreover, as noted below, 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 was remedied.

We find unpersuasive the suggestion of some commenters and the April 2020 Board [124] that the desires of the unit employes to decertify a union can be thwarted because, during the time it takes to litigate the merits of the unfair labor practice charge that resulted in the representation petition being held in abeyance or being dismissed, the decertification petitioner may leave the unit or become so discouraged by the delay that they give up and request to withdraw the petition. The commenters and the April 2020 Board simply ignore that if the decertification petitioner

And despite criticizing the pre-April 2020 blocking charge policy for permitting a mere administrative determination to delay employees' ability to go to the polls to resolve their representational status, the April 2020 Board did not explain why it left unchanged Board law permitting an employer to withdraw recognition from an incumbent union that had won a Board-conducted election based merely on the General Counsel's administrative determination that a majority of the unit no longer desire union representation. And that administrative determination—unlike the administrative determination to hold a petition in abeyance under the blocking charge policy—is not even reviewable by the Board, because the General Counsel has unreviewable discretion to decline to issue a complaint challenging an employer's unilateral withdrawal of recognition from an incumbent union. See *NLRB* v. *United Food & Commercial Workers Union, Local 23, AFL–CIO,* 484 U.S 112, 118–119 (1987) (a charging party may appeal a regional director's dismissal of an unfair labor practice charge to the General Counsel, but not to the Board); *Williams* v. *NLRB,* 105 F.3d 787, 790–791 fn. 3 (2d Cir. 1996) (''`General Counsel's prosecutorial decisions are not subject to review by the Board,'" and courts may not pass judgment on the merits of a matter never put in issue or passed upon by the Board) (citation omitted).

[120] See, *e.g.,* comments of CDW; HRPA.

[121] As discussed more below, Sec. 103.20(f) and (g) of the final rule aims to provide guidance regarding the circumstances under which it will be appropriate for a regional director to resume processing a petition.

[122] Scaccia appears to suggest that that the Board should outline a specific time frame for elections similar to the regular election cycles in the political arena. However, the Board has no authority to conduct an election in the absence of an appropriately filed petition raising a question of representation. See Sec. 9(c) of the Act (29 U.S.C. 159(c)). Moreover, during the Act's long history, neither Congress nor the Board has seen fit to impose a mandatory timeline for the scheduling of elections. We agree with the views of the December 2014 Board that regional directors should continue to hold elections as soon as practicable in the circumstances of each case. Thus, ''[w]here there is no need to wait, the election should proceed; where there is a need to wait, the election should not proceed.'' 79 FR 74422, 74429. Suffice it to say that for the reasons explained at length in this preamble, we believe there is a need to wait when adequately supported blocking charge requests are filed and no exceptions are applicable.

[123] See, *e.g.,* comments of HRPA; NRTWLDF.

[124] See 85 FR 18366–18367, 18377; comments of CDW; HRPA; NRTWLDF.

ceases to be employed in the unit, the Board will continue to process the petition upon the request of the employees who remain in the unit. See *Northwestern Photo Engraving Co.,* 106 NLRB 1067, 1067 fn. 1 (1953) (denying union's request that decertification petition be dismissed because of death of decertification petitioner where unit employees requested that Board proceed with the processing of the petition). Cf. *Tyson Fresh Meats, Inc.,* 343 NLRB 1335, 1335 & fn. 3 (2004) (rejecting argument that employer's objections to a decertification election won by the union should be dismissed because decertification petitioner was promoted out of the unit to a supervisory position after filing the petition because where a petitioner becomes a supervisor after the filing of a petition, the process is not abated, as the petitioner is only a representative of the employees who are interested in a vote on continuing representation) (internal quotation marks omitted); *Weyerhaeuser Timber Co.,* 93 NLRB 842, 843–844 (1951) (denying the union's request to dismiss the decertification petition on the ground that the petitioner was promoted to supervisory position because ''[t]he employees of the Employer, who are currently being represented by the Union, are principally involved rather than the Petitioner. To dismiss the petition herein would be to their prejudice, not the Petitioner.''). Indeed, HRPA's comment cites a recent case where another employee was substituted for the original decertification petitioner who had left the unit. See *Geodis Logistics, LLC,* 371 NLRB No. 102, slip op. at 1 fn. 1 (2022) (Board grants motion to substitute a different individual as the petitioner in the decertification cases after original decertification petitioner left the unit). Similarly, if the other unit employees who supported the decertification petition object to a decertification petitioner's request to withdraw the petition, the Board rejects the withdrawal request and continues processing the decertification petition. See *Saginaw Hardware Co.,* 108 NLRB 955, 957 (1954) (rejecting decertification petitioner's request to withdraw petition where other unit employees objected and had not authorized the petitioner to withdraw the decertification petition). And it goes without saying that another employee is free to file a new petition. This was the law that was in effect prior to the April 2020 rule, and it remains the law after the effective date of the instant rule.[125]

Accordingly, we also categorically deny the suggestion of some commenters[126] that the proposal to return to the pre-April 2020 blocking charge policy demonstrates that the Board is uninterested in protecting the rights of employees who wish to rid themselves of their collective-bargaining representatives, and that our desire to conduct free and fair elections is illusory. We likewise disagree with the contention made by many commenters that the blocking charge policy wrongfully punishes employees for the misconduct of their employers.[127] Put simply, as we have explained at length, the blocking charge policy is designed to protect employees' right to exercise a free and untrammeled choice for or against union representation.

e. Comments Regarding the Possibility of Employee Turnover Pending the Investigation of The Merits of the Blocking Charge

Our dissenting colleague, CDW, and the April 2020 Board (85 FR 18367, 18378, 18393) also fault the pre-April 2020 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. We do not find this argument a persuasive reason to adhere to the April 2020 rule. 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 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); Casehandling Manual Section 11312.1 (September 2020). 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); Casehandling Manual Sections 11086.3; 11312.1 (September 2020).

In our considered policy judgment, it serves no valid purpose to conduct elections over the objections of charging parties in the face of unremedied unfair labor practices that interfere with employee free choice, even though delaying the election until the unfair labor practices are remedied might mean that some employees who were in the workforce at the time the petition was filed are no longer employed at the time the election is held. As for the subset of cases where the charges are nonmeritorious, we do not believe that it is unjust to bar employees from voting who were employed at the time of the

[125] 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,* 502 F.2d at 1028–1029 (''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.''). 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 disclaimed interest.

We also disagree with the April 2020 Board's claim (85 FR 18367, 18379), echoed by our dissenting colleague, along with commenters such as CDW, that the pre-April 2020 blocking charge policy renders illusory the possibility of employer-filed (''RM'') election petitions. Under that policy, which we reaffirm and codify in Sec. 103.20(f) and (g) of the final rule we promulgate, 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 were never blocked, and that even in the minority of instances when RM petitions are blocked, most of these petitions are blocked by meritorious charges.

[126] See, *e.g.,* comments of Chairwoman Foxx; Chamber; HRPA; NRTWLDF; ''Interested Party.''

[127] See, *e.g.,* comments of ABC; NRTWLDF; Anonymous 143; Anonymous 83; Anonymous 106; Anonymous 113; Anonymous 123; Anonymous 152; Anonymous 76; Paul Andrews; Kenneth Bailey; Donald Barefoot; Barry Barkley; Kathleen Brown; Howard Butz; Dawn Castle; Kenneth Chase; John Churchill; Graham; Annette Craig; Julie D'Alessandro; Richard Damico; Daniel De La O; John-G Donovan; Edward Farrow; R.E. Fox; John Gaither; Allan Gardiner; Rachel Hughes; Gary Kirkland; Alan Goldberg; Robert Henes; Ron Hinds; Irene Holt; Marta Howard; Deborah Hurd; Insignia Design Lrd; Jeffrey Kilgariff; Chuck Kirkhuff; Fred Lambing; Mark Larsen; Terrence Linderman; Philip Martin; Charles Maurhoff; Mike Mayo; Daniel McCormack; Kevin McLaughlin; Tim Modert; Gwen Myers; Mike O'Donnell; Richard Park; James Pearce; John Raudabaugh; Saul Raw; Craig Root; Mary Ellen Rozmus; Lorraine Schukar; Randy Schultz; Dane Smith; Kathy Stewart; Elizabeth Turner; George Zolnoski.

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. And this is true equally in the decertification context and in the context of initial organizing campaigns. 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.

We also find it significant that the April 2020 rule did not 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. The April 2020 rule recognized that the Board should set aside the initial election and, in certain circumstances, conduct a rerun election in cases where the charges that were the subject of a request to block are meritorious. And just as was the case prior to the April 2020 rule, the eligibility period for rerun elections under the April 2020 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). Put simply, this means that, under the April 2020 rule, employees who vote in the election that counts—*i.e.,* the election whose results are certified—sometimes will not be the employees who were in the unit when the petition was filed. Yet, despite its professed concerns about employee turnover, the April 2020 Board was willing to countenance this result; indeed, like so many of the commenters opposed to the NPRM, the April 2020 Board took the position that a rerun election constitutes an adequate remedy notwithstanding the possibility of turnover. Some risk of disenfranchisement is thus unavoidable in this context. However, in our considered policy judgment, the costs of the delay (including the risk that employees who voluntarily choose to leave the unit while the merits of the unfair labor practice charge are determined will not have the opportunity to vote in an eventual election) do not outweigh the benefits of enabling regional directors to avoid having to force employees to vote under coercive circumstances when there are concurrent charges supported by an adequate offer of proof and a request to block.

f. Comments Regarding Section 8(a)(2), the First Amendment, Compulsory Dues Obligations Following Expiration of Collective-Bargaining Agreements, and the Alleged Statutory Right to a Decertification Election 12 Months After a Prior NLRB-Supervised Election

Nor do we agree with those commenters that argue that we should adhere to the April 2020 rule because it better accords with the considerations underlying Section 8(a)(2) of the Act than the pre-April 2020 blocking charge policy.[128] According to CDW, because the blocking charge policy delays decertification elections for the duration of the ''administrative processes'' (including the investigation into the merits of the concurrent unfair labor practice charge(s)), it ''runs directly counter to the policy considerations underlying Section 8(a)(2)'s prohibition on recognition of minority unions'' because the lawfully recognized union ''may have long since lost the support of a majority of employees.'' [129]

However, these comments ignore that the blocking charge policy applies equally to petitions filed in initial organizing campaigns, where, by definition, there is *no* incumbent union serving as the representative of the unit employees. Thus, the commenters' concerns about the blocking charge policy insulating an entrenched minority union from being ousted in the decertification context cannot justify denying regional directors the ability to delay elections in the initial organizing context when there are pending unfair labor practice charges and blocking requests alleging conduct that would interfere with employee free choice in an election were one to be held.

Nor do the commenters explain why their concern about the blocking charge policy's effect in the decertification context should prevent a regional director from delaying an election sought by a rival union with whom the employer might prefer to deal (over the incumbent union) and which the employer has unlawfully assisted in obtaining a showing of interest in support of the petition, when the incumbent union has filed a request to block supported by an adequate offer of proof. See CHM Section 11730.3(a) (August 2007) (noting that Section 8(a)(2) charges alleging that employer representatives assisted in the showing of interest obtained by a labor organization may justify dismissal of the petition).

As for the delay that results from application of the blocking charge policy in the context of decertification petitions where there admittedly is a currently certified (or voluntarily recognized) representative, we note that, by definition, the incumbent union would not have been certified by the Board (or recognized by the employer) prior to the filing of the decertification petition unless the union had previously won a Board-conducted election (or the employer had satisfied itself that the union enjoyed majority support when it recognized the union). We further note that because a decertification petition need only be supported by 30 percent of the unit, the mere filing of a decertification petition does not by itself demonstrate that the incumbent union lacks majority support. See *Allied Industrial Workers, AFL–CIO Local Union 289* v. *NLRB,* 476 F.2d 868, 881 (D.C. Cir. 1973) (''The naked showing that a decertification petition has been filed, with no indication of the number of signatories . . . , is an insufficient basis'' for doubting the union's majority status ''since it establishes no more than that the petition was supported by the requisite 30% 'showing of interest.' '') (citation omitted); *Bryan Memorial Hospital* v. *NLRB,* 814 F.2d 1259, 1262 (8th Cir. 1987). The commenters do not explain how requiring employees to await the outcome of the investigation into the merits of an unfair labor practice charge alleging conduct that would interfere with employee free choice or which is inconsistent with the petition itself runs afoul of Section 8(a)(2) where there has not even been a purported showing that the incumbent union in fact has lost its majority support. Moreover, even if the decertification petition purportedly was signed by a majority of the unit employees, the petition itself may have been tainted by unfair labor practices, thereby casting doubt on whether the petition demonstrates the uncoerced sentiments of a majority of the unit employees. And the results of the decertification election cannot be said to

[128] See, *e.g.,* comments of CDW; NRTWLDF.

[129] See *Bernhard-Altmann,* supra, 366 U.S. at 738 (''[A] grant of exclusive recognition to a minority union constitutes unlawful support in violation of . . . [S]ec[.] [8(a)(2)], because the union so favored is given 'a marked advantage over any other in securing the adherence of employees.' '') (quoting *Pennsylvania Greyhound Lines,* 303 U.S. at 267).

represent the uncoerced views of a majority if the election was conducted under coercive circumstances that postdate the showing of interest. As for decertification elections delayed by nonmeritorious charges, we repeat that the regional director resumes processing the petition if the charge lacks merit. In short, we see no fundamental inconsistency between the blocking charge policy and Section 8(a)(2); both advance the goals of protecting employee free choice in the selection and retention of collective-bargaining representatives and shielding the employees' choice from unlawful interference by the employer.

Finally, as several commenters that support the proposed rule note,[130] even though the April 2020 rule permits employees to vote sooner, the employees' choice is not necessarily effectuated any sooner—in the sense of the incumbent union actually being decertified—because the certification of the results of the election must await the determination of the merits of the unfair labor practice charge, and it takes the same amount of time to investigate the charge whether it is investigated before the election (under the pre-April 2020 policy to which we return) or after the election (as under the April 2020 rule). For all these reasons, we do not believe that we should decline to return to the blocking charge policy on Section 8(a)(2) policy grounds.

Insofar as certain commenters raise First Amendment concerns about the blocking charge policy delaying employees' ability to oust a union because they would prefer not to be union members,[131] we note that under the Act, employees need not join a union or remain members of a union and may resign their union membership at any time.[132] Even assuming for the sake of argument that the First Amendment applies at all to private-sector agency-shop arrangements, the commenters cite no authority for the proposition that the First Amendment is violated if an election is delayed during the investigation of unfair labor practice charges alleging conduct that would interfere with employee free choice or that is inconsistent with the petition itself.[133]

Nor are we persuaded by the comments that argue that we should refrain from returning to the Board's historical blocking charge policy because that policy punishes employees by forcing them to pay dues to the union they wish to decertify after the collective-bargaining agreement containing the union-security clause expires.[134] Thus, even in a state where union-security clauses are lawful, once the collective-bargaining agreement containing the union-security clause has expired, nonmember employees who do not wish to financially support the incumbent union can avoid having to pay any dues to the incumbent union simply by revoking their dues-checkoff authorizations pursuant to Section 302(c)(4) of the Taft-Hartley Act. After all, ''[u]nion-security clauses do not survive contract expiration because the proviso to Section 8(a)(3) of the Act limits such provisions to the term of the contracts containing them,'' and even if employees have voluntarily authorized dues checkoff, their authorizations ''are revocable at the employee's option'' after contract expiration, consistent with the terms of such authorizations. *Valley Hospital II,* 371 NLRB No. 160, slip op. at 9 fn. 23 & 10 fn. 31.[135]

Many commenters opposed to the proposed rule argue that the pre-April 2020 blocking charge policy infringes on workers' ''statutory right to hold decertification elections at any time outside of 12 months following a previous NLRB-supervised election.'' [136] We disagree. Those comments cite no authority for such a supposed statutory right, and the courts have repeatedly upheld Board doctrines that can prevent the holding of decertification elections or the withdrawal of recognition more than 12 months after a valid NLRB-supervised election. See, *e.g., Auciello Iron Works, Inc.,* supra, 517 U.S. at 786–787 (union is entitled to a conclusive presumption of majority status during the term of a collective-bargaining agreement of three years or less). See also *Veritas Health Services, Inc.* v. *NLRB,* supra, 895 F.3d at 80–82 (''[T]here are certain times when a union's presumption of majority

[130] See comments of AFL–CIO/NABTU; GC Reply; LA Federation; USW.

[131] See, *e.g.,* comments of Weber, Scaccia, and Chaump. We note in passing that certain commenters, such as Scaccia, a New York State employee, and Chaump, a public school teacher in Pennsylvania, will not be directly affected by the instant rule because the Board lacks jurisdiction over public employees. 29 U.S.C. 152(2).

[132] See *Pattern Makers' League of North America, AFL–CIO* v. *NLRB,* 473 U.S. 95, 99–108 (1985) (employees may resign membership in a union at any time); *NLRB* v. *General Motors Corp.,* 373 U.S. 734, 742 (1963) (''`Membership' as a condition of employment is whittled down to its financial core.''). Except in States where union-security clauses are prohibited by state law, as Sec. 14(b) of the Act authorizes, however, nonmember employees may be subject to the requirements of such clauses. See, *e.g., Marquez* v. *Screen Actors Guild, Inc.,* 525 U.S. 33, 36–37, 46 (1998) (Sec. 8(a)(3) of the Act ''incorporates an employee's right not to `join' the union (except by paying fees and dues) for ''representational activities'').

[133] See *Blanco,* 641 F. Supp. at 419 (rejecting the contention that application of the historical blocking charge policy deprived the plaintiff of his First Amendment rights).

[134] See, *e.g.,* comments of Chairwoman Foxx; Chamber; NRTWLDF; Scaccia. At least one commenter relies on the Board's decision in *WKYC–TV, Inc.,* 359 NLRB No. 30 (2012), in support of her claim regarding compulsory dues payments following expiration of a collective-bargaining agreement containing a dues-checkoff obligation. At the time that case was decided, the composition of the Board included two persons whose appointments were subsequently held to be constitutionally invalid in *NLRB* v. *Noel Canning,* 537 U.S. 513 (2014). In *Lincoln Lutheran of Racine,* 362 NLRB 1655 (2015), decided thereafter by a valid Board majority, the Board held that an employer's obligation to check off union dues continues after expiration of a collective-bargaining agreement that contains a dues-checkoff provision. In *Valley Hospital Medical Center, Inc.,* 368 NLRB No. 139, slip. op. at 1 (2019) (''*Valley Hospital I*''), the Board overruled *Lincoln Lutheran of Racine,* but, following a remand from the United States Court of Appeals for the Ninth Circuit, the Board reversed *Valley Hospital I* and ''reinstate[d]'' *Lincoln Lutheran's* holding. See *Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center,* 371 NLRB No. 160, slip op. at 1–3 & fn. 1 (2022) (''*Valley Hospital II*''), enfd. 93 F.4th 1120 (9th Cir. 2024). *Valley Hospital II* found *Lincoln Lutheran's* decision ''thoughtful and well reasoned,'' and adopted its reasoning. Id. slip op. at 1–2, 9. Accordingly, our discussion of this issue will reference *Valley Hospital II,* rather than *WKYC–TV,* as cited in the comment.

[135] We likewise reject as lacking in merit commenter Chaump's unexplained claim that the proposed return to the blocking charge policy would ''stifle competition in labor relations by forcing union representation onto all employees, without the employees having the chance to vote for representation in the first place.'' As discussed above, federal labor law has long recognized, even prior to the adoption of the blocking charge policy, that employees may obtain representation for purposes of collective bargaining without first voting in a Board-conducted election. We further note, as was also discussed previously, that the Supreme Court has held that the Board has the authority to order an employer to bargain with a union when the employer has committed serious unfair labor practice conduct disruptive of the election machinery and where the Board concludes that previously expressed employee sentiment would be better protected by a bargaining order. See *Gissel Packing,* 395 U.S. at 591–592, 610–611, 614–615. See also *Cemex,* supra, 372 NLRB No. 130, slip op. at 24 (discussing the Supreme Court's decision in *Gissel*). To the extent Chaump contends that the other rule provisions have that effect, the argument is addressed elsewhere. We likewise reject as lacking in merit Bryden's unexplained claim that limiting voting windows is ''racist.''

[136] See, *e.g.,* comments of Anonymous 83; Anonymous 106; Anonymous 113; Anonymous 123; Anonymous 152; Anonymous 76; Paul Andrews; Kenneth Bailey; Donald Barefoot; Barry Barkley; Kathleen Brown; Howard Butz; Dawn Castle; Kenneth Chase; John Churchill; Marvin Graham; Annette Craig; Julie D'Alessandro; Richard Damico; Daniel De La O; John-G Donovan; Edward Farrow; William Fedewa; R.E. Fox; John Gaither; Rachel Hughes; Gary Kirkland; Alan Goldberg; Robert Henes; Ron Hinds; Irene Holt; Marta Howard; Deborah Hurd; Insignia Design Lrd; Jeffrey Kilgariff; Chuck Kirkhuff; Fred Lambing; Mark Larsen; Terrence Linderman; Philip Martin; Charles Maurhoff; Mike Mayo; Daniel McCormack; Kevin McLaughlin; Tim Modert; Gwen Myers; Mike O'Donnell; Richard Park; James Pearce; John Raudabaugh; Saul Raw; Craig Root; Mary Ellen Rozmus; Lorraine Schukar; Randy Schultz; Dane Smith; Kathy Stewart; Elizabeth Turner; George Zolnoski.

support is irrebuttable, such that any refusal to recognize and deal with a duly elected union—with or without a decertification petition—will violate the Act.''); *Bryant & Stratton Business Institute, Inc.* v. *NLRB,* 140 F.3d 169, 174, 186–187 (2d Cir. 1998) (upholding Board's finding that employer's April 1996 withdrawal of recognition was unlawful because employer withdrew recognition prior to the expiration of the extension of the certification year that the Board ordered to remedy employer's bargaining violations during the 12-month period following the union's November 1989 certification); *NLRB* v. *Commerce Co.,* 328 F.2d 600, 601 (5th Cir. 1964) (''[I]n view of the undisputed evidence as to earlier failure to bargain, we think the board's action, in making the order dismissing the decertification petition and granting the union an additional six months beyond the certification year in which to bargain, was reasonable and proper.''), cert. denied. 379 U.S. 817 (1964). Cf. *Mar-Jac Poultry Co., Inc.,* 136 NLRB 785, 787 (1962) (dismissing election petition filed by employer more than 12 months after the union was certified but before the employer had bargained for 12 months; ''to permit the Employer now to obtain an election would be to allow it to take advantage of its own failure to carry out its statutory [bargaining] obligation, contrary to the very reasons for the establishment of the rule that a certification requires bargaining for at least 1 year.''); *Lamar Hotel,* 137 NLRB 1271, 1271–1273 (1962) (dismissing decertification petition filed more than 12 months after union's certification because the employer had ceased bargaining for approximately the last six months of that 12-month period). It is thus not surprising that no court had ever invalidated the blocking charge policy in the more than eight decades of its existence, and that even the 2020 Board did not claim that the blocking charge policy violated the Act. Moreover, as previously discussed, even under the April 2020 rule, regional directors were empowered to dismiss petitions—and thereby block elections—more than 12 months after a previous election under the merit-determination dismissal procedure.[137]

[137] For related reasons, we also reject the suggestion of the NRTWLDF that if the Board decides to reinstate the pre-April 2020 blocking charge policy, we should include a provision allowing decertification petitioners to intervene as full parties in all blocking charge litigation to protect and effectuate their statutory right to an election. See comments of NRTWLDF.

''Sec. 10(b) of the Act expressly provides that intervention in unfair labor practice proceedings is discretionary with the Board, and not a matter of right.'' *DirectSat USA, LLC,* 366 NLRB No. 141, slip op. at 2 (2018) (citing *Medi-Center of America,* 301 NLRB 680, 680 fn. 1 (1991)), review denied, 925 F.3d 1272 (D.C. Cir. 2019). Thus, Sec. 10(b) of the Act provides, ''[i]n the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony.''). The Board's Rules and Regulations likewise make intervention discretionary and not a matter of right. See 29 CFR 102.29 (''Any person desiring to intervene in any proceeding must file a motion in writing or, if made at the hearing, may move orally on the record, stating the grounds upon which such person claims an interest . . . . The Regional Director or the Administrative Law Judge, as the case may be, may, by order, permit intervention in person, or by counsel or other representative, to such extent and upon such terms as may be deemed proper.''). Moreover, as a case cited by the commenter implicitly recognizes, in some cases, a decertification petitioner has no right to an election when it files the decertification petition and can have nothing relevant to contribute to an unfair labor practice proceeding because its petition is legally foreclosed. See *Veritas Health Services, Inc.,* supra, 895 F.3d at 87 (even assuming a decertification petition was signed by a majority of the unit employees, any loss of majority support for the Union would not have been actionable during the still-pending extended certification year); id. at 89 (concurring opinion) (while urging the Board to establish substantive criteria governing intervention, concurring opinion notes that the Board's failure to do so is ultimately without consequence in this particular case because [the employee's] claims on intervention pertain to a legally foreclosed decertification petition). Allowing decertification petitioners to intervene in such cases, with all the rights that such participation extends, can only serve to hinder and delay the prompt decision of the controversy. The commenter also implicitly concedes that in other cases, the decertification petitioner's interests sometimes will be adequately represented by the employer. See comments of NRTWLDF (contending that it ''is not always the case'' that the employer has the same interest as the petitioner'' in the representation case) (emphasis added). Cf. *Semi-Steel Casting Co. of St. Louis* v. *NLRB,* 160 F.2d 388, 393 (8th Cir. 1947) (''Insofar as intervention was sought by the employees for the purpose of making the same defense as that made by the company, they were not only not necessary parties, but their presence could only serve to hinder and delay the prompt decision of the controversy.''). Accordingly, we decline to grant decertification petitioners a categorical entitlement to intervene as full parties in all blocking charge litigation. Rather, consistent with the statute and the extant regulations, motions to intervene made by decertification petitioners should be decided on a case-by-case basis.

The NRTWLDF also asserts that the Board has held that decertification petitioners are not entitled to even get information regarding the blocking charge litigation. We are unaware of any Board holding precluding Agency personnel from responding to requests for nonprivileged information about the status of pending unfair labor practice charges. We expect regional offices to disclose publicly available information in response to requests by decertification petitioners about the status of blocking charges just as they would respond to inquiries about the status of other charges.

g. Comments That the Pre-April 2020 Blocking Charge Policy Incentivizes the Filing of Meritless or Frivolous Charges

Many commenters who oppose the NPRM argue that because the blocking charge policy can substantially delay elections based on mere allegations of unfair labor practices, the policy incentivizes the filing of meritless or frivolous charges, particularly in the decertification context where employees are seeking to rid themselves of union representation.[138] The April 2020 Board made the same argument to justify its decision to jettison the blocking charge policy. 85 FR 18367, 18376, 18377, 18379–18380, 18393. Our dissenting colleague also defends the April 2020 rule on this basis, arguing that the majority ''largely downplays and dismisses the gamesmanship problem.''

That argument, unsupported by evidence, does not persuade us that we should decline to return to the pre-April 2020 blocking charge policy. Put simply, there has been no factual demonstration that it was the norm for unions to file nonmeritorious blocking charges—let alone to file frivolous charges—in order to delay elections in RD or RM cases when the historical blocking charge policy was in effect. Indeed, as then-Member McFerran pointed out in her 2019 NPRM dissent, the Board's 2019 NPRM made no effort to determine how often decertification petitions were blocked by meritorious charges, as compared 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 Board do so when it issued the April 2020 rule. And nor do the commenters or our dissenting colleague who oppose returning to the pre-April 2020 blocking charge policy. As noted, the analysis of the pre-Covid data contained in then-Member McFerran's 2019 NPRM dissent would seem to undercut the unsupported concerns of many of the commenters, our colleague, and the April 2020 Board, as it shows that an overwhelming majority of the decertification petitions and employer-filed RM petitions were never blocked, and that even in the minority of instances when decertification petitions and RM petitions were blocked, most of these petitions were blocked by meritorious charges.[139] Even if we were

[138] See, *e.g.,* comments of ABC, CDW; Chairwoman Foxx; Chamber; Graham; HRPA; NRTWLDF; Scaccia.

[139] See 84 FR 39943–39945 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.''); Dissent Appendix, Section 1.'' 84 FR 39943–39944 & fn. 64 (''[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, Section 1.''); 84 FR 39945 fn. 69 (''my review of the relevant data

to accept the 2019 NPRM majority's flawed data as accurate, it too confirms that the majority of petitions were not blocked. See 2019 NPRM Majority Appendix A, currently available at *https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-7583/majority-appendix-reformatted.pdf.* Thus, there simply has been no showing that it was the norm for decertification petitions to be blocked when the pre-April 2020 blocking charge policy was in effect, let alone that that it was the norm for the petitions to be blocked by meritless or frivolous charges.[140]

Moreover, we believe that the regulatory provisions included in the December 2014 rule—requiring the party that seeks to block the election to (1) simultaneously file a written offer of proof providing the names of its witnesses who will testify in support of the charge and a summary of each witness's anticipated testimony, and (2) promptly make the witnesses available to the regional director—operate to disincentivize the filing of frivolous charges and provide powerful tools to regional directors to promptly dispose of any nonmeritorious blocking requests that are filed. As a further safeguard, under the 2014 rule, if a regional director determined that a party's offer of proof did not describe evidence that, if proven, would interfere with employee free choice in an election or would be inherently inconsistent with the petition itself, the regional director would continue processing the petition and conduct the election where appropriate. See *Associated Builders & Contractors of Texas, Inc.,* supra, 826 F.3d at 228 (citing amended § 103.20's offer of proof requirement (29 CFR 103.20 (Dec. 15, 2014) and concluding that the Board ''considered the delays caused by blocking charges, and modified current policy in accordance with those considerations''). Indeed, the April 2020 Board itself conceded that this new evidentiary requirement would likely facilitate the quick elimination of obviously meritless charges and blocking requests based on them, and thereby permit processing of some petitions with minimal delay. 85 FR 18377.[141]

Ultimately, 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 have decided to return to the judicially approved, pre-April 2020 blocking charge policy based on a policy choice that the historical blocking charge policy, as amended by the December 2014 rule, 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.

h. Comments That the April 2020 Rule Has Not Caused a Spike in the Number of Elections Being Set Aside

The NRTWLDF also claims that the number of elections set aside did not significantly increase after promulgation of the April 2020 final rule, thereby demonstrating (in its view) that the historical blocking charge policy served only to incentivize the filing of nonmeritorious unfair labor practice charges. Its premise appears to be that if employees have been forced to vote under coercive conditions under the April 2020 rule, the Board would have ordered rerun elections (or dismissed petitions) in those cases, and, since no commenter cites evidence that the number of rerun elections/dismissed petitions has significantly spiked, this demonstrates that any would-be blocking charges would have been nonmeritorious. Thus, it claims that the April 2020 rule has succeeded in its goal of permitting employees to vote promptly without interfering with the employees' Section 7 rights to make a free choice for or against union representation. The NRTWLDF states in this regard that it is aware of only three instances in the first two years following the April 2020 rule of an election being held without resolving the question of representation. The NRTWLDF argues that in the absence of evidence proving a spike in the number of rerun elections (or dismissed petitions), the Board lacks a reasoned explanation for returning to the historical blocking charge policy that by definition delays elections.

To be sure, the April 2020 rule by design has the effect of fewer blocked elections, thereby enabling employees to vote sooner than they could have under the Board's historical blocking charge policy (though, as the April 2020 Board and the NRTWLDF concede, the results of those elections cannot be certified until merits of the unfair labor practice charges are determined). However, we are not persuaded by the argument that we should refrain from returning to the pre-April 2020 blocking charge policy in the absence of evidence that the number of elections set aside has significantly increased since the April 2020 rule was implemented in the throes of the Covid 19-pandemic. The commenter ignores that, under the April 2020 rule, elections *are* being set aside because of charges alleging pre-election unfair labor practice conduct, just as the April 2020 Board conceded would be the case. As an initial matter, we disagree with the NRTWLDF's suggestion that there are ''only three instances in two years of an election being held without resolving the question of representation.'' The NRTWLDF's count is admittedly limited to merit-determination dismissal cases. However, as we have previously explained, the merit-determination dismissal procedure, by its own terms, is applicable to only a small subset of representation cases involving concurrent unfair labor practice charges.

The NRTWLDF's figures also fail to take into account cases where the

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. . . . 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.''). Moreover, the merit rates for blocking 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). In claiming that then-Member McFerran should not have deemed charges meritorious if they resulted in a settlement, the NRTWLDF ignores that, as shown previously, in determining whether a petition was blocked by a meritorious charge, then-Member McFerran ''applied the Office of the General Counsel's long-standing merit definition contained in OM 02–102'' available at *https://www.nlrb.gov/guidance/memos-research/operations-management-memos,* and that the Board Chairman and General Counsel in office when both the 2019 NPRM and the April 2020 rule issued ''used the *same* merit definition in their Strategic Plan for FY 2019–FY 2022.'' See, *e.g.,* Strategic Plan pp. 2, 5, attached to GC Memorandum 19–02, available at *https://www.nlrb.gov/guidance/memos-research/general-counsel-memos.* 84 FR 39944 fn. 64 (emphasis added).

[140] Our colleague argues that our ''suggestion that there is insufficient evidence that nonmeritorious or frivolous blocking charges are 'the norm'' depends on our willingness to tolerate ''a very substantial burden on employee free choice before even acknowledging, let alone redressing, this harm.'' For the reasons set forth above, we respectfully disagree with our colleague's view that the historical blocking charge policy requires tolerating a ''burden'' on employee free choice. Instead, it is the Board's obligation to minimize the burden on employees of participating in elections conducted under coercive circumstances.

[141] Our dissenting colleague expresses doubt that the offer-of-proof and witness availability requirements will successfully filter out nonmeritorious charges, arguing that those aspects of the pre-April 2020 blocking charge policy are not ''sufficient, standing alone, to curb any abuse of the blocking charge policy.'' Instead, our colleague contends that the Board should have considered ''the use of durational limits for blocking charges'' or other reform alternatives. Because we respectfully disagree with our colleague's assessment of the efficacy of the offer-of-proof and witness availability requirements of the pre-April 2020 blocking charge policy, we do not see a need to explore other reform alternatives. As more extensively discussed above, see supra fn. 119, these requirements are not perfunctory, and we expect regional directors to apply them appropriately when assessing blocking requests.

General Counsel has sought a *Gissel* bargaining order to remedy unlawful conduct adversely affecting an election. See, *e.g., List Industries, Inc.,* Cases 13–CA–278248 et al. & 13–RC–278226; *Spike Enterprise, Inc.,* Cases 14–CA–281652, 13–CA–282513, 13–RC–281169; *I.N.S.A., Inc.,* Cases 01–CA–290558 et al. & 01–RC–288998; *IBN Construction Corp.,* Cases 22–CA–277455, 22–RC–274819; *Starbucks Corp.,* Cases 03–CA–285671 et al. & 03–RC–282127. The NRTWLDF's figures also fail to take into account cases where elections were set aside pursuant to party agreement.[142]

In any event, in focusing on the absence of a spike in the number of elections set aside, we believe that the commenter misses a key point. Put simply, the fact that an election is not set aside does not mean that employees were able to exercise a free and untrammeled choice in the election that was held. The Board generally lacks authority to set aside the results of an election and to conduct a rerun election on its own initiative in a case that does not involve commingled determinative challenges, absent a party's filing election objections (or a request to block).[143] In addition, not all unions will opt to seek a rerun election. In our considered policy judgment, it cannot be counted as a statutory success if a union chooses not to seek a rerun election after being forced to participate in an election conducted under coercive conditions that interfere with employee free choice. Nor do we consider it a statutory success if a union withdraws its petition because it believes that it cannot prevail in an election because of employer unfair labor practices.[144] Accordingly, we are not persuaded that we should refrain from returning to the Board's historical blocking charge policy absent proof of a significant uptick in rerun elections or dismissed petitions following implementation of the April 2020 rule.[145]

[142] See, *e.g., Hussmann Services Corp.,* Cases 27–CA–270714 et al. & 27–RC–271418 (after regional director issued October 13, 2021 order consolidating objections with unfair labor practice complaint, parties settled charges and agreed to set aside election and to a rerun election).

[143] The Board lacks the authority to initiate election objections proceedings on its own. See 29 CFR 102.69(a)(8) (July 21, 2023) (''Within 5 business days after the tally of ballots has been prepared, any party may file with the Regional Director objections to the conduct of the election or to conduct affecting the results of the election. . . .''). Thus, if a party refrains from filing election objections and there are no determinative challenges, the results of the election generally will be certified even if it was conducted under coercive circumstances. See 29 CFR 102.69(b) (July 21, 2023) (''If no objections are filed within the time set forth in paragraph (a)(8) of this section, if the challenged ballots are insufficient in number to affect the results of the election, and if no runoff election is to be held pursuant to § 102.70, and if no request for review filed pursuant to § 102.67(c) is pending, the Regional Director shall forthwith issue to the parties a certification of the results of the election, including certification of representative where appropriate, with the same force and effect as if issued by the Board.''). While the April 2020 rule deferred certification of the results of an election in cases where there had been a request to block filed based on a concurrent unfair labor practice charge (see 29 CFR 103.20(d)), there was no provision in that rule for deferring certification in the absence of a request to block (or election objections). Thus, under the April 2020 rule, absent the filing of election objections or a request to block based on unfair labor practice charges, the Board had no authority to set aside the results of an election and to direct a rerun election that did not involve commingled determinative challenges.

[144] In some cases, a union may withdraw its petition even after filing election objections. See, *e.g.,* Opinion Granting Preliminary Injunction in *Goonan* v. *Amerinox Processing, Inc.,* 2021 WL 2948052 (D.N.J. July 14, 2021) (after the Board obtained a court approved formal settlement agreement providing for a rerun election and requiring the employer to cease and desist from its unlawful acts and to pay backpay to a number of discharged employes (who had declined reinstatement), union withdrew its petition in part because of the pandemic and in part ''because the Union believed that employees would be unwilling to vote for the Union at that time due to Amerinox's prior actions.''); *Amerinox Processing, Inc.,* 371 NLRB No. 105, slip op. at 10–12 & fn. 4 (2022), enfd. 2023 WL 2818503 (D.C. Cir. 2023).

SEIU's comment similarly raises *Lockport Rehab & Health Care Center,* Cases 03–RC–267061, 03–RC–267049, and 03–CA–269156, as an example of why a return to the pre-April 2020 blocking charge policy is necessary. SEIU claims that the April 2020 rule forced it to proceed to an election on its petitions, filed October 5, 2020, despite the employer's commission of numerous pre-election unfair labor practices, including two October discharges, threats, and surveillance, causing employees to be terrified of losing their jobs. SEIU claims that the holding of the November 6, 2020 elections ''made a mockery of the Board's responsibility to conduct elections under 'laboratory conditions,' '' and ''ensured that the Lockport election proceeded under coercive circumstances,'' and that it unsurprisingly lost the vote. While the NRTWLDF notes in its reply comment that the SEIU never explicitly states in its comment what happened to its petitions, the SEIU comment indicates that its organizational coordinator did not believe that a rerun election would be a sufficient option because ''[w]orkers lost hope after the election. They walked away with the impression that voting in an NLRB election doesn't mean much and that the employer still really controls the environment no matter what the law says.'' The SEIU comment further indicates that the parties subsequently entered into a non-Board settlement of the unfair labor practice complaint (that issued after the election) providing relief for the discriminatees, and a review of the case file indicates that the Regional Director approved the Union's request to withdraw the petitions based on the non-Board settlement. See March 4, 2021, Complaint And Notice of Hearing in *Lockport Rehab & Health Care Center,* Case No 03–CA–269156; March 5, 2021 Order Directing Hearing On Objections And Order Consolidating Cases and Notice of Hearing in *Lockport Rehab & Health Care Center,* Case Nos. 03–CA–269156, 03–RC–267049, and 03–RC–267061; June 14, 2021 Order Approving Withdrawal of Charge And Petitions And Dismissing The Consolidated Complaint in *Lockport Rehab & Health Care Center,* Case Nos. Case 03–CA–269156, 03–RC–267049, and 03–RC–267061.

[145] For much the same reasons, we reject the related claim of the NRTWLDF that it is the pre-April 2020 blocking charge policy—rather than the April 2020 rule—that imposes unnecessary costs on the Board and the parties by incentivizing the filing of meritless or frivolous charges. To repeat, the commenter has not shown that it was the norm for unions to file meritless or frivolous unfair labor practice charges to delay elections under the pre-April 2020 blocking charge policy or that there have only been three instances of elections not resolving the question of representation during the first two years following the promulgation of the April 2020 rule. The commenter further ignores that the December 2014 rule granted regional directors tools to swiftly dispose of nonmeritorious charges. More fundamentally, the argument ignores that one of the Board's primary functions is to conduct free and fair elections, and that duty is not discharged when, as under the April 2020 rule, the Board is required to conduct some elections under coercive circumstances. The April 2020 rule thus not only imposed unnecessary financial costs on the Board and the parties by admittedly requiring regional directors to conduct, and the parties and employees to participate in, elections that will not count, it undermined a fundamental statutory goal of ensuring free choice. In our view, any financial burden incurred by the Board and the parties in having to investigate (or in being asked to respond to) unfair labor practice charges alleging conduct that would interfere with employee free choice in an election were one to held or conduct which is inconsistent with the petition itself, but which are ultimately found to lack merit, is outweighed by the critical benefit of ensuring employee free choice. Finally, the commenter does not explain why an incumbent union intent on delaying its decertification until the last possible moment notwithstanding its knowledge that it has lost the support of the unit for reasons entirely unrelated to any employer conduct would necessarily be deterred from filing an unfair labor practice charge by the April 2020 rule given that the April 2020 rule itself delayed certification of the results of the election until the merits of the unfair labor charge are determined. In short, even under the April 2020 rule, the actual decertification of the incumbent union can be delayed by the filing of a nonmeritorious charge even if the election is held as promptly as it would have been had no charge ever been filed.

i. Comments Regarding Judicial Criticism of Blocking Charge Policy

Both our dissenting colleague and some commenters claim that we should refrain from returning to the pre-April 2020 blocking charge policy because it was the subject of judicial criticism.[146] They generally cite the same, decades-old cases that the April 2020 Board relied on in support of its decision to jettison the blocking charge policy. 85 FR 18367, 18376. With due respect, however, those few cases—even if we accepted the dubious interpretation of them advanced by the prior Board and the commenters—do not persuade us that we should decline to return to the pre-April 2020 blocking charge policy.

To begin, it bears repeating that, although the Board's application of the blocking charge policy in a particular case had occasionally been criticized, no court had invalidated the policy

[146] See comments of ABC; CDW; Chamber; NRTWLDF. We note that many of these arguments were persuasively addressed by then-Member McFerran in her 2019 NPRM dissent. See 84 FR 39942–39943.

itself during the more than eight decades that it was in effect. Two of the cases cited by the April 2020 Board to justify jettisoning the policy—*Templeton* v. *Dixie Color Printing Co., Inc.,* 444 F.2d 1064 (5th Cir. 1971), and *NLRB* v. *Minute Maid Corp.,* 283 F.2d 705 (5th Cir. 1960)—arose several decades ago in the Fifth Circuit, which in fact has subsequently and repeatedly *approved* of the blocking charge policy, recognizing that the salutary reasons for the blocking charge policy ''do not long elude comprehension,'' and that the policy had been ''legitimized by experience.'' See *Bishop,* 502 F.2d at 1028–1029, 1032 (and cases cited therein); *Associated Builders & Contractors of Texas, Inc.,* 826 F.3d at 228 fn. 9. Indeed, the Fifth Circuit has taken pains to note—''time and again''—that cases such as *Templeton* do not constitute a broad indictment of the blocking charge policy, but merely reflect the ''most unusual'' circumstances presented there. See *Bishop,* 502 F.2d at 1030–1031.[147]

Similarly, in *NLRB* v. *Midtown Service Co.,* the Second Circuit wholeheartedly endorsed the notion that the Act requires the Board ''to insure . . . employees a free and unfettered choice of bargaining representatives.'' 425 F.2d 665, 672 (2d Cir. 1970). While the court criticized the Board for declining to conduct a rerun election before the employer's unfair labor practices were remedied, that was only because of the highly unusual circumstances presented there, where the employer's unlawful acts were actually designed to support the incumbent union against the decertification petition. See id. at 667, 669, 672 (''If ever there were special circumstances warranting the holding of [a rerun] election, they existed here'' because the union was the ''beneficiary of the Employer's misconduct,'' and thus the union was using the charges to achieve an indefinite stalemate ''designed to perpetuate [itself] in power.''). Although the court also opined that a rerun election should not have been blocked even if the charges had been filed by the decertification petitioner, see id., the blocking charge policy as it existed prior to the effective date of the April 2020 amendments—to which we return—would not have blocked the election in such circumstances, because, as shown, a petition was not blocked under the pre-April 2020 blocking charge policy unless, among other things, the charging party requested that its charge block the petition. See 29 CFR 103.20 (Dec. 15, 2014).

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

Finally, the last case relied on by the April 2020 Board—*NLRB* v. *Hart Beverage Co.,* also decades-old—was not even a blocking charge case, but instead arose at a time when an employer had no right to decline a union's demand for recognition on the basis of authorization cards (and no right to demand that the union seeking Section 9(a) status win an election), unless the employer had a good faith doubt of the union's majority status. 445 F.2d 415, 417–418 (8th Cir. 1971). It was in that context that the union business agent made the statement that the court relied on in concluding that the union was not even interested in obtaining a free and fair election, and therefore had filed the charges to abort the employer's petitioned-for election and obtain a bargaining order.[148] See id. at 417, 420.[149]

[147] As noted above, see supra fn. 102, we are puzzled by our colleague's effort to minimize the significance of *Bishop,* which was decided after *Templeton* and *Minute Maid.* We further observe that *Bishop,* unlike *Templeton* and *Minute Maid,* approvingly discussed the broader policy underpinnings of the Board's blocking charge policy rather criticizing an isolated example of its application.

[148] For the same reasons, we reject our dissenting colleague's effort to invoke *Hart Beverage* as an example of judicial criticism of the historical blocking charge policy.

[149] NRTWLDF also cites to a dissenting opinion in an unpublished case (*T-Mobile USA, Inc.* v. *NLRB,* 717 Fed. Appx. 1, *4–*5 (D.C. Cir. 2018), but that dissenting opinion contained no analysis of the blocking charge policy. As for the NRTWLDF's citation to *NLRB* v. *Gebhardt-Vogel Tanning Co.,* 389 F.2d 71 (7th Cir. 1968), the Seventh Circuit did not hold there that the Board could not properly decline to process a decertification petition on the ground that it was filed during an extension of the certification year made necessary by the employer's unlawful refusal to furnish information during the original certification year. Rather, the court merely concluded that the employer's refusal to bargain could not be deemed unlawful because the certification year had been improperly extended (since there was no proof that the employer had in fact unlawfully refused to furnish the information during the original certification year). See id. at 73, 74–76 (court assumed that it is a ''sound principle'' that ''where a union is deprived of the opportunity to bargain for a substantial portion of the certification year through no fault of its own, the Board may properly extend the union's right to bargain for an equivalent period of time,'' but concluded that ''the Board's finding that 'Respondent had unlawfully delayed in furnishing wage information for a period of 5 months during the certification year' was without the requisite evidentiary support.''). It was in that context that the court cited the Fifth Circuit's decision in *Minute Maid* in support of the proposition that there is no ''evidentiary value'' in an unfair labor practice charge alleging an unlawful refusal to furnish information upon which no complaint was issued and which was later withdrawn. Id. at 75.

Nor does our dissenting colleague and CDW's citation to the concurring opinion in *Scomas of Sausalito, LLC* v. *NLRB,* 849 F.3d 1147 (D.C. Cir. 2017), persuade us that we should decline to return to the pre-April 2020 blocking charge policy. As the court itself acknowledged, *Scomas* was an ''unusual'' case, where an employer withdrew recognition from the incumbent union in good faith based on a facially valid decertification petition only after verifying that the petition signatures demonstrated a loss of majority and where the incumbent union actually ''withheld information [from the employer] about its restored majority status.'' Id. at 1153, 1156, 1157. The court further found that the genesis of the employees' discontent with the incumbent union was not the employer's conduct but an extended period of union neglect, and that ''there is no 'taint' to 'dissipate[].'" Id. at 1157. Obviously, that is not the paradigmatic situation when the blocking charge policy is invoked. To be sure, the concurring opinion went on to discuss in dicta why in its view the employer's option of filing an RM petition when it has a good-faith doubt about a union's majority status would not necessarily enable the employer to promptly withdraw recognition from the union with impunity (because the union potentially could file a blocking charge). Id. at 1159. But, as shown and as the GC's reply comment points out, even if an election pursuant to an RM petition were conducted without delay as under the April 2020 final rule, the employer still could not be certain that the results of the election would be certified (and the union gone) because, under the April 2020

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j. Comments Regarding Particular Board Cases

Nor do the isolated Board cases cited by the commenters, our dissenting colleague, and the April 2020 Board provide a persuasive basis for adhering to the April 2020 rule. We have carefully considered these cases. Even if they illustrated that application of the traditional blocking-charge policy sometimes led to undesirable results, these decisions do not establish some serious, inherent flaw in the policy itself. Instead, whatever minimal costs in delay may result from the policy are far outweighed by the benefits of allowing employees to vote in an election free from interference caused by the employer's unfair labor practices.[150] Given the very long period in which the blocking charge policy was in effect, it is striking that critics of the policy have so few arguable examples to point to.

For example, CDW, our dissenting colleague, and the April 2020 Board (85 FR 18366–18367, 18377) point to *Cablevision Systems Corp.,* 367 NLRB No. 59 (2018), as an example where employees were wrongfully forced to wait for years for a regional director to process a decertification petition under the pre-April 2020 blocking charge policy. As the SEIU points out, however, it cannot fairly be said that the petition in *Cablevision* was delayed by frivolous blocking charges. The decertification petition in that case was filed on October 16, 2014. See *Cablevision Systems Corp.,* 367 NLRB No. 59, slip op. at 1. As CDW concedes in its comment, at the time the decertification petition was dismissed, the General Counsel had already issued unfair labor practice complaints against the employer, and the Regional Director relied on the outstanding complaints—alleging, inter alia, surface bargaining, unlawful discharges, threats, and unilateral changes—in dismissing the petition, while providing that the petition was subject to reinstatement if appropriate after the final disposition of the charges at issue. See RD Decision to Dismiss, Case 29–RD–138839 (Nov. 12, 2014). As the Board explained in denying review of the Regional Director's dismissal, the Regional Director had previously found merit to certain unfair labor practice allegations for which a bargaining order and extension of the certification year were being sought. See Board Order Denying Review, Case 29–RD–138839 (June 30, 2016) (''Such conduct, if proven, would preclude the existence of a question concerning representation and therefore the petition is appropriately dismissed.''). Thus, even if the decertification petition in that case had been filed under the April 2020 rule to which the commenter and the NPRM dissenters urge us to adhere, the petition also would have been dismissed because, as noted, the April 2020 rule did not eliminate the merit-determination dismissal procedure. See *Rieth-Riley,* 371 NLRB No. 109, slip op. at 1, 3, 4.[151]

HRPA argues that *Geodis Logistics, LLC,* Case Nos. 15–RD–217294 and 15–RD–231857, where decertification petitions have been blocked since 2018, illustrates that the blocking charge policy incentivizes the filing of meritless charges, impedes speedy resolution of decertification petitions, and places an inappropriate amount of authority in the hands of regional directors. Our dissenting colleague also cites this case as an example of a situation where ''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.'' However, neither HRPA nor our colleague cites any evidence that the petitions to decertify the union in *Geodis* have been blocked by meritless charges, let alone that the union filed them knowing them to be meritless.[152] While there has not yet been a Board determination that the charge that initially blocked the petitions was meritorious, neither has there been a determination by the Board that the charge was meritless. In fact, the Regional Director issued an unfair labor practice complaint based on that charge.[153] The Board has yet to

rule, certification of the results of any RM election is withheld pending a determination of the merits of any unfair labor practice charge that might have been filed. Moreover, as the concurring opinion appeared to recognize, even if there were no such thing as the blocking charge policy, a union could file objections to the results of an election, which would delay certification of the results. Id. at 1159. In any event, as discussed above, the pre-April 2020 blocking charge policy did not render RM petitions illusory.

[150] In this regard, we part company from our dissenting colleague, who weighs these costs and benefits differently.

[151] While, as CDW notes, an administrative law judge subsequently found that the surface bargaining allegations lacked merit, the judge's dismissal of those allegations were the subject of exceptions to the Board. See Board Order Denying Review, Case 29–RD–138839 (June 30, 2016). Moreover, even if the Board had sustained the dismissal of those surface bargaining allegations, administrative law judges had found that the Employer had violated the Act by discharging unit employees, threatening unit employees, coercively polling unit employees, and unilaterally changing unit employees' working conditions. See *Cablevision Systems Corp.,* 367 NLRB No. 59, slip op. at 1–2, 6 (recounting these and other unfair labor practice findings made by administrative law judges). Accordingly, even if the Board had affirmed the judge's dismissal of the surface bargaining allegations, the petition might still have been properly dismissed. See Board Order Denying Review, Case 29–RD–13889 (June 30, 2016) (''Should the surface bargaining allegation ultimately be found by the Board to be without merit, the Regional Director may consider whether dismissing the petition on other grounds may be appropriate based on the remaining unfair labor practice allegations found to be meritorious, if any, or whether the petition should be reinstated, after final disposition of the unfair labor practice charges.''). To be sure, the Board did not ultimately pass on the merits of the charges, but this was because the parties entered into a non-Board settlement while the charges were pending on exceptions before the Board, with the Employer entering into a collective-bargaining agreement with the Union and paying the discriminatees backpay, and the Union withdrawing its charges. See *Cablevision Systems Corp.,* 367 NLRB No. 59, slip op. at 2.

Nor can it fairly be said that it was the blocking charge policy that prevented the employees from ever voting. The Petitioner in *Cablevision* withdrew the decertification petition on January 16, 2019, even though the Board had previously reinstated the petition in its December 19, 2018 Decision on Review and Order, finding that the parties' settlement agreement could not justify dismissing the petition and preventing the employees from voting during the parties' new three-year collective-bargaining agreement resulting from the settlement (because the settlement agreement was entered into after the petition was filed but prior to any Board determination of the merits of the judges' unfair labor practice findings, and because the settlement agreement did not contain an admission of unlawful conduct on the part of the Employer). See *Cablevision Systems Corp.,* 367 NLRB No. 59, slip op. at 1, 4–5; Order Approving Withdrawal of Petition and Cancelling Hearing, Case 29–RD–138839 (Jan. 24, 2019) (approving Petitioner's written request to withdraw decertification petition).

[152] Mary Alexis Ray filed the original decertification petition in Case 15–RD–217294 on March 27, 2018. See *Geodis Logistics, LLC,* 371 NLRB No. 102, slip op. at 1 (2022). On April 17, 2018, the union filed the original charge in Case 15–CA–218543, and it requested that the charge block the petition. As discussed below, the Regional Director, on behalf of the Board's General Counsel, determined that it was appropriate to issue an unfair labor practice complaint based on that charge, which was still pending when the petitioner filed another decertification petition in Case 15–RD–231857 on November 30, 2018. Id., slip op. at 1, 4, 5 (the majority opinion mistakenly states that the second petition was filed on November 29, 2019).

[153] See October 31, 2018 Complaint and Notice of Hearing, Case 15–CA–218543, alleging, inter alia: that between about February 2018 and March 2018, Geodis provided more than ministerial assistance to employees in helping them remove the union as their collective-bargaining representative; that between about March 2018 and April 2018, Geodis told employees that it was losing customers and/or clients because of the union, that it was losing business because its employees are represented by the union, that it was unable to attract new business because of the union, and that its customers and/or clients were unwilling to do business with it because its employees are represented by the union; that Geodis, although generally prohibiting the use of its photocopiers, allowed employees to use Respondent's photocopier to produce antiunion materials; and that Geodis had transferred its employee Jennifer Smith to a position with more

determine the merits of those complaint allegations, first because of a settlement,[154] and second because, after the settlement agreement was revoked, the case was consolidated with numerous additional unfair labor practice cases, which are currently pending before an administrative law judge.[155]

Although HRPA also points to *Geodis* as proof that the blocking charge policy ''impedes the speedy resolution of decertification petitions,'' it is by no means clear that the question of representation would necessarily have been resolved any sooner in that case had it arisen under the April 2020 rule. To repeat yet again, the April 2020 Board conceded that, although elections would be held in virtually all cases under the April 2020 rule, certification of the results of the election—*i.e.,* actual *resolution* of the question of representation—would be delayed until final Board determination of the merits of the blocking charge(s) and their effect on the petition, which has yet to occur in *Geodis.* Thus, although the unit employees may have been permitted to vote sooner under the April 2020 rule, even if they chose to decertify the union, that choice may not have been effectuated any sooner.[156]

While the commenter also complains that the blocking charge policy places an inappropriate amount of authority in the hands of the regional director, under the statutory scheme, as we have previously explained, it is the regional director, on behalf of the General Counsel, who determines, at least initially, if an unfair labor charge has merit and warrants issuance of a complaint absent settlement, and it is the regional director to whom the Board has long delegated authority to determine (subject to a request for review) whether a question of representation exists and whether and when to conduct an election. The commenter further ignores that even under the April 2020 rule to which the commenter urges the Board should adhere, a petition could be dismissed based on a mere administrative determination by a regional director that certain Type II charges had merit. See *Rieth Riley,* 371 NLRB No. 109, slip op. at 1, 3.[157]

onerous working conditions. See also *Geodis Logistics, LLC,* 371 NLRB No. 102, slip op. at 1, 4. As noted, on November 30, 2018, the Petitioner filed a second decertification petition, Case 15–RD–231857, notwithstanding that the alleged unlawful conduct had not been remedied, and the petitions continued to be held in abeyance at that time. See id.

[154] In October 2019, Case 15–CA–218543 was consolidated with four other unfair labor practice cases alleging that Geodis had further violated the Act by, inter alia: informing employees that it did not recognize the union as the representative of the unit employees and that there was no union there; telling employees it would be futile to join or support the union; threatening unspecified reprisals if they joined or supported the union; discharging one employee and warning two other employees. See October 9, 2019 Order Further Consolidating Cases, Second Consolidated Complaint and Notice of Hearing in Cases 15–CA–218543, 15–CA–226722, 15–CA–232539, 15–CA–239440, and 15–CA–239492. On January 2, 2020, following issuance of the unfair labor practice complaints, the Regional Director dismissed both decertification petitions. The Board denied the employer's request for review of the dismissals, but noted that the decertification petitions were subject to reinstatement, if appropriate, after the final disposition of the unfair labor practice proceedings, and made the Petitioner a party-in-interest to Consolidated Cases 15–CA–218543, 15–CA–226722, 15–CA–232539 15–CA–239440, and 15–CA–230492 for the purpose of receiving notification of the final outcome of those cases. See Board Order Denying Review, Cases 15–RD–217294 and 15–RD–231857 (April 13, 2020).

The hearing on those charges was scheduled to occur on January 27, 2020. However, Geodis initially settled the charges, which resulted in the cancellation of the unfair labor practice hearing that had been scheduled on that complaint. See January 22, 2020 Conformed Settlement Agreement in Cases 15–CA–218543, 15–CA–226722, 15–CA–232539, 15–CA–239440 & 15–CA–239492. Under the terms of that settlement agreement, which contained a nonadmission clause, Geodis agreed to: pay $45,000 to one discriminatee (who waived reinstatement); return another discriminatee to her prior position; remove all references to the disciplines and discharges of five employees; post a Notice to Employees for 60 days promising: (a) not to provide more than ministerial assistance in helping employees remove the Union; (b) not to allow employees to use Employer photocopiers to produce antiunion materials while prohibiting them from using the photocopiers for other purposes; (c) not to threaten employees with discipline because of their union activities or support; (d) not to tell employees that the Employer does not recognize the Union, or that there is no union at the Tennessee and Mississippi facilities; (e) not to make the other 8(a)(1) statements alleged in the original charge in 15–CA–218543 and subsequent charges; (f) not to take various actions against employees because of their union activity, membership or support; and (g) not to ''in any like or related manner'' interfere with employees' Sec. 7 rights. The settlement agreement also provided for the withdrawal of the unfair labor practice complaints.

[155] After the settlement agreement in those five cases, the Union filed a series of additional charges, which the Regional Director determined were meritorious, and the Regional Director partially revoked the settlement agreement. Ultimately, on July 27, 2022, the Regional Director issued an Order Partially Revoking Settlement Agreement, Further Consolidating Cases, and Sixth Consolidated Complaint and Notice of Hearing in Cases 15–CA–218543, 15–CA–232539, 15–CA–239440, 15–CA–239492, 15–CA–264345, 15–CA–265152, 15–CA–270897, 15–CA–274687, 15–CA–282543, 15–CA–285602, 15–CA–285611, 15–CA–286941, 15–CA–286942, 15–CA–288593, and 15–CA–292199, involving the charge allegations that had blocked the initial decertification petition as well as allegations of unfair labor practices that occurred before, during, and after the initial notice-posting period in Case 15–CA–218543 (including discrimination against union supporters), threats of adverse consequences if employees supported the union, and statements of futility. The unfair labor practice hearing opened on January 23, 2023, and the cases remain pending before an administrative law judge.

As the HRPA acknowledges in its comment, the Board unanimously affirmed the Regional Director's decision not to grant the Employer's request to reinstate the decertification petitions, noting that the NLRA permits only employees, not employers, to request and secure reinstatement of decertification petitions. See *Geodis Logistics, LLC,* 371 NLRB No. 102, slip op. at 2, 4. Although the commenter also complains that the employee who filed the original decertification petition is no longer employed in the unit, the Board granted a motion to substitute a different individual as the petitioner in the decertification proceedings. Id. slip op. at 1 fn. 1. On June 24, 2022, the Regional Director denied the new Petitioner's request to reinstate the decertification petitions (originally filed by a different individual) based on the January 22, 2020 settlement agreement, noting that the settlement agreement had been partially revoked and that the complaint had been reinstated. See Order Denying Petitioner's Request to Reinstate the RD Petitions, Cases 15–RD–217294 & 15–RD–231857 (June 24, 2022). On December 14, 2022, the Board denied the Petitioner's request for review of the Regional Director's denial of her request to reinstate the decertification petitions, noting that: (1) a Regional Director may properly revoke their approval of a settlement agreement and issue a complaint if there has been a failure to comply with the settlement agreement or if related post-settlement unfair labor practices have been committed; (2) in such a procedural posture, the administrative law judge in the unfair labor practice cases (and the Board if exceptions are filed) must decide based on record evidence whether the settlement was properly revoked and, if so, whether the respondent committed the various alleged unfair labor practices, both pre-and post-settlement; and (3) the Board cannot decide what are essentially unfair labor practice issues in the context of these representation cases. The Board further noted that its denial of review was ''without prejudice to the Petitioner's reasserting her claim, if appropriate after disposition of the unfair labor practice proceedings, that the parties' settlement agreement requires reinstatement of the petitions under the principles of *Truserv Corp.,* 349 NLRB 227 (2007).'' As noted, the unfair labor practice cases remain pending before an administrative law judge.

[156] Even if an election had been held notwithstanding the charge in Case 15–CA–218543 and the request to block, the election results would not have been certified if the charge was found to have merit. Moreover, even if that charge had been litigated and decided on a standalone basis (notwithstanding the additional charges that were filed) and even if a new election had been held following a finding of merit to the charge, the results of that new election could not have been certified until the Board had determined the merits of the subsequent unfair labor practice charges that were filed concerning the employer's alleged ongoing repeated unlawful conduct (assuming there were additional requests to block or election objections).

[157] While commenters such as the HRPA and NRTWLDF complain about the long delay in effectuating employee free choice in the decertification context, they ignore that unfair labor practices and litigation over objections and determinative challenges can likewise delay effectuation of employee free choice (*i.e.,* Board certification of a union) in the initial organizing context. Indeed, *Geodis,* the very case highlighted by the HRPA, is itself is an example of such delay. When the initial campaign to organize the employees (who are the subject of the decertification petitions in that case) began in 2009, the employees were employed by Geodis' predecessor, Ozburn-Hessey Logistics (OHL). It took some 7 years after the initial organizing campaign commenced—and more than 5 years after the Union won an election—to obtain an enforceable order

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The NRTWLDF also cites four cases arising under the December 2014 amendments to the blocking charge policy—and one case predating the 2014 rule—which it claims demonstrates the policy's shortcomings.[158] Although the NRTWLDF suggests that the cases demonstrate the ability of incumbent unions to file patently frivolous, minor, or false charges to delay their ouster against the wishes of the unit employees under the pre-April 2020 blocking charge policy, NRTWLDF does not demonstrate that the charging parties knowingly filed patently frivolous, minor, or false charges in those cases. We further note that in *Pinnacle Foods Group, LLC,* Case 14–RD–226626, the Regional Director issued a complaint against the employer alleging a failure bargain in good faith (by falling to make itself available on reasonable dates, failing to provide sufficient time for bargaining during the bargaining sessions held, unilaterally changing the lengths of shifts, and unilaterally changing the bidding procedures for those shifts). The parties subsequently entered into a settlement agreement providing for an extension of the certification year. See *Pinnacle Foods Group, LLC,* 368 NLRB No. 97, slip op. at 1 (2019). The incumbent union subsequently won the decertification election that was conducted. See November 27, 2019 Certification of Representative, Case 14–RD–226626. We additionally note that in *Apple Bus,* nearly 8 months of the delay can in no sense be deemed improper under extant law as the original decertification petition (filed on July 31, 2017) in Case 19–RD–203378 was properly dismissed under the successor-bar rule. See Board Order Denying Review of Regional Director's Decision to Dismiss the Petition, Case 19–RD–203378 (Dec. 14, 2017). And the new decertification petition that was filed on March 15, 2018 in Case 19–RD–216636 was ''held in abeyance on the basis of successive *settled* unfair labor practice charges.'' See Board Order Denying Petitioner's Fourth and Fifth Requests for Review of Regional Director's determinations to hold petition in abeyance in Case 19–RD–216636 (Nov. 18, 2019), before the Union disclaimed interest and the decertification petitioner withdrew its petition. See Order Approving Withdrawal of Petition, Cancelling Hearing, and Revoking Certification, Case 19–RD–216636 (Nov. 27, 2019). Moreover, in the 5 cited cases, the employees eventually either were able to vote,[159] or the union disclaimed interest in continuing to represent the unit, thereby obviating the need for an election.[160] Accordingly, notwithstanding the delay in case processing, the cited cases do not persuade us that we should decline to adopt the proposed rule.[161]

k. Comments Regarding the Pre-April 2020 Blocking Charge Policy's Alleged Unjustified Disparate Treatment of Petitioners

Both our dissenting colleague and some commenters claim that, in contrast to the April 2020 rule, the pre-April 2020 blocking charge policy unjustifiably treated petitioners in an initial organizing context differently from petitioners in the decertification context, and we should therefore decline to return to it. They suggest that under the pre-April 2020 blocking charge policy the election would always proceed in the initial organizing context if the petitioner wanted it to proceed, whereas in the decertification context, the election would not necessarily proceed when there was a request to

requiring the employees' employer to bargain with the Union. See *Ozburn-Hessey Logistics, LLC* v. *NLRB,* 833 F.3d. 210, 212–213, 214–216, 224–225 (D.C. Cir. 2016). The litigation concerning the campaign and its aftermath, which included petitioning federal district courts for Sec. 10(j) relief, involved OHL's actions both before and after the revised tally of ballots showed that the union had won the 2011 election. See *Ozburn-Hessey Logistics, LLC,* 357 NLRB 1456 (2011), enfd. 605 Fed. Appx. 1 (D.C. Cir. 2015); *Ozburn-Hessey Logistics, LLC,* 357 NLRB 1632 (2011), enfd. 609 Fed. Appx. 656 (D.C. Cir. 2015); *Ozburn-Hessey Logistics, LLC,* 359 NLRB 1025 (2013) (recess appointment case), reaffirmed 361 NLRB 921 (2014); *Ozburn-Hessey Logistics, LLC* 362 NLRB 977 (2015), enfd 833 F.3d 210 (D.C. Cir. 2016); *Ozburn-Hessey Logistics, LLC,* 362 NLRB 1532, 1535 (2015) (including broad ''cease and desist'' language due to respondent's grave and repeated violations), enfd. 689 Fed. Appx. 639 (D.C. Cir. 2016); *Ozburn-Hessey Logistics, LLC,* 366 NLRB No. 173 (2018), enfd. 939 F.3d 777 (6th Cir. 2019); *Ozburn-Hessey Logistics, LLC,* 366 NLRB No. 177, slip op. at 1 fn. 3, 13 (2018) (imposing extraordinary remedies, including a three-year notice-posting period, due to respondent's ''extraordinary record of law breaking''), enfd. in part 803 Fed. Appx. 876 (6th Cir. 2020). And, as discussed above, Geodis is itself alleged to have committed multiple unfair labor practices when it became the unit employees' employer.

[158] See comments of NRTWLDF (citing *Scott Brothers Dairy/Chino Valley Dairy Products,* Case 31–RD–001611; *ADT Security Services,* Case 18–RD–206831 (Dec. 20, 2017); *Arizona Public Service Co.,* Case 28–RD–194724; *Pinnacle Foods Group, LLC,* Case 14–RD–226626; *Apple Bus Co.,* Cases 19–RD–203378 and 19–RD–216636. The 2020 Board referenced these cases as well. 85 FR at 18377.

[159] See Tally of Ballots in *Scott Brothers Dairy/Chino Valley Dairy Products,* Case 31–RD–1611 (Aug. 10, 2011); Original Tally of Ballots in *Arizona Public Service Co.,* Case 28–RD–194724 (July 6, 2017) & Rerun Tally of Ballots, Case 28–RD–194724 (Aug. 30, 2017); Tally of Ballots in *Conagra Brands* (successor to *Pinnacle Foods Group*), Case 14–RD–226626 (Nov. 15, 2019).

[160] See Order Approving Withdrawal of Petition, Cancelling Hearing, and Revoking Certification in *Apple Bus Co.,* Case 19–RD–216636 (Nov. 27, 2019) (referencing union's disclaimer of interest in representing the unit). In another case, the certification of representative was revoked and the petition was withdrawn, also obviating the need for an election. See ARD Letter Approving Petitioner's Withdrawal Request and Revoking Certification of Representative, *ADT, LLC,* Case 18–RD–206831 (Jan. 2, 2018).

[161] The NRTWLDF also generally contends that it is very difficult for decertification petitioners to file a timely petition and to have it processed, and we should therefore not make it any more difficult by returning to the pre-April 2020 blocking charge policy. For example, it criticizes the Board's longstanding window-period requirements for filing petitions during the term of a collective-bargaining agreement, and the requirement that a decertification petition be supported by an adequate showing of interest, which must be collected ''on personal time'' and which can subject solicitors to ''unwanted attention, threats or worse.''

Those complaints, which concern matters beyond the scope of this rulemaking, do not persuade us that we should refrain from returning to the pre-April 2020 blocking charge policy. To repeat, the blocking charge policy is not designed to make it more difficult for employees to decertify a union. Rather, the policy, which also applies outside the decertification context, is designed to protect employee free choice. In any event, the commenter ignores that petitioners in the initial organizing context face the same or analogous difficulties. For example, employees who want to become represented by a union cannot file a petition, or have one filed on their behalf, without first obtaining an identical 30 percent showing of interest, which likewise must be collected on personal time. 29 CFR 102.61(a)(7), 102.61(c)(8) (Dec. 18, 2019); Casehandling Manual Section 11023.1 (August 2007); Casehandling Manual Section 11023.1 (September 2020). And when employees solicit support for a petition seeking to have a union represent them, they obviously risk incurring the wrath of their employer—which, unlike a union, directly controls their livelihood—and the displeasure of any antiunion colleagues. Moreover, Sec. 9(c)(3) of the Act 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). Accordingly, unions too cannot always file petitions when they would like. See NLRB, An Outline Of Law And Procedure in Representation Cases Section 10–110 p. 115 (June 2017) (noting that although ''[t]he prohibition of Section 9(c)(3) does not preclude the processing of a petition filed within 60 days before the expiration of the statutory period so long as the election resulting from such petition is not held within the prohibited time[,] . . . petitions filed more than 60 days before the end of the statutory period will be dismissed.''). Contrary to the commenter's additional complaint about the difficulty decertification petitioners have in determining the scope of the unit, a decertification petitioner generally has a much easier time in determining the scope of the unit, because a decertification election typically must be held in a unit coextensive with the certified or recognized unit, see, *e.g., Mo's West,* 283 NLRB 130, 130 (1987), whereas the appropriate unit in which to conduct an election in the initial organizing context ordinarily has not been determined when the petition is filed. As for the commenter's additional argument that a decertification petitioner must file an allegedly burdensome prehearing responsive statement of position, that requirement applied to all petitioners (and not just decertification petitioners) when it was in effect (see 29 CFR 102.63(b)(1)(ii); 102.63(b)(2)(iii); 102.63(b)(3)(ii) (Dec. 18, 2019), and, in any event, that requirement was recently rescinded by the Board in a separate rulemaking. See *Representation-Case Procedures,* 88 FR 58076, 58085 (Aug. 25, 2023).

block filed by the incumbent union even if the decertification petitioner wanted to proceed to an election.[162]

We are not persuaded by this argument. To begin, the argument's premise—that the pre-April 2020 blocking charge policy did not create a level playing field in any respect—ignores that employers were also permitted to file requests to block elections sought by unions in the initial organizing context. The pre-April 2020 blocking charge policy which we codify allowed ''*any* party to a representation proceeding,'' including employers, to file requests to block. 29 CFR 103.20 (Dec. 15, 2014) (emphasis added). For example, if an employer filed an unfair labor practice charge alleging that a petitioning union in an initial organizing context threatened to assault employees if they did not vote for the union, together with a request to block that was supported by an adequate offer of proof, regional directors had authority to block the election even if the petitioning union wished to proceed to the election. Similarly, decertification petitioners were free to file unfair labor practice charges and requests to block based on employer or incumbent union misconduct that would interfere with the employees' ability to freely vote against continued representation, just as petitioning unions could file requests to block in the initial organizing context. In short, under the pre-April 2020 blocking charge policy which the final rule restores and codifies, petitioners in an initial organizing context and in the decertification context could both file requests to block and could both face election delays in cases where they would prefer to proceed directly to an election as a result of blocking charges filed by other parties.

To be sure, as previously discussed, it was also the case under the pre-April 2020 blocking charge policy that a petitioning union in an initial organizing context could—by refraining from filing a request to block—obtain a prompt election notwithstanding the employer's commission of unfair labor practices (such as a threat to retaliate against union supporters), whereas a decertification election could be delayed over the objections of the decertification petitioner where the incumbent union had filed a request to block based on the employer's commission of unfair labor practices (such as a threat to retaliate against union supporters). But the petitioners occupy very different positions in those two contexts. In the latter, the petitioner's goal—to oust the union—is aided by the alleged unfair labor practice, whereas in the former the petitioner's goal is undermined by the alleged unfair labor practices. We agree with the December 2014 Board that depriving the petitioner in an initial organizing context of the ability to proceed to an election if it so chooses in the face of employer unfair labor practices designed to keep the union out of its establishment would compound the injustice and ''doubly benefit'' the employer by allowing the employer to delay the election that seeks the certification of a collective-bargaining representative for its employees over the objections of that very petitioning union. 79 FR 74429 fn. 534. By contrast, permitting a decertification petitioner to proceed to an election over the objections of the incumbent union where an employer has threatened to retaliate against employees who vote in favor of continued representation would compound the unfair labor practices and benefit the employer and the decertification petitioner. Accordingly, we decline the NRTWLDF's suggestions that the Board should either eliminate the ability of all petitioners to obtain an immediate election where they have filed unfair labor practice charges (but nevertheless think they can still prevail) and make them wait until the Board makes its own independent determination of the merits of the charge, or grant decertification petitioners the ability to obtain an immediate election when an incumbent union has filed a charge alleging conduct that would interfere with employee free choice or would be inherently inconsistent with the petition itself.[163]

l. Comments Regarding Alleged Inconsistency Between the Pre-April 2020 Blocking Charge Policy and Ideal Electric

The April 2020 Board also criticized the blocking charge policy as creating ''an anomalous situation'' whereby conduct that, under *Ideal Electric,* 134 NLRB 1275 (1961), cannot be found to interfere with employee free choice if alleged in election objections (because it occurred prepetition), nevertheless can be the basis for delaying or denying an election. 85 FR at 18367, 18393. That argument does not persuade us that we should refrain from returning to the pre-April 2020 blocking charge policy. Put simply, the supposed anomaly is more apparent than real. To begin, *Ideal Electric* does not preclude the Board from considering prepetition 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*

[162] See reply comments of NRTWLDF. See also comments asserting that ''[i]n practice, employees and employers cannot 'block' a union certification election. The same standard should apply to decertification elections.'' Paul Andrews; Anonymous #143; Anonymous 83; Anonymous 106; Anonymous 113; Anonymous 123; Anonymous 152; Anonymous 76; Kenneth Bailey; Donald Barefoot; Barry Barkley; Kathleen Brown; Howard Butz; Dawn Castle; Kenneth Chase; John Churchill; Marvin Graham; Annette Craig; Julie D'Alessandro; Richard Damico; Daniel De La O; John-G Donovan; Edward Farrow; R.E. Fox; John Gaither; Allan Gardiner; Rachel Hughes; Gary Kirkland; Alan Goldberg; Robert Henes; Ron Hinds; Irene Holt; Marta Howard; Deborah Hurd; Insignia Design Lrd; Jeffrey Kilgariff; Chuck Kirkhuff; Fred Lambing; Mark Larsen; Terrence Linderman; Philip Martin; Charles Maurhoff; Mike Mayo; Daniel McCormack; Kevin McLaughlin; Tim Modert; Gwen Myers; Mike O'Donnell; Richard Park; James Pearce; John Raudabaugh; Saul Raw; Craig Root; Mary Ellen Rozmus; Lorraine Schukar; Randy Schultz; Dane Smith; Kathy Stewart; Elizabeth Turner; George Zolnoski.

[163] We further note that if the Board were to eliminate the charging party's ability to proceed to an immediate election until the Board makes its own independent determination of the merits of charges they file, it would delay elections even more than they are delayed under the Board's historical blocking charge policy. Moreover, if the Board were to deprive parties of the ability to obtain an election until it made its own independent determination of the merits of pending charges, it would eliminate the ability of parties to settle the unfair labor practice charges that are delaying elections, even though such settlements can obviate the need for lengthy litigation before an administrative law judge, the filing of exceptions to the Board, and appeals to the circuit courts. After all, a settlement of unfair labor practice charges, by definition, does not constitute an independent Board determination of the merits of those charges. To the extent that the NRTWLDF claims that it is unfair to permit unions to file objections to elections that they lose if they did not file requests to block the elections beforehand, we simply disagree. There is no double standard here; under the pre-April 2020 blocking charge policy to which we return, petitioners in initial organizing cases *and* petitioners in decertification cases both have the option to choose to file unfair labor practice charges prior to the election *without* requesting to block the election and then file objections afterwards (just as the petitioners in both contexts have the same right to file requests to block before the election). The commenter certainly does not explain why it interferes with employee free choice for the Board to decline to certify the results of an election based on meritorious objections that are filed after the election. We additionally note that employers, too, may affect the timing of elections by filing adequately supported requests to block or, as the 2014 Board noted (79 FR 74429 fn. 534), by choosing when to settle unfair labor practice charges filed against them.

For similar reasons, we reject our dissenting colleague's suggestion that the Board's 2023 Election Rule demonstrates that the Board is treating petitioners in initial organizing cases differently than petitioners in decertification cases. See *Representation-Case Procedures,* 88 FR 58076 (2023). The 2023 Election Rule, like the instant rulemaking, represented an effort to balance the Board's duties to ''duty to protect employees' rights by fairly, efficiently, and expeditiously resolving questions of representation.'' Id. at 58079.

Square Garden CT., LLC, 350 NLRB 117, 122 (2007). And, as noted, a unanimous Board held in *Rieth-Riley* that even under the April 2020 rule, regional directors remained free to dismiss petitions—and thereby block elections—in cases involving certain types of Type II *prepetition* misconduct, at least so long as the regional director determines that the Type II charge has merit before dismissing the petition. See *Rieth-Riley,* 371 NLRB No. 109, slip op. at 1, 2, 3, 8 (majority affirms regional director's dismissal of decertification petitions filed on March 10, 2020 and August 7, 2020 based on prepetition misconduct that was the subject of prepetition complaints; dissent ''agree[s] with the majority that regional directors retain the authority to dismiss an election petition, subject to reinstatement, in appropriate circumstances, at least where, as here, the regional director has found merit to unfair labor practice charges and issued a complaint before the petition was filed.'').[164]

m. Comments That the Pre-April 2020 Blocking Charge Policy Impeded Settlement

The April 2020 rule also appeared to suggest that the pre-April 2020 blocking charge policy impeded settlement and that the policy should therefore be eliminated to promote settlement of blocking charges. 85 FR 18380.[165] In the NPRM, we noted that we were not entirely certain that we understood the prior Board's cryptic statements in this regard. 87 FR 66907. We remain of the same view after reviewing the comments. To the extent that the April 2020 Board adopted the rule because it believed the rule would promote settlement (by enabling the parties to know the results of the election during their settlement discussions), this does not persuade us that we should refrain from restoring the Board's historical blocking charge policy. The blocking charge policy advances the core statutory interest of promoting employee free choice regarding whether to be represented by a labor organization for purposes of collective bargaining. We believe that, even assuming for purposes of argument that the April 2020 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 rule (which provides for the holding of an election in virtually 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.[166] However, as noted, under the April 2020 rule, employees are 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 rule would necessarily 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 rule, 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, 18378, 18399. In other words, under the April 2020 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 rule).

We also reject 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 rule, an election is held in virtually all cases, parties still have to consider the representation case as part of their settlement negotiations regarding the unfair labor practice charge(s). Because, in the view of the April 2020 Board (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 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. Nor under current law can a post-petition settlement result in the petition being dismissed unless the charged party admits that it violated the Act as part of the settlement or the decertification petitioner agrees to withdraw its petition as part of the settlement or the Regional Director finds that the petition was instigated by the employer or that the employees' showing of interest in support of the petition was solicited by the employer. See *Cablevision Systems Corp.,* 367 NLRB No. 59, slip op. at 3 & fn. 9. 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 to agree to a rerun election or to admit that it violated the Act as part of the settlement.[167] The April 2020 Board offered no compelling explanation for why an incumbent union supposedly intent on delaying its ouster would not insist on an admission of wrongdoing (which would result in dismissal of the petition) or agreement to a new election as the price of settlement.

[164] Moreover, as the April 2020 Board implicitly conceded, under the April 2020 rule, it is equally the case that ballots will ''never be counted'' in some cases based on serious prepetition misconduct, such as where the employer instigates the petition and where a complaint issues within 60 days of the election. 85 FR 18378, 18380, 18399 (even if the ballots are counted under the April 2020 rule because the complaint on the Type II charge issues more than 60 days after the election, the results of the election will be set aside if the Board ultimately decides that the charge that was the subject of the request to block has merit).

[165] The April 2020 rule, however, did not ''disturb the Board's case law addressing the effects of various types of settlements.'' 85 FR 18380. Thus, ''an employer who agrees in a settlement agreement to bargain must do so for a reasonable period, and a decertification petition filed *after* such a settlement and during that reasonable period must be dismissed.'' *Truserv Corp.,* supra, 349 NLRB at 230 (emphasis in original).

[166] In a related vein, our dissenting colleague suggests that ''employers might decide to settle unfair labor practice charges for reasons unrelated to their merit,'' noting the prevalence of nonadmission language in settlements.

[167] Alternatively, as the Board observed in *Truserv Corp.,* unions have an incentive to include decertification petitioners in settlement discussions to allow for the possibility that decertification petitioners could agree to a settlement that provides for dismissal of the petition that was filed before the settlement. 349 NLRB at 231, 232 fn. 14.

n. Comments That This Rulemaking Constitutes Needless Policy Oscillation

Some commenters, such as CDW and the Chamber, contend that our rulemaking constitutes needless policy oscillation that tends to upset the settled expectations of the Agency's stakeholders while undermining the very policy of employee free choice on which the 2020 rule is predicated and that tends to threaten the legitimacy of the Agency. Our dissenting colleague also articulates this view. We could not disagree more. As shown, it was the April 2020 Board that set aside the Board's historical blocking charge policy that had been in effect since the early days of the Act and that had adhered to by Boards of differing policy perspectives for more than eight decades. The April 2020 Board did so without pointing to anything that had changed in the representation case arena to justify jettisoning the policy: 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; and significantly, the Agency's career regional directors—the officials who are charged with administering the policy in the first instance, and whose opinions were explicitly sought and received by that Board—had publicly endorsed the policy. And, for the reasons discussed at length in this preamble, we believe that restoring and codifying the pre-April 2020 blocking charge policy better protects employee free choice and better enables us to conduct elections under conditions as nearly ideal as possible, which should serve to heighten the Board's legitimacy.

In sum, we recognize that under the April 2020 rule, elections are conducted more speedily than they were conducted under the Board's historical blocking charge policy as amended by the December 2014 rule. However, a speedy election is not desirable in and of itself if it does not reflect the free choice of the unit employees. In our considered policy judgment, restoring and codifying the Board's historical blocking charge policy, as amended by the 2014 rule, represents a more appropriately balanced approach than the April 2020 rule. The policy to which we return simply permits regional directors to delay conducting an election 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—provided that the charge is supported by an adequate offer of proof, the charging party agrees to promptly make its witnesses available, and provided no exception is applicable—until the merits of the charge can be determined. It cannot be denied that most elections were never delayed under the policy to which we return and that many of the elections that were delayed by that policy were properly delayed by meritorious charges. Further, as we have mentioned repeatedly, even though employees are permitted to vote sooner under the April 2020 rule when there are concurrent unfair labor practice charges, the employees' choice is not necessarily effectuated significantly sooner because the certification of the results of the elections conducted under those circumstances must still await a determination of the merits of the unfair labor practice charge. In our view, the pre-April 2020 blocking charge policy better protects employee free choice and better enables us to conduct elections under circumstances as nearly ideal as possible than adherence to the April 2020 rule. Under the pre-April 2020 blocking charge policy to which we return, employees are not required to vote under coercive conditions over the objections of the charging party as they are under the April 2020 rule, and employees *are* permitted to vote if the charges that delay the election are ultimately found to be nonmeritorious.[168]

[168] Some commenters argue that we should rescind the portion of the April 2020 rule addressing the blocking charge policy because the April 2020 Board never corrected the faulty data—including the data that artificially inflated the number of petitions blocked as a result of the blocking charge policy and the data that grossly overstated the period of time that petitions were blocked as a result of the blocking charge policy—in the 2019 NPRM that led to the April 2020 rule. See comments of AFL–CIO/NABTU (Initial and Reply); NNU; SEIU. The NRTWLDF argues in its reply comments that if accurate statistical analysis of the prior rule's impact is required to survive an APA challenge, then the instant rule ''falls woefully short'' because the NPRM did not contain, and the pro-rule commenters have not cited evidence establishing that the April 2020 rule has resulted in a spike in the number of elections being set aside (or petitions being dismissed). It also notes that the April 2020 Board ''made a determination based on policy concerns—rather than based on the data—that the rule should be promulgated.'' Reply Comments of NRTWLDF.

To be clear, we find it unnecessary to rely on the inclusion of faulty data in the 2019 NPRM that led to the April 2020 rule as a basis for adopting the instant rule. Nor do we rely on the AFL–CIO/NABTU's claims that the April 2020 rule's blocking charge amendments were not a logical outgrowth of the 2019 NPRM's proposed blocking charge proposal and that the April 2020 Board failed to respond to significant comments. See also comments of NNU. In other words, even if the 2019 NPRM that led to the April 2020 rule had not contained any faulty data (and even if the 2019 NPRM had proposed the blocking charge provisions ultimately adopted in the April 2020 rule and the April 2020 rule had responded to all significant comments to the satisfaction of the commenters), we would still rescind that rule.

The April 2020 Board ultimately made a policy choice to modify the Board's historical blocking charge policy that did not depend on statistical analysis (85 FR 18377) and, as explained at length above, we likewise have made a policy choice that returning to the Board's historical blocking charge policy, as modified by the December 2014 rule, better protects employee free choice and better enables the Board to conduct elections under laboratory conditions than the April 2020 rule. The April 2020 Board conceded that its rule would require the Board to conduct at least some elections under coercive circumstances. That is undeniably true and requires no statistical evidence to demonstrate. As noted, it is also the case that elections have been set aside under the April 2020 rule because of charges filed by parties to the representation case alleging pre-election unfair labor practice conduct—just as the April 2020 Board conceded would be the case. The dissenters to the NPRM in this rulemaking also conceded, as they had to, that we have the authority to return to the pre-April 2020 blocking charge policy. 87 FR 66915.

The Board makes this change, ''conscious'' of its ''change of course,'' because ''there are good reasons'' for returning to the December 2014 rule's blocking charge provisions and based on those reasons, we believe that that rule does a better job of advancing the purposes of the Act than the April 2020 rule. See *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009). See also *AFL–CIO* v. *NLRB,* 471 F. Supp. 3d 228, 241 (D.D.C. 2020) (''[T]he Board's choice 'not to do an empirical study does not make [the agency's action] an *unreasoned* decision' for APA purposes, *Chamber of Commerce of U.S.* v. *SEC.,* 412 F.3d 133, 142, 366 U.S. App. DC 351 (D.C. Cir. 2005) (emphasis added), and this is especially so given that the NLRB specifically explained that its 'reasons for revising or rescinding some of the 2014 amendments are . . . based on non-statistical policy choices[.]' ''), affd. in part 57 F.4th 1023 (D.C. Cir. 2023).

3. Final Rule Provisions Restoring and Codifying the Historical Blocking Charge Policy

In the NPRM, we proposed to rescind Section 103.20 of the 2020 rule and replace it with the same regulatory language that appeared in the 2014 rule. In effect, the proposed rule sought to return to the Board's historical blocking charge policy, as amended by the 2014 rule. For the reasons set forth extensively above, we are persuaded that restoring the pre-April 2020 blocking charge policy in full is appropriate. However, for the sake of clarity, the final rule includes additional regulatory language setting forth the basic contours of the historical blocking charge policy, as amended by the 2014 rule. Below, we summarize these provisions of the final rule. We emphasize that nothing in the language below is intended to alter the blocking charge policy that was in effect prior to the 2020 rule.

Section 103.20(a) of the final rule includes the language of the first three sentences of proposed Section 103.20. As noted above and in the NPRM, these sentences were added to the Board's Rules and Regulations by the 2014 rule.

Section 103.20(a) of the final rule sets forth the 2014 rule's requirement that whenever any party to a representation proceeding seeks to block the processing of an election petition, that party must simultaneously file a written offer of proof listing the names of witnesses who will testify in support of the charge and a summary of each witness's anticipated testimony and promptly make its witnesses available.

Section 103.20(b) and Section 103.20(c) of the final rule break the final sentence of proposed Section 103.20 into separate subsections corresponding to Type I and Type II charges, respectively, and make explicit what was implicit in the proposed regulatory text. As under the 2014 rule, under Section 103.20(b), if a regional director determines that a party's offer of proof describes evidence that, if proven, would interfere with employee free choice in an election, the regional director shall, absent special circumstances,[169] hold the petition in abeyance.[170] Section 103.20(b) provides that the regional director shall notify the parties of the determination to hold the petition in abeyance. The requirement that the regional director provide notice is consistent with the Casehandling Manuals in effect before and after the 2014 rule. See, *e.g.,* Casehandling Manual Section 11730.7 (August 2007); Casehandling Manual Section 11730.7 (January 2017). Section 103.20(c) mirrors the language of Section 103.20(b) except that it further provides that, in appropriate circumstances, the regional director should dismiss the petition subject to reinstatement and notify the parties of this determination. Consistent with *Rieth-Riley* and longstanding practice predating the 2014 rule, ''the appropriate circumstances'' in which the regional director may dismiss the petition subject to reinstatement are when the regional director has made a determination that certain types of Type II charges have merit. See Casehandling Manual Sections 11730.1, 11730.3, 11733, 11733.2 (August 2007); *Rieth-Riley,* 371 NLRB No. 109, slip op. at 3 (merit-determination dismissals ''hinge on [the Regional Director's] determination . . . that [the Type II] unfair labor practice charge has merit'').

As under the 2014 rule, Section 103.20(d) provides that if the regional director instead determines that the offer of proof does not describe evidence that, if proven, would interfere with employee free choice in an election or be inherently inconsistent with the petition itself, the regional director will continue to process the petition and conduct the election where appropriate.

Section 103.20(e) of the final rule provides that if, after holding a petition in abeyance, the regional director determines that special circumstances have arisen or that employee free choice is possible notwithstanding the pending unfair labor practice charges, the regional director may resume processing the petition. We note that this is consistent with longstanding practice and the Board's Casehandling Manual. See Casehandling Manual Section*s* 11730.4, 11731 (August 2007); Casehandling Manual Sections 11730.4, 11731 (January 2017).

Section 103.20(f) of the final rule provides if, upon completion of the investigation of the charge, the regional director determines that the charge lacks merit and is to be dismissed, absent withdrawal, the regional director shall resume processing the petition, provided that resumption of processing is otherwise appropriate. Once again, this provision is consistent with longstanding practice and the Board's Casehandling Manual. See Casehandling Manual Section 11732 (August 2007). Consistent with existing practice, in certain circumstances, it may not otherwise be appropriate to resume processing the petition to an election, such as when the petition has been withdrawn or when there are additional pending unfair labor practice charges supported by an adequate offer of proof and a request to block (unless the director determines that special circumstances are present). By definition, this section does not apply where a petition has been dismissed following a regional director's determination that the Type 2 charge had merit.

Finally, Section 103.20(g) of the final rule provides that upon final disposition of a charge that the regional director initially determined had merit, the regional director shall resume processing a petition that was held in abeyance due to the pendency of the charge, provided that resumption of processing is otherwise appropriate. For example, if a petition is being held in abeyance based on an unfair labor practice charge that resulted in the issuance of an unfair labor practice complaint, the regional director shall resume processing the petition when the respondent has taken all the action required by a Board order (or when the Board dismisses the complaint following an unfair labor practice hearing), provided that resumption of the processing is otherwise appropriate. Like the previous sections, this provision is consistent with longstanding practice and the Board's Casehandling Manual. See Casehandling Manual Sections 11730.2 and 11734 (August 2007). Consistent with existing practice, in certain circumstances, it may not otherwise be appropriate to resume processing the petition to an election, such as when the petition has been withdrawn or when there are additional pending unfair labor practice charges supported by an adequate offer of proof and a request to block (unless the regional director determines that special circumstances are present). As is the case with Section 103.20(f), Section 103.20(g) does not apply when a petition has been dismissed by a regional director pursuant to the merit-determination dismissal procedure. Rather, consistent with existing practice, if a petition has been dismissed because of a Type II charge and there was a provision for reinstatement of the dismissed petition on application of the petitioner after final disposition of the unfair labor practice case, the petition is subject to reinstatement on the petitioner's application only if the allegations in the unfair labor practice case, which caused the petition to be dismissed, are ultimately found to be without merit. See Casehandling Manual Sections 11733.2(a), 11733.2(b) (August 2007).[171]

The final rule includes a severability provision to codify the Board's view that the paragraphs of Section 103.20 are intended to be severable. Paragraph (h) recites that ''[t]he provisions of this section are intended to be severable'' and that ''[i]f any paragraph of this section is held to be unlawful, the remaining paragraphs of this section not deemed unlawful are intended to remain in effect to the fullest extent permitted by law.'' In addition, as noted

[169] As under the 2014 rule, ''[o]ur use of the term 'special circumstances' is merely intended to recognize the longstanding reality that regional directors have discretion to continue to process petitions notwithstanding the pendency of charges that would otherwise result in a petition being held in abeyance. In this way, regional directors will continue to have discretion to engage in a balancing of relative hardships concerning the blocking of an election . . . . See Sec[.] 11731.2 of the [August 2007] Casehandling Manual.'' 79 FR 74419 fn. 488.

[170] This language is also consistent with 2014 rule preamble. See id. at 74419–74420 (explaining that 2014 rule amendments ''will serve to provide 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 [. . . .] This information will also be provided within a time frame that will assist the regional director in making a more expeditious decision on whether to hold the petition in abeyance.'').

[171] This section of the final rule does not address the effect of settlements or disturb the Board's existing case law addressing the effects of various types of settlements.

above,[172] in the event that the blocking charge final rule text promulgated here is deemed invalid, the Board would nevertheless adhere to its decision to rescind the 2020 rule's provisions addressing the blocking charge policy. In that event, the Board's view is that the historical blocking charge policy, which was developed through adjudication and contained in the pre-rulemaking Casehandling Manual, would again be applied and developed consistent with the precedent that was extant before the 2020 rule was promulgated, unless and until the policy were revised through adjudication.[173] The Board is of the view that the rescission of the blocking charge policy is separate and severable from the portions of the rule addressing the voluntary-recognition bar doctrine and the application of the voluntary recognition bar and contract bar in the construction industry. The blocking charge policy operates independently and autonomously of these aspects of Board law.

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

1. Introduction

As mentioned above, the November 4, 2022 NPRM proposed (1) to rescind Section 103.21 of the Board's Rules and Regulations, adopted in April 2020, which modified the Board's voluntary-recognition bar doctrine to establish a new notice-and-election procedure; and (2) to replace the rescinded provision with a new Section 103.21, essentially codifying the voluntary-recognition bar doctrine as reflected in *Lamons Gasket Co.,* 357 NLRB 739 (2011), which had been overruled by the 2020 rule. 87 FR 66909.

Having carefully considered the public comments received in response to the NPRM, the Board has decided to rescind the April 2020 rule and to adopt a final rule that is identical to the proposed rule, but with two additional provisions. One of these provisions, Section 103.21(e), acknowledges (but does not codify) current caselaw addressing application of the voluntary-recognition bar when two or more unions are vying to represent employees, as reflected in *Smith's Food & Drug Centers,* 320 NLRB 844 (1996). The other, Section 103.21(g), codified the Board's view that the paragraphs of Section 103.21 are intended to be severable.[174] As noted earlier,[175] these two actions (rescission of the 2020 rule and adoption of a new rule) are intended to be separate and severable. This portion of the final rule addressing voluntary recognition, in turn, is intended to be severable from the other portions of the final rule rescinding and replacing the portions of 2020 rule that addressed the blocking charge policy and rescinding the portion of the 2020 rule that addressed proof of majority support for labor organizations representing employees in the construction industry. The Board rescinds the 2020 rule because it undermines the sound policies reflected in the voluntary-recognition bar, and does so independently of any legal challenge to the Board's promulgation of the new Section 103.21 codifying *Lamons Gasket.*[176] Below, we address the historical development of the voluntary-recognition bar, the proposed rule and its rationale (which we endorse), the public comments received in response to the NPRM, and the final rule adopted here.

2. The Final Rule

As noted, the final rule rescinds current Section 103.21 of the Board's Rules and Regulations and replaces it with a new provision, which essentially codifies the traditional voluntary-recognition bar as modified in *Lamons Gasket.* The final rule departs from the proposed rule only in adding a provision that specifically addresses the uncommon situation involving rival unions vying to represent the same employees, as presented in *Smith's Food,* supra. The rescission of the current rule and its replacement with a new rule are separate actions and are intended to be severable.[177] In adopting the final rule, the Board has given careful consideration to the public comments on the proposed rule, which are discussed in detail below, following our discussion of the final rule.

Rescinding the current rule eliminates the notice-and-election procedure first established in the *Dana* decision, which represented a sharp break with the traditional voluntary-recognition bar in place—with unanimous judicial support—for more than 40 years (from 1966 to 2007). *Dana* was unprompted.[178] As explained, *Dana* ushered in a new and undesirable era of instability in the law surrounding voluntary recognition: *Dana* was reversed after four years by *Lamons Gasket* (decided in 2011), and *Lamons Gasket,* in turn, was reversed by the 2020 rule, which restored *Dana.* For reasons already explained, we believe (as did the *Lamons Gasket* Board) that *Dana* was a serious misstep. *Dana's* premise—that voluntary recognition is inherently suspect with respect to employee free choice—finds no firm support in the Act. To the contrary, the Act clearly treats voluntary recognition as a legitimate basis for establishing an enforceable bargaining obligation. Moreover, the *Dana* Board's skepticism toward voluntary recognition lacked any empirical basis. The Board's experience under *Dana* showed that following voluntary recognition, employees only very rarely sought an election (despite being notified of their right to do so) and almost never rejected the recognized

[172] See supra fn. 4.

[173] Prior to the 2014 rule, ''the blocking charge policy [wa]s not codified in the [Board's Rules and R]egulations. Rather, it [was] the product of adjudication and [was] described in the non-binding Casehandling Manual[.]'' 79 FR 74418 (''As explained in Sec[.] 11730 of the Casehandling Manual, '[t]he Agency has a general policy of holding in abeyance the processing of a petition where a concurrent unfair labor practice charge is filed by a party to the petition and the charge alleges conduct that would interfere with employee free choice in an election, were one to be conducted.' '') (citations omitted). In our view, that general policy represents a better balance of the Board's statutory interests in protecting employee free choice, preserving laboratory conditions in Board-conducted elections, and resolving questions concerning representation expeditiously than does the April 2020 rule. By contrast, the April 2020 rule at times required regional directors to conduct elections under coercive circumstances. Although the blocking charge policy as it existed prior to the 2014 rulemaking did not require—as this rule does—simultaneous offers of proof and prompt witness availability to speed regional directors' investigation of blocking charges' merits, we nevertheless view the extant policy before the 2014 rulemaking as more faithful to the Board's statutory interests than the April 2020 rule.

[174] Para. (g) recites that ''[t]he provisions of this section are intended to be severable'' and that ''[i]f any paragraph of this section is held to be unlawful, the remaining paragraphs of this section not deemed unlawful are intended to remain in effect to the fullest extent permitted by law.''

[175] See supra fn. 4.

[176] In the event the promulgation of the new rule codifying *Lamons Gasket* does not survive judicial review, the voluntary-recognition bar would revert to a matter of case-law doctrine, subject to revision through adjudication. Because of the rescission of the 2020 rule, *Lamons Gasket* would be the controlling precedent, insofar as judicially permitted.

[177] As explained below, the Board has concluded that current Sec. 103.21 fails adequately to promote the policies of the Act. Rescinding that provision permits the Board to better promote those policies, whether through new Sec. 103.21 (by codifying *Lamons Gasket,* as the Board prefers) or by returning to adjudication (if necessary, should the new regulatory text be struck down) to address voluntary-recognition bar issues under *Lamons Gasket* and its progeny, as the Board did before adoption of the 2020 rule. All of the reasons that the Board disagrees with current Sec. 103.21 support the decision to rescind it. The decision to rescind current Sec. 103.21 is independent of the decision to adopt new regulatory text in the final rule.

[178] The *Dana* Board did not cite any intervening judicial decision questioning the Board's voluntary recognition-bar doctrine (there were none).

union. Thus, the Board restored the *Dana* procedure despite new evidence (generated by *Dana* itself) strongly suggesting that the procedure was unnecessary to serve its stated purpose of promoting employee free choice. Whether or not the 2020 Board's decision to do so was arbitrary or capricious (and thus impermissible under the Administrative Procedure Act), it was at least questionable as a matter of administrative decision-making. In a case involving the Board, the Supreme Court has observed that the ''constant process of trial and error . . . differentiates perhaps more than anything else the administrative from the judicial process.'' [179] The application of the *Dana* decision from 2007 to 2011 represented a trial of its notice-and-election procedure, which revealed the *Dana* Board's error in treating voluntary recognition as suspect. We believe that the 2020 Board erred in failing to correctly acknowledge what the *Dana* trial period had shown.[180] Not surprisingly, the Board's experience under the 2020 rule now has proved to be entirely consistent with that under *Dana.* There is no apparent empirical reason to treat voluntary recognition with suspicion.[181]

Insofar as the rationale for the 2020 rule was based not on empirical evidence, but instead on a policy preference, we take a different view. The 2020 Board suggested that, whatever the experience under *Dana* had been, the notice-and-election procedure better promoted employee free choice—given the asserted superiority of elections over voluntary recognition as a means of determining employees' desire to be represented or not—and that this benefit was not outweighed by any cost to effective collective bargaining. Our dissenting colleague reiterates this view. For the reasons already explained and set forth below, we do not agree with the 2020 Board's cost-benefit analysis.

To begin, we see no firm support in the Act for testing a union's voluntary recognition by subjecting it to an election as a means of promoting employee free choice, especially in the absence of even an allegation (much less a showing) that recognition was not based on the union's majority support among employees. Section 8(a)(5) of the Act, read together with Section 9(a), makes clear that where a union has been lawfully recognized by an employer, based on its majority support among employees, the union is indisputably the exclusive bargaining representative of employees, with precisely the same bargaining rights and duties as a union certified by the Board following an election.[182] Whatever privileges and protections the Act grants exclusively to certified unions, in this crucial respect—integral to the voluntary-recognition bar—recognized unions are no different than certified unions. Both types of unions have established their representative status legitimately. We are not persuaded that employee free choice is genuinely served by subjecting a recognized union to the requirement that it demonstrate its majority status *again,* before it has had a chance to prove itself to employees through collective bargaining.

The current notice-and-election procedure, as explained, permits a minority of bargaining-unit employees (as few as 30 percent) to require the holding of an election, forcing the union to divert its resources from bargaining to campaigning. As part of that election, a minority of unit employees may oust the union if they are a majority of voting employees. In restoring the *Dana* procedure, the 2020 Board gave far too little weight to the free-choice rights of the employee *majority* whose support made the initial employer recognition of the union lawful. We see no compelling reason why the Board should effectively undercut their choice.[183] Indeed, temporarily insulating the recognized union from challenge until it has had a reasonable opportunity to bargain with the employer promotes *informed* employee free choice. Once the recognition-bar period ends, employees will be able to make their decision as to continued representation based on the union's performance in bargaining (immediately if no collective-bargaining agreement has been reached and, if there is an agreement, following the expiration of the contract-bar period).

We also disagree with the view of the 2020 Board and our dissenting colleague that the notice-and-election procedure does not have a reasonable tendency to interfere with effective collective bargaining. To be sure, current Section 103.21 does not eliminate the voluntary-recognition bar altogether. However, it does defer application of the bar for at least the minimum period specified by the rule: 45 days after the Board notice to employees is posted, assuming no election petition is filed. Of course, the rule also creates the possibility that the voluntary-recognition bar will *never* apply (if a petition is filed, an election is held, and the union is defeated). This framework obviously places the union's status in genuine doubt, as a formal matter.[184] In this way—as Board and

[179] *NLRB* v. *J. Weingarten, Inc.,* 420 U.S. 251, 266 (1975) (quoting *NLRB* v. *Seven-Up Bottling Co. of Miami,* 344 U.S. 344, 349 (1953)).

[180] In particular, we reject the 2020 Board's view (and the view of our dissenting colleague) that the proper focus of the Board, in evaluating its experience with the notice-and-election procedure, should be on the percentage of cases in which, *when an election was sought,* the union was decertified. In our view, the critical fact is that employees very rarely sought an election at all and that the cases in which a recognized union was decertified represent a miniscule percentage of the cases in which a notice was posted following recognition. Even such cases, as we note below, do not demonstrate that the recognized union lacked majority support when it was lawfully recognized by the employer. Contrary to our dissenting colleague, we are not persuaded that we should adhere to the 2020 rule because employees rarely sought elections after the notice was posted. Retaining the notice-and-election procedure entails costs to the Board and to parties, and if those costs are not justified by corresponding benefits, the Board is justified in modifying its procedures.

[181] Experience under *Dana* and/or under the 2020 rule has shown that unions were very rarely decertified after the notice was posted. Moreover, the fact that an election *following* voluntary recognition results in the union's defeat does not necessarily demonstrate that the union lacked reliable majority support *at the time of recognition.*

This conclusion follows for two reasons. First, the election obviously captures employee sentiment at a later date, when it may well have been influenced by intervening events or simply by changing minds. Second, as explained, to be lawful, voluntary recognition requires majority support among bargaining-unit employees as a whole, while an election is determined by a majority of voting employees. Thus, under the current notice-and-election procedure, a *minority* of unit employees could oust a union that, when recognized, was supported by a *majority* of unit employees.

[182] 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). 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).

[183] The *Lamons Gasket* Board characterized the *Dana* notice-and-election procedure as effectively compromising the Board's neutrality by inviting employees to reconsider their choice of the union. We need not decide whether a reasonable employee could perceive the current notice-and-election procedure this way. Nor do we suggest that the *Dana* Board or the 2020 Board was motivated by hostility toward voluntary recognition. Our focus, rather, is on the debatable, if not dubious, rationales offered for the creation and restoration of the procedure, as well as on the objective tendencies and effects of the procedure on employees.

[184] Based on the Board's administrative experience with the notice-and-election procedure, which shows that unions are almost never decertified following notice-posting, it might be argued that the procedure does not, in fact, cast doubt on the union's status and that employers, unions, and employees understand as much. That argument, however, would confirm that the procedure is only a formality. In that case, the procedure would seem to serve no clear legitimate purpose. Insofar as the notice-and-election procedure is an empty exercise, it amounts at best to a waste of the Board's resources, as well as those of the employer and the union, even apart from the procedure's harm to the collective-bargaining process.

Our dissenting colleague questions whether ''simply posting a *Dana* notice imposes a significant burden on Board resources.'' In framing the resource question this way, our colleague omits reference to the second part of the procedure, which

judicial decisions applying the recognition-bar doctrine and analogous bar doctrines observe [185]—the procedure tends to impede bargaining. The employer may well be less likely to invest time and effort in bargaining if the bargaining process might be terminated soon with the union's defeat in an election.[186] This would especially be true if the employer had second thoughts about voluntarily recognizing the union and hoped to be relieved of its duty to bargain (as productive bargaining could be contrary to the employer's interests).

The notice-and-election procedure also reasonably tends to interfere with effective bargaining from the union's side. Because its representative status is at stake, the union may well feel the need to divert resources away from bargaining to campaigning. At the same time, it may well face or feel pressure to quickly demonstrate good results in bargaining to preserve employee support, as recognized by the Board and the courts in bar-doctrine cases.[187] That pressure on the union might lessen the chances of agreement and instead lead to conflict with the employer—indeed, even to strikes or other workplace disruptions—that could have been avoided, had there been more time to reach compromise. The reasonably likely combined effect of the notice-and-election procedure on collective bargaining seems clear. It creates incentives for employers to move slowly and for unions to move quickly, increasing the chances of conflict, not compromise. This is not a good way to promote the practice and procedure of collective bargaining, as the Act intends.

We acknowledge that there likely can be no more than anecdotal evidence that the notice-and-election procedure, in fact, interferes with effective collective bargaining. The Board has no statutory role in monitoring the national collective-bargaining process, as opposed to adjudicating individual cases involving the duty to bargain if and when they come to the Board. Even in a rulemaking proceeding, the Board is largely limited by the information presented to it. It seems implausible that employers who have bargained less diligently than they might have because of the current procedure would advise the Board as such and equally implausible that unions who have overreached in bargaining to protect their representative status and generated avoidable labor disputes would share that information.

In our view, as explained, the notice-and-election procedure has little, if any, demonstrable benefit in promoting employee free choice, while imposing administrative costs on the Board and compliance costs on employers.[188] Any potential benefit to employee free choice is (in our policy judgment) outweighed by, at least, the potential harm to effective collective bargaining, as described. We thus make a different policy choice than the 2020 Board, which concluded that the potential benefit of the Section 103.21 procedure outweighed any potential harm, while essentially treating the Board's administrative experience as irrelevant. We similarly disagree with our dissenting colleague's assessment of the relative costs and benefits of the Section 103.21 procedure.

Based on that policy choice, the Board's final rule rescinds current Section 103.21, which fails to genuinely promote employee free choice, threatens to interfere with effective collective bargaining, and wastes the Board's administrative resources. The final rule also codifies the traditional voluntary-recognition bar, as refined in *Lamons Gasket,* by newly defining the reasonable period for collective bargaining that sets the duration of the bar. This separate and severable step is intended to provide greater stability in this area of labor law than would returning to case-by-case adjudication. As noted, the *Dana* decision (resurrected by the 2020 rule) upset what had been well-established Board law for more than 40 years, and then was properly overruled by *Lamons Gasket.*

Given the federal courts' universal approval of the traditional voluntary-recognition bar, in decisions spanning decades, we believe that codifying the doctrine is well within the Board's authority to interpret the Act and to promulgate rules necessary to carry out its provisions, as contemplated by Section 6 of the Act.[189] As explained, the traditional voluntary-recognition bar doctrine appropriately treats the newly established bargaining relationship between the recognized union and the employer as worthy of initial protection, because it is based on a legitimate expression of employee free choice sanctioned by the Act and because doing so promotes effective collective bargaining. The voluntary-recognition bar insulates the union from challenge, but only for a limited time, *i.e.,* a reasonable period for collective bargaining, mitigating its impact on employee free choice. The refinement made by *Lamons Gasket*—which defined the reasonable period for collective bargaining (setting minimum and maximum lengths while incorporating an existing multifactor test for fixing the bar period in a particular case)—brings greater clarity and certainty to the recognition-bar doctrine, providing better guidance for employees, unions, and employers and facilitating its fair and consistent application by the Board.

Consistent with *Lamons Gasket,* we have chosen not to extend the final rule to cover unfair labor practice cases (*e.g.,* where it is alleged that an employer violated its statutory duty to bargain by unilaterally—not on the basis of a Board election or order—withdrawing recognition from a voluntarily recognized union before a reasonable period for bargaining had elapsed). This decision leaves the Board free to continue to apply the voluntary-recognition bar in such circumstances through adjudication, if and as cases arise, consistent with the Board's traditional approach to the issue.[190] It

may require the Board to conduct an election. Perhaps anticipating this argument, our colleague further argues that any expenditure of agency resources is justified, since ''[t]here is hardly a more important use of the Board's resources than to protect employees' fundamental statutory rights.'' We cannot agree with our colleague's tacit view that it better protects employees' fundamental statutory rights to maximize the opportunity for a minority of unit employees to overcome the prior selection of a union by the majority of employees. The statute protects employees' fundamental right ''to bargain collectively through representatives of their own choosing,'' including through their ''designated *or* selected'' representatives. 29 U.S.C. 157 & 159(a) (emphasis added). In addition, and contrary to our dissenting colleague, we find it entirely appropriate to consider the waste of party resources in deciding that the notice-and-election procedure, on balance, entails more costs than benefits.

[185] See, *e.g., NLRB* v. *Universal Gear Service Corp.,* supra, 394 F.2d at 398 (upholding Board's application of voluntary-recognition bar; citing Supreme Court's decision in *Brooks* v. *NLRB,* supra, approving certification-year bar; and endorsing Board's statement that ''only if the parties can rely on the continuing representative status of the lawfully recognized union, at least for a reasonable period of time, can bargaining negotiations succeed and the policies of the Act be effectuated'').

[186] To be sure, the employer has a statutory duty to bargain in good faith with the union from the time it voluntarily recognizes the union. The issue, however, is not whether the current notice-and-election procedure relieves the employer of this duty, but whether the procedure creates a situation in which employers might reasonably tend to bargain less diligently than they would absent the procedure.

[187] See, *e.g., NLRB* v. *Universal Gear Service Corp.,* supra, 394 F.2d at 398 (quoting Supreme Court's observation in *Brooks* v. *NLRB,* supra, that ''[a] union should be given ample time for carrying out its mandate on behalf of its members, and should not be under exigent pressure to produce hothouse results or be turned out'').

[188] See supra fn. 185.

[189] We are of the same view with respect to the rescission of the current rule.

[190] As explained, the Board first established the voluntary-recognition bar in an unfair labor practice

Continued

also permits the Board to consider, in future appropriate cases, issues related to the propriety of employer unilateral withdrawals of recognition more generally and not simply when such a withdrawal follows voluntary recognition.

Finally, the Board has decided to acknowledge, but not codify, the caselaw rule of *Smith's Food,* supra, which permits a union to file and proceed with a representation petition if, at the time the employer voluntarily recognized a rival union, the petitioner union had already obtained a sufficient showing of interest to support a petition. This approach leaves the law in this area unchanged (as *Lamons Gasket* did) and allows any modifications to it to be made through case-by-case adjudication. We believe that this approach, providing flexibility and permitting the Board to consider the particular circumstances in which the *Smith's Food* issue arises, is better suited to address this uncommon situation.

3. Response to Public Comments on Proposed Rule

The Board received many public comments addressing the proposed rule, and we have considered them carefully. Likewise, we have carefully considered the view of our dissenting colleague. The issues implicated by the proposed rule are largely familiar to the Board and the public, given the recent history of the voluntary-recognition bar. These issues were debated in the Board's divided decision in *Dana* (2007), in the *Lamons Gasket* decision (2011) that overruled *Dana,* and in the rulemaking that culminated in the 2020 rule, which we rescind and replace.

A number of commenters expressed their support for the proposed rule and urged the Board to implement the proposal without any modifications.[191] Commenters who opposed the proposed rule largely raised arguments that were made by the Board's *Dana* majority, rejected by the *Lamons Gasket* majority, and then embraced by the 2020 Board. The common thread of many comments opposing the new rule and rescission of the 2020 rule is the claim that voluntary recognition does not reliably reflect majority support for union representation among employees, such that the current notice-and-election procedure serves as a necessary and appropriate check on voluntary recognition. These comments assert the superiority of Board elections over union-authorization cards and other recognized, alternative means by which employees may designate a union to represent them under the Act. The comments cite various features that, in their view, favorably distinguish elections from these alternative means of establishing majority support. Our dissenting colleague also takes this position.

We address these comments and the view of our dissenting colleague below. As we explain, they do not persuasively come to terms with the key points already examined here, which support restoring the traditional voluntary-recognition bar: The National Labor Relations Act explicitly provides that employees may designate a union to represent them by means *other* than a Board election. Temporarily protecting a new bargaining relationship established through voluntary recognition—as other new or restored relationships are protected by analogous bar doctrines—promotes effective collective bargaining, as the federal courts have uniformly recognized. Finally, the Board's experience with the notice-and-election procedure, under both *Dana* and the 2020 rule, shows that the procedure is not necessary to preserve employee free choice. The Board's experience under *Dana* and the 2020 rule provides no basis for viewing voluntary recognition as less reflective of employees' free choice in favor of union representation. Contrary to comments opposing the rule, we see no overriding reason to treat voluntary recognition as suspect and to preserve current Section 103.21 as a check on that statutorily sanctioned practice.

In addition to examining comments and the views of our dissenting colleague opposed to the proposed rule, we also consider comments addressing three issues on which the NPRM specifically invited comment: (1) whether to extend the final rule to cover unfair labor practice cases; (2) whether to modify the proposed definition of the reasonable period for collective bargaining; and (3) how to address the situation presented in *Smith's Food,* where multiple unions are vying to represent the same employees and the employer voluntarily recognizes one union when another has sufficient support to seek a Board election.

a. Comments Regarding the Asserted Superiority of Board Elections To Effectuate Employee Free Choice

Our dissenting colleague, along with commenters opposing rescission of the 2020 rule and adoption of the proposed rule, contend that the process by which voluntarily recognized unions demonstrate their majority support is unreliable and/or inferior to the Board's election process.[192] They point to judicial decisions such as *Gissel Packing Co.,* supra, 395 U.S. 575, which they assert hold that elections are the superior method for determining questions of representation, and to Section 9(c)(3) of the Act, which provides that no new Board election may be conducted for one year following an election.[193]

We see no support for our colleague and the commenters' position in the Supreme Court's *Gissel* decision. If anything, the opposite is true. The issue there was whether the Board could order an employer, whose serious unfair labor practices had made a fair election unlikely, to bargain with a union that had demonstrated its majority support through authorization cards. In upholding the Board's authority, the Court decisively rejected both the argument that the Act permitted only unions chosen in Board election to represent employees [194] and the argument that authorization cards were inherently unreliable to establish the union's majority support.[195]

To be sure, the *Gissel* Court observed that ''[t]he Board itself has recognized . . . that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support.'' [196] This observation must be understood in context, however. The

case in 1966. See *Keller Plastics Eastern,* supra, 157 NLRB 583. See also *Universal Gear Service Corp.,* supra, 157 NLRB 1169.

[191] See comments of AFL–CIO; AFSCME; CAP; EPI; NNU; SEIU; USW.

[192] E.g., comments of CDW; Chamber; Chairwoman Virginia Foxx; NRTWLDF.

[193] Sec. 9(c)(3) recites in relevant part: ''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.'' 29 U.S.C. 159(c)(3).

[194] 395 U.S. at 595–600. Citing the language of Sec. 8(a)(5) and Sec. 9(a) of the Act, the Supreme Court observed that it had ''consistently accepted th[e] interpretation'' of the Act that a union was ''not limited to a Board election'' to establish its representative status, but rather ''could establish majority status by other means,'' including employee-signed authorization cards. Id. at 596–597.

[195] Id. at 601–605. The Court squarely rejected what it identified as the two principal arguments attacking the reliability of authorization cards in the context of issuing bargaining orders:

(1) that, as contrasted with the election procedure, the cards cannot accurately reflect an employee's wishes, either because an employer has not had a chance to present his views and thus a chance to insure that the employee choice was an informed one, or because the choice was the result of group pressures and not individual decision made in the privacy of a voting booth; and (2) that quite apart from the election comparison, the cards are too often obtained through misrepresentation and coercion which compound the cards' inherent inferiority to the election process.

Id. at 602 (footnote omitted). The Court observed that ''[n]either contention is persuasive.'' Id.

[196] Id. at 602 (footnote omitted).

Court upheld the Board's authority to issue a bargaining order when a union had established majority support through alternative means. In turn, the Court plainly was not questioning the long-established practice of voluntary recognition, where an employer has chosen to recognize the union, rather than being ordered by the Board to do so. Nothing in the Court's observation suggests that the Board had ever treated voluntary recognition as inherently suspect or affirmatively disfavored. Indeed, the voluntary-recognition bar was Board law when *Gissel* was decided in 1969, and no federal court has since questioned that doctrine, whether based on *Gissel* or otherwise. *Gissel,* then, provides no persuasive reason for adopting the current notice-and-election procedure, as the Board did in 2007, or for preserving that procedure now.[197]

Nor do we see Section 9(c)(3) of the Act as providing such a rationale. As the Supreme Court explained in *Brooks* v. *NLRB,* supra, that statutory provision was added in 1947 to address the fact that a union, having lost a Board election, ''could begin at once to agitate for a new election.'' [198] Section 9(c)(3), then, does not speak directly to the issue addressed by the Board's bar doctrines, the need to temporarily protect new or restored bargaining relationships to promote effective collective bargaining. The Board's certification-year bar, ordinarily insulating a Board-certified union from challenge for one year, pre-dates Section 9(c)(3), and it was upheld by the Court in *Brooks,* which did not rest its decision on that provision, but rather on the pro-bargaining rationale offered by the Board.[199] As we have explained, the certification-year bar served as a model for the voluntary-recognition bar; the Board adopted the bar and the federal courts endorsed the bar after looking to the Court's decision in *Brooks* as support.

Commenters also point to several practical reasons why, in their view, union demonstrations of majority support tend to be less reliable than Board elections.[200] For example, the Coalition for a Democratic Workforce cites the nonpublic character of union solicitations, the potential lack of any involvement by an opposing entity and/or the absence of contrary information, the lack of any Board policing of card solicitation, and the potentially protracted period over which cards are solicited.[201] The National Right to Work Legal Defense Fund points to examples where a union secured a card majority but ultimately lost an election even though the employer was bound by a neutrality agreement and did not oppose union representation.[202]

These comments, in our view, fail to justify preserving the current notice-and-election procedure. Even assuming that the features of an election that distinguish it from certain alternative means of demonstrating a union's majority support make an election closer to the ideal expression of free choice, this possibility does not mean that alternative means of demonstrating majority support are generally unreliable or, in particular, insufficiently reliable to support the traditional voluntary-recognition bar.[203] The reasons should be clear. First, the Act itself treats alternative means of demonstrating majority support as sufficient to establish a union's representative status and the employer's corresponding duty to bargain, as confirmed by the Supreme Court.[204] Second, to serve as a basis for the union's representative status, these alternative means must demonstrate majority support among bargaining-unit employees as a whole—in contrast to a Board election, where a union need only win a majority among voting employees. Third, the Board's administrative experience with the notice-and-election procedure demonstrates that employees almost never reject the recognized union; in the overwhelming majority of cases, they never seek an election in the first place. As already explained,[205] that a union might lose an election despite having earlier been able to demonstrate majority support does not necessarily prove that the union lacked majority support to begin with (even assuming that it was a majority of bargaining-unit employees who voted against the union in the election). Intervening events, or even a simple change of mind among a determinative number of employees, may well explain the union's election loss.[206]

Some commenters opposed to the proposed rule point to the specific privileges and protections granted by the Act to Board-certified unions, but not to voluntarily recognized unions, to argue that recognized unions are less worthy of temporary insulation from challenge and thus that the current notice-and-election procedure is appropriate.[207] We disagree. That the

[197] As noted above, long after the close of the comment period, the Board issued its decision in *Cemex Construction Materials, Pacific, LLC,* supra, 372 NLRB No. 130, holding that an employer violates Sec. 8(a)(5) and (1) by refusing to recognize, upon request, a union that has been designated as the Sec. 9(a) representative by the majority of employees in an appropriate unit unless the employer promptly files an RM petition pursuant to Sec. 9(c)(1)(B) of the Act to test the union's majority status or the appropriateness of the unit, assuming that the union has not already filed an RC petition pursuant to Sec. 9(c)(1)(A). Id., slip op. at 25–26 & fn. 141. No commenter has requested the Board to reopen the comment period for the purpose of addressing *Cemex.*

[198] 348 U.S. at 100 (footnote omitted).

[199] Id. at 100–102.

[200] See comments of Chairwoman Foxx; NRTWLDF. Chairwoman Foxx specifically points to the potential for union abuses in the gathering of signatures and/or documented examples of such abuses. We address her comments below.

[201] Comments of CDW. Rachel Greszler argues in her comment that workplace turnover may make voluntary recognition an invalid gauge of employee sentiment, as the employee complement that initially chose a union may dramatically change over the bar period. See comments of Rachel Greszler. But this observation overlooks the fact that employee turnover is a reality of the workplace, whether a union wins representation rights through voluntary recognition or an election. Thus, although the voters in a Board election may all be employed as of that date, any number of those voters could leave their employment before a Board certification issues or bargaining actually begins, particularly if the Board's certification is challenged. Indeed, under Board law, a certified or recognized union enjoys a continuing presumption of majority support, conclusive during certain periods and rebuttable otherwise, no matter how much time has passed. See *Levitz Furniture Co. of the Pacific,* supra, 333 NLRB at 720 & fns. 16, 17. See also *Fall River Dyeing & Finishing Corp.* v. *NLRB,* 482 U.S. 27, 37–39 (1987) (describing the Board's presumptions of majority support as serving the Board's permissible policy decision to promote stable collective-bargaining relationships).

[202] Comments of NRTWLDF.

[203] See *Gissel,* 395 U.S. at 602. There, as explained, the Supreme Court noted the Board's view that ''secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support,'' but upheld the use of authorization cards as the basis for establishing a union's majority support and issuing a bargaining order against an employer who had committed unfair labor practices interfering with the possibility of a free election. Id. at 601–605, 610. The Court cited the Board's decision in *Aaron Brothers Co. of California,* 158 NLRB 1077 (1966), where the Board observed that ''an election by secret ballot is normally a more satisfactory means of determining employees' wishes, *although authorization cards signed by a majority may also evidence their desires.*'' 158 NLRB at 1078 (emphasis added).

[204] See *Gissel,* 395 U.S. at 602–606.

[205] See supra fn. 181 & 182.

[206] The Act certainly does not require a voluntarily recognized union to demonstrate majority support more than once—whether through an election or otherwise—before it can achieve representative status, any more than it requires a union to win multiple elections before being certified, even if such a requirement would increase opportunities for employees to exercise free choice in some sense.

[207] See, *e.g.,* comments of NRTWLDF. As explained previously, these statutory benefits include Sec. 9(c)(3)'s bar on elections for a 12-month period; the protection against recognitional picketing by rival unions under Sec. 8(b)(4)(C); the right to engage in certain secondary and recognitional activity under Sec. 8(b)(4)(B) and 7(A); and, in certain circumstances, a defense to allegations of unlawful jurisdictional picketing under Sec. 8(b)(4)(D). Neither the proposed rule nor the final rule purport to extend these statutory privileges and protections to recognized unions, of course.

Act grants unique benefits to certified unions does not alter the fact that the Act permits recognized unions to become the exclusive bargaining representative of employees. It is that status which the voluntary-recognition bar protects in order to promote effective collective bargaining. The Act's pro-bargaining policy applies no matter how a bargaining relationship is lawfully established. We reject the view that because the Act distinguishes between certified and recognized unions in specified and limited ways, the Board should broadly disadvantage recognized unions as current Section 103.21 does, for no compelling reason.[208] Such an approach, as we have observed, is contrary to the teaching of the Supreme Court.[209] We do not say, however, that certified unions and recognized unions must be treated identically in every respect. Thus, the voluntary-recognition bar as codified in the final rule is distinct from the existing bar doctrine applicable to certified unions. Under the certification-year bar doctrine, as noted, the bar period is ordinarily one year, absent special circumstances. Pursuant to the final rule adopted, in contrast, the reasonable period for bargaining that defines the voluntary-recognition bar period may be as short as six months and may never be longer than one year (measured from the start of bargaining), depending on specific factors to be applied case-by-case.[210]

[208] The benefits granted to certified unions should not be understood as disadvantages imposed on voluntarily recognized unions, but rather as benefits bestowed on unions that obtain certification through a Board election. Notably, Board law has long permitted a recognized union to file a representation-election petition and to become certified by the Board if it wins the election. See *General Box Co.,* 82 NLRB 678, 682–683 (1949).

[209] See *United Mine Workers,* supra, 351 U.S. at 73 (the Act's specified advantages for a union's compliance with certain statutory requirements implied that noncompliance did not result in any additional consequences).

[210] Because the voluntary-recognition bar is designed to facilitate bargaining by temporarily insulating the recognized union from challenge, the duration of the bar is based on a reasonable period for collective bargaining. That period is logically defined as beginning with the parties' first bargaining session. It follows that the bar period may extend for more than a year *following the date of voluntary recognition,* if the parties do not begin bargaining on the date of recognition. However, it seems reasonable to believe that delays in the start of bargaining are unlikely when the parties have entered into the bargaining relationship voluntarily and presumably both wish to reach a collective-bargaining agreement promptly. NRTWLDF points out that under Sec. 9(c)(3), the bar on a new election runs for one year from the date of a valid election. See comments of NRTWLDF. That statutory provision has no bearing here, however. Looking to the analogous certification-year bar, meanwhile, reveals that if the start of bargaining is delayed by litigation over the propriety of the union's victory, the one-year bar period also does not start to run until bargaining actually begins. See *Volkswagen Group of America Chattanooga Operations, LLC,* 367 NLRB No. 138, slip op. at 1 (2019) (''Where an employer exercises its right to pursue judicial review of a certification, the certification year will begin with the first bargaining session held following court enforcement of the Board's order.'').

CDW and NRTWLDF point out that, if a collective-bargaining agreement is reached within the voluntary-recognition bar period, then the Board's contract-bar doctrine would come into play, adding a separate three-year bar on the filing of election petitions. See comments of CDW; reply comments of NRTWLDF. The same is true, however, if a contract is reached during the certification-year bar period. In both situations, of course, collective bargaining has succeeded, as the Act envisions. Nonetheless, the contract bar is separate from the voluntary-recognition bar and is beyond the scope of the current rulemaking.

b. Comments Concerning Fraudulent or Coercive Conduct by Unions

Some commenters opposing the proposed rule argue that voluntary recognition is an unreliable indicator of a union's majority support because of fraudulent or coercive conduct by unions in obtaining the evidence necessary to demonstrate that support. This asserted conduct includes union intimidation of employees, harassment, and deception as to the nature of the authorization cards or other instruments employees are asked to sign to demonstrate support. For example, Representative Virginia Foxx, the Chairwoman of the House Committee on Education and the Workforce, cites to congressional testimony on union solicitation of authorization cards using false pretenses and high-pressure tactics to obtain employee signatures.[211] We are not persuaded by these comments that voluntary recognition is inherently suspect or that the Board's current notice-and-election procedure is necessary as a check to ensure that recognized unions do, in fact, have uncoerced majority support.

Had Congress believed that voluntary recognition was often tainted by union misconduct in securing majority support among employees, the Act presumably would not have made it possible for a union to establish its representative status through means other than a Board election. As we have repeatedly observed, however, the Act explicitly does provide for this alternate path. In this respect, commenters' quarrel is less with the proposed rule than with the Act itself. In *Gissel,* the Supreme Court not only confirmed the Act's plain meaning, but also rejected the argument that union-authorization cards could not properly establish a union's majority support. The Court was not persuaded that cards were suspect because ''an employee may, in a card drive, succumb to group pressures or sign simply to get the union 'off his back,'" noting that the ''same pressures are likely to be equally present in an election.'' [212] The Court in turn rejected the ''complaint, that [authorization] cards are too often obtained through misrepresentation and coercion,'' citing the ''Board's present rules for controlling card solicitation,'' which the Court ''view[ed] as adequate to the task where the cards involved state their purpose clearly and unambiguously on their face.'' [213]

The current notice-and-election procedure applies in all cases of voluntary recognition, regardless of whether there is any reason to doubt the union's majority support. The procedure does not require even an allegation that the union's demonstration of majority support was deficient in any respect. Moreover, as we have explained, the procedure is unnecessary to serve as a check on the legitimacy of the union's majority support. Most obviously, in any particular case, the legality of an employer's voluntary recognition of a union is open to challenge under the Act's unfair labor practice provisions, as administered by the Board. As explained, an employer violates Section 8(a)(2) of the Act when it voluntarily recognizes a union that does not, in fact, have uncoerced majority support, and the minority union correspondingly violates Section 8(b)(1)(A) by accepting recognition if it does not enjoy majority support.[214] The Board has been unequivocal that ''unlawful conduct involved in the solicitation of the cards, including threats, interrogations, surveillance, and promises of benefits . . . . supports a reasonable inference that the claimed card majority was tainted.'' [215] Board cases make clear that union misrepresentation of the nature of authorization cards and the use of threats to secure card signatures are unlawful and that such misrepresentations will invalidate the authorization card.[216] One commenter opposing the proposed rule, the HR Policy Association, raises the concern that voluntary recognition may be the

[211] Comments of Chairwoman Foxx.

[212] 395 U.S. at 603–604.

[213] Id. at 604.

[214] See *Lamons Gasket,* supra, 357 NLRB at 746–747 (citing *Bernhard-Altmann,* supra, 366 U.S. at 738, and *Dairyland USA Corp.,* 347 NLRB 310, 313–314 (2006), enfd. 273 Fed. Appx. 40 (2d Cir. 2008)).

[215] *Dairyland USA,* supra, 347 NLRB at 313.

[216] See, *e.g., Cumberland Shoe Corp.,* 144 NLRB 1268, 1268 (1963) (union authorization card invalid if organizer misrepresents the card's nature or purpose), enfd. 351 F.2d 917 (6th Cir. 1965); see also *Clement Bros.,* 165 NLRB 698, 699, 707 (1967) (union adherents' coercion or misrepresentation in card solicitation may violate Sec. 8(b)(1)(A) of the Act and invalidate majority showing), enfd. 407 F.2d 1027 (5th Cir. 1969).

product of improper dealings between a union and an employer.[217] This concern, too, can be redressed in a particular case, through Section 8(a)(2) of the Act, which (as explained) expressly prohibits an employer from ''dominat[ing] or interfer[ing] with the formation or administration of any labor organization or contribute financial or other support to it.'' 29 U.S.C. 158(a)(2).

One commenter discounts the value of the Act's unfair labor practice provisions as a check on union misconduct related to voluntary recognition, asserting that filing and pursuing unfair labor practice charges with the Board is burdensome on employees, who must depend on the General Counsel and the Board's regional offices to investigate a charge to determine its merit, issue a complaint, and pursue a case before the Board.[218] This, of course, is the process that Congress has established to protect employees' rights under the Act. By definition, then, it must be deemed adequate to serve the Act's purposes in the current context. The Supreme Court's decision in *Gissel,* in turn, implicitly endorsed the Board's ability to effectively administer the Act in all relevant respects. The Act provides ample opportunity for employees and their supporters to seek redress for union or employer misconduct in connection with the voluntary-recognition process. As observed in *Lamons Gasket,* any person may file an unfair labor practice charge with the Board, up to six months after the alleged union misconduct or the unlawful voluntary recognition of the union by the employer.[219]

Relatedly, a commenter asserts that filing election objections in a representation case is a more effective means of protecting employee free choice than an unfair labor practice charge.[220] We are not persuaded by this assertion. For reasons already explained, the Act's unfair labor practice provisions are adequate to ensure the integrity of voluntary recognition. Congress authorized voluntary recognition as a means for unions and employers to establish a bargaining relationship, and concomitantly established unfair labor practices to prevent conduct that might taint the creation of such a relationship. Where a union files an election petition, in contrast, the Board's representation-case procedures and standards of election conduct apply (in addition to the unfair labor practice provisions of the Act). In short, these alternative routes to representation are appropriately governed by their own sets of rules. Even if the Act's unfair labor practice procedures and standards were somehow inferior to those governing representation cases,[221] that fact would be immaterial because the Act does not require unions to invoke the Board's representation procedures.

c. Comments Regarding the Lack of Parallel Legal Treatment of Voluntary Recognition and Withdrawal of Recognition

Commenter NRTWLDF argues that employers and unions can easily establish bargaining relationships through voluntary recognition, while employers' efforts to unilaterally withdraw recognition are more difficult. This commenter argues that this inequity would be worsened by the proposed rule.[222] NRTWLDF chiefly argues that there are complex sets of rules governing employer involvement in any withdrawal of recognition solicitations and regarding when and where such evidence may be solicited by employees, while voluntary recognition is subject to far less scrutiny. Putting aside the issue of whether NRTWLDF has accurately characterized Board law, we disagree that voluntary recognition and unilateral withdrawals of recognition—despite both turning on whether a union has (or continues to have) majority support—are equivalent. The Board has never treated them as such. Rather, each practice involves its own legal and policy issues under the Act, which merit separate consideration. For example, no provision of the Act clearly authorizes employers to withdraw recognition from a certified or recognized union without an election, nor has unilateral withdrawal of recognition ever been deemed a favored element of national labor policy. The present rulemaking is thus appropriately confined to the issue of voluntary recognition, just as the 2020 rulemaking was.

d. Comments Concerning the Impact on Collective Bargaining of the 2020 Rule

In response to the Board's invitation, various commenters addressed the question of whether and what evidence there was to suggest that the 2020 rule had negatively affected the ability of voluntarily recognized unions and employers to engage in productive collective bargaining by subjecting unions to potential challenges to their representative status. In *Lamons Gasket,* the Board had pointed to its own experience demonstrating that a notice-posting procedure is likely to delay and distort bargaining.[223] Comments supporting the proposed rule chiefly argue that, as a matter of logic and experience, bargaining will be harmed; [224] however, they do not bring significant empirical evidence to bear. We take note of some of the burdens commenters have pointed to, but for reasons already explained, we believe that recission of the 2020 rule reflects the better policy choice. Contrary to our dissenting colleague's view, we believe that the 2020 rule has a reasonable tendency to harm the bargaining process and that, in any case, the current notice-and-election procedure does not serve its ostensible purpose of promoting employee free choice. The procedure thus has no clear benefit that would outweigh its potential for harm.

The AFL–CIO suggests that the practical effect of the notice period is that employers will delay bargaining until after the 45-day posting period prescribed in the 2020 rule.[225] It also refers to union briefs and academic modeling cited in the *Lamons Gasket* decision, which suggest that uncertainty as to the duration of the union's status will cause collective bargaining to be less cooperative.[226] The Los Angeles County Federation of Labor points to the experience of UNITE HERE Local 11, which—under the 2020 rule—had to divert resources from bargaining to defend against a decertification petition (which was ultimately unsuccessful). It also points to academic studies and other experience suggesting that delays in the consummation of an agreement may lead to substantively worse terms.[227] SEIU also asserts, as a logical proposition, that unions and employers will avoid the path of voluntary recognition if they believe it is fraught and less likely to yield positive collective-bargaining outcomes.[228] And of course, as some commenters observed, there are administrative costs

[217] See comments of HRPA.

[218] See reply comments of NRTWLDF.

[219] 357 NLRB at 746–747.

[220] See reply comments of NRTWLDF.

[221] This is not clearly the case, as the *Lamons Gasket* Board pointed out, in part because the representation-case process emphasizes speed. 357 NLRB at 747. An election objection must be filed with seven days of the tally of ballots, by a party to the election, while an employee (or any other person) may file an unfair labor practice charge as long as six months after the alleged misconduct. Id.

[222] Comments of NRTWLDF.

[223] 357 NLRB at 747 & fn. 32.

[224] See, *e.g.,* comments of AFL–CIO; AFSCME; GC Abruzzo; LA Federation; SEIU; USW.

[225] See comments of AFL–CIO.

[226] See id. (citing 357 NLRB at 747 fn. 30).

[227] Comments of LA Federation.

[228] Comments of SEIU.

imposed on the regions and the parties to request, furnish, and post notices.[229]

These assertions from commenters align with the logical expectations of how the 2020 rule's notice-posting requirement tends to affect bargaining relationships, as well as the Board's own experience as laid out in *Lamons Gasket*.[230] It seems fair to conclude, as a matter of experience and academic modeling, that the current notice-and-election procedure has a reasonable tendency to influence the trajectory of bargaining. Employers might well refuse to invest the same time and effort into bargaining if the bargaining relationship might soon be terminated. Unions, in turn, might feel pressure to quickly produce positive results in bargaining to avoid losing support among employees—making a mutually satisfactory agreement with the employer more difficult and increasing the likelihood of labor disputes. These concerns, of course, animate the voluntary-recognition bar and other bar doctrines, including the certification-year bar endorsed by the Supreme Court.[231]

e. Comments on FOIA Data and Updated FOIA Data Reflecting Experience Under 2020 Rule

Numerous commenters have remarked on the Board data reflecting experience under the 2020 rule, produced under FOIA, cited in the NPRM. As we explained in the NPRM, after ''the Board's rule went into effect on June 1, 2020,'' the Board ''[i]n response to a series of Freedom of Information Act requests, . . . has compiled and disclosed data that reflects its experience under the rule,'' tabulating employer requests for notices under the 2020 rule and whether a petition was subsequently filed. 87 FR 66898. Opponents of the proposed rule generally express the view that even the slightest indication that employees in some cases might not wish to retain a voluntarily recognized union is sufficient justification for the 2020 rule's procedure.[232] Supporters, meanwhile, take the view that this data overwhelmingly shows there is no need for the 2020 notice-and-election procedure, and that the successful track record of voluntary recognition justifies treating it as a valid expression of employee choice.

As noted earlier, we believe the Board's experience with the 2020 rule clearly does not compel the conclusion that the rule is necessary to protect employee free choice. In any case, even if the administrative data pointed to no firm conclusions about the need for the current rule, we would still rescind the rule as a matter of policy for the reasons we have explained.

Many commenters opposed to the rule argue that the current notice-and-election procedure is justified if it ever results in a recognized union being decertified. We disagree, for reasons already explained. That a recognized union loses a subsequent election—and this has occurred only in a tiny number of cases where the required notice was posted (both under *Dana* and under the current rule)—does not demonstrate that the union lacked majority support at the time it was recognized. Rather, that result may well be explained by intervening events or by a simple change of mind among employees. Recall, too, that an election is decided by a majority of voting employees, while lawful recognition requires majority support by bargaining unit employees as a whole. Of course, even two free and fair elections held in quick succession may produce different results if enough voters suddenly change their minds, but that is no reason to discard the critical role of bargaining stability in the administration of the Act.

f. Comments That the Notice-and-Election Procedure Compromises the Board's Neutrality

Commenter AFL–CIO, joined by other commenters including National Nurses United, argues that the notice-posting requirement of current Section 103.21 compromises the Board's neutrality because it informs employees of their right to reject the recognized union and effectively invites them to exercise that right.[233] These commenters point out that in this respect, the Board treats voluntary recognition differently. Unless an unfair labor practice has been committed or an election has been scheduled, the Board does not currently require that employees be advised of their statutory rights with respect to union representation. The AFL–CIO, joined by other commenters, further argues that the 2020 Board, by not addressing comments raising the neutrality issue, violated the Administrative Procedure Act when it adopted current Section 103.21.

In rescinding the 2020 rule and replacing it with a new rule, we need not and do not rely on these arguments, but rather on the reasons already offered here, which we regard as ample justification for this rule's steps.[234] Irrespective of whether the 2020 rule was adopted in accordance with the Administrative Procedure Act, we disagree with the policy choice reflected by the 2020 rule. We make a different policy choice here.

g. Comments Addressing the Definition of the Reasonable Period for Bargaining

Several commenters take issue with the proposed rule's definition of the reasonable period for bargaining, which establishes the length of the voluntary-recognition bar. As noted, the proposed rule defined this reasonable period as ''no less than 6 months after the parties' first bargaining session and no more than 1 year after that date,'' and provided that, ''[i]n determining whether a reasonable period of time for collective bargaining has elapsed in a given case, the following factors will be considered: (1) [w]hether the parties are bargaining for an initial collective-bargaining agreement; (2) [t]he complexity of the issues being negotiated and of the parties' bargaining processes; (3) [t]he amount of time elapsed since bargaining commenced and the number of bargaining sessions; (4) [t]he amount of progress made in negotiations and how near the parties are to concluding an agreement; and (5) [w]hether the parties are at impasse.'' 87 FR at 66933.

NRTWLDF argues that defining the period this way imposes an undue burden on employees opposed to union representation, who are likely to have difficulty assessing the duration of the period under the multifactor approach of the proposed rule.[235] We are not persuaded by this argument. To begin, the final rule (in line with the proposed rule) restores the definition first adopted in *Lamons Gasket* in 2011. Before then, Board law did not define the reasonable period for collective bargaining at all in the context of voluntary recognition. In bringing greater clarity and certainty to the law, then, the final rule speaks to the concern of NRTWLDF. Employees

[229] Although, as CDW suggests in its comment, see comments of CDW, these costs may be small, any small or theoretical harms must be balanced against the lack of any meaningful benefits of imposing a notice procedure as a prerequisite to the voluntary-recognition bar.

[230] *Lamons Gasket,* 357 NLRB at 747 & fn. 32.

[231] Id. at 744 (citing *Brooks* v. *NLRB,* supra, 348 U.S. at 100).

[232] Commenter CDW argues that if one interprets the data as the NPRM does—showing minimal impact on unions' status—then it makes no sense to upset the status quo of the 2020 rule because the rule has not negatively affected unions' representational status. Comments of CDW. As we have explained, given the lack of justification for a rule that imposes a needless hurdle to bargaining, even potential obstacles to productive bargaining should be avoided.

[233] Comments of AFL–CIO; NNU.

[234] In this respect, we neither adopt nor reject the reasoning of *Lamons Gasket.* See 357 NLRB at 743–744 (concluding that *Dana* notice-and-election procedure compromised the Board's neutrality).

[235] Comments of NRTWLDF.

know, at a minimum, that the recognized union's representative status may not be challenged before six months but may be challenged after one year. Between those minimum and maximum lengths, the duration of the voluntary-recognition bar will necessarily vary from case to case, based upon the factors identified.

But the alternative to a factor-based approach is to draw a bright line fixing the length of the bar that would apply in every case (unless the Board maintained its traditional approach of not defining the length of the bar at all). We do not believe that a bright-line rule would be superior. It would require the Board to treat all cases as if they were the same, when it seems clear that each case presents particular circumstances justifying a shorter or longer bar period, within the minimum and maximum lengths established. We believe that the definition of the reasonable period for bargaining that we adopt—incorporating a standard that already exists in Board law addressing an analogous bar period—reflects a sound balance between competing considerations of certainty and flexibility.

We are similarly not persuaded by the General Counsel's comment urging the Board to take a different approach to defining the reasonable period for bargaining. The General Counsel argues that the Board should fix the default reasonable period for bargaining at one year (with only limited grounds for extension beyond that). In her view, the proposed rule's minimum six-month period is inadequate to allow the new bargaining relationship to take root. Instead, according to the General Counsel, the reasonable period should mirror that of the statutory election bar, given that both voluntary recognition and elections are valid means of ascertaining employee free choice. She also argues that the multifactor test in the proposed rule could be confusing and difficult to administer.[236]

As explained, we believe that the approach adopted in the final rule is sound, both with respect to its use of the particular minimum and maximum periods and its use of a multifactor test to determine the length of the period between those two markers. We agree with the General Counsel that both voluntary recognition and Board elections are both valid means of establishing a union's right to represent employees. However, we do not believe that this fact dictates the appropriate length of the bar period. As explained, in a given case, the recognition-bar period may appropriately be fixed at one year (although not more). But, as suggested, circumstances will vary from case to case. Moreover, a bargaining relationship based on voluntary recognition is a consensual one, in contrast to a bargaining relationship based on an election. The latter relationship is effectively imposed by the Act, after the employer has *refused* to recognize the union, after what may have been a contentious election campaign, after the union has won the election, and perhaps after the employer's legal challenge to the union's certification has failed. It seems reasonable to believe, then, that bargaining which proceeds from voluntary recognition may be more productive, in a shorter time, than bargaining after an election. These circumstances are appropriately reflected in the bar period.

h. Comments Regarding Extending the Rule to the Unfair Labor Practice Context

In the NPRM, the Board ''invite[d] 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.'' 87 FR 66909. No commenter supported the expansion of the proposed rule to unfair labor practice cases.

In response to the NPRM's invitation, some commenters weighed in on this issue. The General Counsel and NRTWLDF both oppose extending the scope of the rule to unfair labor practice cases, albeit for different reasons.[237] The General Counsel suggests that the Board, in the context of adjudication, should sharply limit the ability of employers to unilaterally withdraw recognition from unions in most circumstances, instead generally permitting withdrawal only based on the results of a Board election in which the incumbent union was defeated. This approach would largely obviate the need for a rule provision addressing unilateral withdrawals in the context of voluntary recognition.[238] Meanwhile, NRTWLDF opposes extending the rule to unfair labor practice cases because, in its view, such an extension would assertedly exacerbate the unequal treatment between employer's ability to voluntary recognize a union and an employer's ability to withdraw recognition. We have already addressed the premise of this point, with which we disagree.

As explained, we have decided not to expand the scope of the proposed rule. Thus, while the final rule rescinds current Section 103.21, it codifies the voluntary-recognition bar only as it applies in the representation-case context. The Board is free in a future unfair labor practice case to apply the voluntary-recognition bar as established through adjudication, consistent with the Board's traditional approach to the issue, or to modify the doctrine if and as appropriate for the unfair labor practice context. We express no view on the General Counsel's position that the Board should limit employers' ability to unilaterally withdraw recognition from incumbent unions in all circumstances, not simply in the voluntary-recognition context.

i. Comments Regarding the Smith's Food Rule (Rival Union's Right To File Petition Based on Showing of Interest Pre-Dating Voluntary Recognition)

Only the General Counsel weighed in on the question posed in the NPRM of whether the Board should retain or modify the rule set forth in *Smith's Food,* supra, 320 NLRB 844, which held that the voluntary-recognition bar did not foreclose a rival union's election petition where that union had a 30 percent or greater showing of interest pre-dating the voluntary recognition of another union. The *Smith's Food* approach ''ensure[s] that a union capable of filing a petition at the time of recognition is not denied the opportunity for an election because it underestimated a competing union's support, or it simply arrived at the Board's office a little too late. More importantly, [it] does not rigidly impose on employees the fortuitous consequences of the union's filing, a matter over which they have no control.'' *Smith's Food.*

The General Counsel urges that we codify the principle of *Smith's Food* in the final rule, but with modifications. Namely, she asks that the Board

[236] Comments of GC Abruzzo.

[237] Comments of GC Abruzzo; NRTWLDF.

[238] The General Counsel states that:

[T]he Board should decide this issue via adjudication and, in an appropriate case, hold that, absent an incumbent union's disclaimer of interest or an agreement between an incumbent union and an employer, an employer may lawfully withdraw recognition from its employees' Sec[.] 9(a) representative based only on the results of an RM or RD election. Indeed, the General Counsel's proposal achieves the same result as the Board's suggested rule because, upon restoration of the traditional voluntary recognition bar, an RM or RD election would not be permitted to proceed until after a reasonable period for bargaining has elapsed. Comments of GC Abruzzo.

increase the threshold for the rival union's showing of support to 50 percent and that the Board should only process the rival union's petition if it is filed within 14 days of the voluntary recognition.

Given the paucity of comments on this issue, however, the Board has decided to preserve the status quo with respect to *Smith's Food* and to leave the issue for future consideration. Thus, a new provision in the final rule provides that the issue will remain one for adjudication, leaving *Smith's Food* in place as precedent, but not codifying the holding in that case. In a future case, the Board would remain free either to reaffirm *Smith's Food* or to consider modifying the approach reflected in that precedent, whether as the General Counsel proposes or in some other manner, in a concrete context where the parties (and any amici) can fully argue their positions.

C. Rescission of Section 103.22 of the Board's Rules and Regulations

1. Explanation for Adoption of NPRM Proposal To Rescind § 103.22

The Board has decided to rescind in toto Section 103.22. Prior to the promulgation of Section 103.22, the Board had long held, through adjudication, that unions should not have less favored status with respect to construction employers than they possess with employers outside of the construction industry.[239] However, Section 103.22 imprudently established a hard and fast rule to treat unions representing construction employees differently. Although Section 8(f) provides an alternative mechanism for a construction employer to voluntarily recognize a union, there is no statutory basis to deprive unions representing construction employees from utilizing the same procedure under Section 9(a) to obtain voluntary recognition—and its attendant benefits—that is available to all other unions. Moreover, in contrast to bargaining relationships outside of the construction industry, Section 103.22 uniquely permits challenges to be raised at any time to a construction employer's voluntary recognition of a union under Section 9(a), unless the parties have retained and preserved contemporaneous evidence of the union's initial majority status that it can produce and have satisfactorily authenticated in a representation proceeding, potentially decades after the initial 9(a) recognition.

Furthermore, the Board recognizes the unique legal issues arising from the interplay between Section 8(f) and Section 9(a) and the particularly volatile nature of the construction industry. Accordingly, in rescinding Section 103.22 in toto, the Board has decided that it would not replace it with another rule but that it would resolve future issues that arise involving the proper standard for finding voluntary 9(a) recognition in the construction industry through adjudication. In *NLRB* v. *Bell Aerospace Co. Div. of Textron,* the Supreme Court recognized ''that the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion.'' [240] The Supreme Court continued that ''[i]t is true, of course, that rulemaking would provide the Board with a forum for soliciting the informed views of those affected in industry and labor before embarking on a new course. But surely the Board has discretion to decide that the adjudicative procedures in this case may also produce the relevant information necessary to mature and fair consideration of the issues.'' [241]

The Board recognizes that returning to adjudication to set forth the proper standard for assessing whether parties had formed a 9(a) bargaining relationship in the construction industry would restore, for the moment, the Board's prior decision in *Staunton Fuel* and *Casale Industries.* To the extent that these decisions are in tension with prior decisions of the D.C. Circuit, as asserted by certain commenters, the Board has attempted to address and accommodate those concerns through its adjudication in *Enright Seeding,* an unfair labor practice case, and will make further refinements to the appropriate standard, as necessary, in adjudicating future cases.[242]

2. Response to Comments

The Board received numerous comments on the proposal to rescind Section 103.22. In deciding that recission of Section 103.22 in toto is appropriate, we have carefully reviewed and considered these comments, as discussed below. We have also carefully considered the views of our dissenting colleague.

a. Comments Regarding Positive Evidence To Support 9(a) Status

In determining whether a union has rebutted the construction-industry presumption of an 8(f) bargaining relationship, commenters posited that a written memorialization of 9(a) recognition, as required under the Board's decision in *Staunton Fuel,* is precisely the type of positive evidence a union should be able to rely on to support its 9(a) status, in accordance with the common law of contracts and evidence.[243] These commenters argued that contract language serves an important role in distinguishing between the two types of legally distinct labor agreements in the construction industry and demonstrates the parties' intent to create a 9(a) relationship at the time of the contract's execution, should the union's 9(a) status ever be challenged years into the future. We agree that a written memorialization of the parties' agreement that a union has proffered the requisite showing to support 9(a) status is probative positive evidence and, importantly, distinguishes an 8(f) agreement from 9(a) recognition for all interested parties.

One commenter countered that contract language expressing the parties' intent to form a 9(a) relationship should not be dispositive in demonstrating a union's majority support.[244] Although we agree that intent itself is not dispositive of a union's 9(a) status, we recognize that the contract language is not only an expression of intent. It is a formal written acknowledgement that the conditions for forming the relationship have been satisfied, including that a union has proffered the requisite showing of majority support. As discussed further below, if the parties falsely made this assertion, an employer's grant of 9(a) recognition and a union's acceptance of that recognition are both unlawful. Additionally, the contract language is an agreement barring an employer from evading its bargaining obligations under the Act by falsely asserting that no 9(a) recognition had ever been granted.

b. Comments Regarding Contract Language Alone Creating 9(a) Status

Several commenters posited that Section 103.22 was promulgated based on a fundamental mischaracterization of

[239] *Casale Industries,* 311 NLRB at 953; *John Deklewa & Sons,* 282 NLRB at 1387 fn. 53.

[240] 416 U.S. 267, 294 (1974).

[241] Id. at 295.

[242] Our dissenting colleague questions why the Board did not adopt other suggested amendments to Sec. 103.22 in the final rule. Because we have decided to return to deciding issues related to Sec. 9(a) recognition in the construction industry through adjudication, we have no occasion in this rulemaking proceeding to entertain other proposals for replacing Sec. 103.22 with different regulatory text or otherwise modifying pre-Sec 103.22 precedent. Accordingly, we leave the further refinement of this area of Board law to case-by-case development.

[243] Comments of AFL–CIO/NABTU; UA.

[244] Comments of AGC.

the Board's decision in *Staunton Fuel*.[245] These commenters contended that, although it is true that *Staunton Fuel* allowed contract language to serve as probative positive evidence that voluntary recognition had been granted pursuant to Section 9(a), *Staunton Fuel* does not provide for contract language alone to create a 9(a) relationship or allow contract language to substitute for a union showing or offering to show evidence of its majority support. Indeed, according to these commenters, if other evidence casts doubt on the assertion that majority support existed at the time of the purported grant of 9(a) recognition, the contract language necessarily fails to establish 9(a) status and, within the 10(b) period, a party can challenge the basis for a union's 9(a) recognition under *Staunton Fuel.* On the other hand, multiple commenters, along with our dissenting colleague, argued that, under *Staunton Fuel,* contract language standing alone does establish the existence of a 9(a) relationship.[246] One commenter described *Staunton Fuel* as allowing fictional proof of majority status to substitute for reality.[247] Other commenters asserted that nothing in the statutory language or legislative history suggested that 9(a) representation could be granted by a mere statement in a collective-bargaining agreement, without proof of majority support.[248] The effect of rescission of Section 103.22, according to one commenter, would be to create a rebuttable presumption of a 9(a) relationship.[249]

As noted above, and as the Board stated in its recent decision in *Enright Seeding,* nothing in *Staunton Fuel* alters the basic premise that establishing a bargaining relationship under Section 9(a) requires a proffered showing of majority support for a union. 371 NLRB No. 127, slip op. at 3. The Board in *Enright Seeding* further recognized that ''contractual language may serve as evidence of a union's status as a Section 9(a) majority representative only if it is true. 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 alone is insufficient to demonstrate the union's 9(a) status.'' Id. at 3–4.

We agree with those commenters that recognized that *Staunton Fuel* does not provide that contract language alone creates a 9(a) relationship. Contract language simply serves as a contemporaneous memorialization of 9(a) recognition that can be relied upon in the absence of contrary evidence. The commenters suggesting otherwise failed to appreciate the distinction between contract language supporting a union's assertion of 9(a) status in accordance with *Staunton Fuel* from the argument that is not part of *Staunton Fuel*—that contract language *itself* establishes a 9(a) relationship.[250]

c. Comments Regarding Labor Relations Stability and Employee Free Choice

As multiple commenters noted, Section 103.22 denies a construction employer, a voluntarily recognized union representing construction employees, and the construction employees themselves, from having certainty as to the stability of the collective-bargaining relationship and does so at the expense of construction employees' free choice as to their bargaining representative. One commenter posited that Section 103.22 was promulgated in response to unfounded fears that voluntary recognition in the construction industry is to the detriment of employee free choice, as Board case law prior to Section 103.22 already provided safeguards to protect employee free choice.[251] According to this commenter, while Section 103.22 does nothing to protect employee free choice, the ever-present threat it creates to a union's representative status denies these employees the benefit of knowing that there would be stability in their bargaining representative and their terms and conditions of employment. In the same vein, other commenters argued that Section 103.22 actually deprives employees of their free choice, because under 103.22 a union that had been properly designated as their 9(a) bargaining representative could be challenged as lacking majority support at any time.[252] We agree with these commenters that Section 103.22 detrimentally affects both labor relations stability and employee free choice.

At the same time, other commenters asserted that, prior to Section 103.22, the Board had placed too much emphasis on labor relations stability over employee free choice and, in doing so, unjustly deprived employees from being able to provide input into the selection of their bargaining representative.[253] One commenter argued that the Board had placed the interests of unions in the contract bar above those of employees who seek to rid themselves of a minority union that has never been subjected to a vote, particularly because of the potential difficulty in filing a decertification petition.[254] However, we believe that these comments not only minimize the Act's important policy goal of promoting labor relations stability but also needlessly dismiss the harm that Section 103.22 does to employee free choice. As discussed further below, the Board already had sufficient safeguards—independent of Section 103.22—to allow employees at the appropriate time to challenge a union's 9(a) status for lacking majority support, including by contacting a Board regional office and timely filing a decertification petition. Nonetheless, when a majority of construction employees in an appropriate unit have designated a union as their collective-bargaining representative, those employees should be able to enjoy the attendant benefits of 9(a) recognition, including stability as to their bargaining representative.

d. Comments Regarding Regional Directors' Assessment of 9(a) Status

Multiple commenters noted that, prior to Section 103.22, regional directors had been afforded discretion to evaluate the evidence in a specific case and assess whether a union had successfully rebutted the 8(f) presumption.[255] One commenter recognized that, even prior to Section 103.22, regional directors did not have to blindly accept the contract language but were permitted to assess evidence that calls into question whether a union had showed or offered to show its proof of majority support.[256]

We agree with these commenters that, prior to Section 103.22, regional directors were appropriately afforded discretion to determine whether the presumption of 8(f) recognition in the construction industry had been rebutted. Unlike the per se approach of Section 103.22, which outright prohibits the application of the voluntary

[245] Comments of LA Federation; AFL–CIO/NABTU; UA.

[246] Comments of AGC; ABC; Chamber; CDW.

[247] Comments of ABC.

[248] Comments of CDW; NRTWLDF.

[249] Comments of AGC.

[250] Our dissenting colleague states that ''[t]he issue is, and has always been, whether contractual language alone is sufficient to prove the existence of a 9(a) relationship.'' We agree that, first and foremost, the 9(a) relationship depends on and requires that the union enjoy majority support among the unit employees, not on the parties having drafted certain language into an agreement.

[251] Comments of LA Federation.

[252] Comments of AFL–CIO/NABTU; UA.

[253] Comments of AGC; Chamber. Our dissenting colleague similarly expresses concern that, by rescinding Sec. 103.22, the majority risks allowing construction industry employers and unions to enter into ''9(a) bargaining relationships without regard to the will of the majority of the employer's employees.''

[254] Comments of NRTWLDF.

[255] Comments of LA Federation; UA.

[256] Comments of UA.

recognition bar and contract bar rules in the construction industry in the absence of what could be very old authorization cards or other documents, we believe that the better approach is to afford regional directors the discretion to determine whether 9(a) recognition was properly granted. As discussed further below, if 9(a) recognition was granted despite the union not enjoying majority support, the Board already has an effective process to resolve such allegations even without Section 103.22.

e. Comments Regarding District of Columbia Circuit Precedent on the Use of Contract Language

Some commenters discussed whether Section 103.22 is required under District of Columbia Circuit precedent. One commenter pointed out that the District of Columbia Circuit has not directly ruled on whether contract language alone is sufficient to support a 9(a) relationship in the construction industry in the absence of contrary evidence that calls into question the veracity of the contract language.[257] According to this commenter, in both *Nova Plumbing* and *Colorado Fire Sprinkler,* the court found only that the contract language in the specific circumstances of those two cases was insufficient to show that the union enjoyed majority status at the time of recognition because in both cases other evidence existed that called into question the union's majority status. In fact, the District of Columbia Circuit suggested in *Allied Mechanical Services,* albeit in dicta, that contract language alone potentially could be sufficient to establish majority support for 9(a) recognition in the absence of contrary evidence. We therefore agree with this commenter.

As discussed above, the District of Columbia Circuit has recognized that contract language cannot support 9(a) recognition where it is shown not to be true, such as where the parties claim there was initial majority support even before a single employee had been hired. In *Nova Plumbing,* 330 F.3d at 537–538, the District of Columbia Circuit pointed to strong evidence in the record that contradicted the contractual language. Id. at 533. In particular, the record established that senior employees who had been longtime union members opposed the union representing them with this employer and also showed that 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. Id. at 537. 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.'' Id.

Subsequently, in *Allied Mechanical Services, Inc.* v. *NLRB,* the District of Columbia 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. 668 F.3d at 766 (''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*).

Similarly, the District of Columbia Circuit in *Colorado Fire Sprinkler* 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 it was undisputed that not a single employee had been hired at the time the parties initially executed their agreement containing that language. 891 F.3d at 1036. In fact, as the court pointed out, ''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. Id. at 1041. In the absence of such contrary evidence casting doubt on the union's initial majority support, however, the District of Columbia Circuit has not challenged the Board's reliance on contract language as a written memorialization of the parties' acknowledgment that the construction employer had granted a union 9(a) recognition.

On the other hand, some commenters have argued for a much broader reading of these District of Columbia Circuit decisions and claimed that the Board has ignored the position of the District of Columbia Circuit regarding the extent to which contract language can be considered in finding 9(a) status and made little discernible effort in resolving the conflicting views.[258] We think this argument is meritless. To the extent these commenters assert that the District of Columbia Circuit has required a union to show or offer to show evidence of majority support to find a 9(a) relationship in the construction industry, we do not take issue with that assessment. However, the contract language simply serves as contemporaneous evidence of the union's support from the time 9(a) recognition was initially granted. For that reason, the argument from one commenter that rescinding Section 103.22 could violate the Administrative Procedure Act because it would be contrary to District of Columbia Circuit decisions is not persuasive.[259] Moreover, in *Enright Seeding,* the Board clarified that ''[i]f 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 alone is insufficient to demonstrate the union's 9(a) status.'' [260] To the extent Board law is found to not align with court decisions applying *Staunton Fuel,* the Board is able to resolve such concerns through adjudication.

f. Comments Regarding Unlawful Employer-Union Collusion

Several commenters posited that Section 103.22 is unnecessary because, even before its promulgation, it was already unlawful for a construction employer to collude and falsely enter into an agreement with a union recognizing it as having majority support and, additionally, that an unfair labor practice proceeding is the proper forum for resolving whether 9(a) recognition had been improperly granted to a union as it contains the proper evidentiary and procedural safeguards to litigate the issue.[261] One commenter noted that, in representation proceedings, the Board does not allow extrinsic evidence challenging the propriety of a labor agreement or litigation of unfair labor practices, including whether a union lacked majority status at the time it was recognized as the 9(a) representative.[262]

On the other hand, some commenters claimed that rescission of Section 103.22 would give construction employers and unions a green light to collude and that there is a long history of backroom deals being made with favored unions in disregard of employee

[257] Comments of AFL–CIO/NABTU.

[258] Comments of ABC; Chamber; CDW. Our dissenting colleague adopts a similar reading of District of Columbia Circuit precedent.

[259] Reply comments of NRTWLDF.

[260] 371 NLRB No. 127, slip op. at 3–4.

[261] Comments of AFL–CIO/NABTU; LA Federation; UA.

[262] Comments of AFL–CIO/NABTU.

free choice.[263] Other commenters asserted that the possibility of an unfair labor practice proceeding is not a sufficient process for resolving an unlawful grant of 9(a) recognition because no unfair labor practice is committed by a construction employer merely granting 9(a) recognition if no attempt is made to improperly enforce an 8(f) agreement as a 9(a) agreement.[264] Another commenter suggested that restricting litigation of whether 9(a) recognition was improperly granted to unfair labor proceedings ignores reality and is written from a position of institutional privilege as employees do not have the knowledge, inside information, or institutional resources to file an unfair labor practice charge.[265]

Although we are very mindful of the importance of preventing unlawful collusion, and the deleterious effect that such collusion can have on employees' Section 7 rights, we disagree with our dissenting colleague and the commenters who claimed that Section 103.22 serves as a reasonable safeguard. Instead, we agree with the commenters that asserted that the most appropriate forum for challenging any claims of collusion is the same with or without Section 103.22—an unfair labor practice proceeding alleging violations of Sections 8(a)(2) and (1) and 8(b)(1)(A).[266]

Representation hearings, unlike those for unfair labor practices, are nonadversarial and do not offer the evidentiary and procedural safeguards, such as applying evidentiary rules or making credibility determinations, that should exist for reviewing the type of evidence necessary to challenge a construction employer's unlawful grant of 9(a) recognition to a union that lacked majority support. Contrary to the claim of one commenter,[267] regardless of whether an 8(f) agreement is enforced as a 9(a) agreement, an employer's grant of 9(a) recognition and a union's acceptance of it when it does not have majority support—across all industries, including construction—is an unfair labor practice by both the employer and the union. We also disagree with the unfounded claim of the commenter that employees are readily able to file representation petitions but do not have the expertise to file unfair labor practice charges.[268] The Board's regional offices are equipped to help employees with all their business before the Board, including the filing of unfair labor practice charges, which the regional office will then investigate and, if deemed meritorious, litigate on behalf of the charging party.

g. Comments Regarding Application of Section 10(b) 6-Month Limitations Period to Challenges to Construction-Industry Bargaining Relationships

Multiple commenters expressed concerns about Section 103.22's removal of a limitations period for challenging a voluntarily recognized bargaining relationship in the construction industry, which resulted from the Board's overruling of *Casale Industries* as part of the promulgation of Section 103.22.[269] These commenters referred to how construction employers and unions are now required to maintain evidence of the union's initial 9(a) recognition for years, even decades, even though recollections and documentary evidence would reasonably be expected to fade and dissipate over time or otherwise be incomplete.[270] As the General Counsel pointed out, the Board would be in the unenviable position of assessing the veracity of evidence long after card signers are likely no longer available or accessible.[271] One commenter noted that the removal of a limitations period is contrary to deeply held notions of equity in the United States, as reflected by statutes of limitations routinely being included in or imputed to laws to delineate the period of time within which a cause of action must be brought.[272]

According to one commenter, Section 103.22 did not need to remove the limitations period precisely because the 9(a) recognition must be unequivocally provided for in writing, thereby providing employees with prompt notice that their union has obtained 9(a) status and that the clock has started for pursuing a challenge to that recognition.[273] Another commenter argued that a construction employee would have no basis to assume that a labor agreement was entered into pursuant to Section 8(f), simply because of the legal presumption of 8(f) status, and that the employee should bear the risk of making such an errant assumption if it kept them from filing a representation petition within the 6-month limitations period.[274] That commenter further postulated that, if a construction employee is sophisticated enough to be aware of the presumption of 8(f) recognition in the construction industry, the same employee would reasonably understand the importance of filing an election petition within the limitations period.

Similarly, one commenter pointed out that, even if an employee fails to file a petition within the initial limitations period, the contract bar only lasts for up to 3 years, and the employee could always file a petition during the window period if it seeks to challenge the union's majority support.[275] Another commenter averred that, in the absence of the *Casale* limitations period, relationships that should be marked by stability are instead strained by uncertainty as to whether an employer, for reasons unrelated to employee free choice, will attempt to terminate or disrupt the relationship by filing an RM petition.[276] This commenter also noted that, paradoxically, the longer the relationship, the more difficult it will be to produce the requisite proof of initial majority support making that relationship least stable and most vulnerable to challenge, despite the Supreme Court's holding in *Bryan Manufacturing* recognizing the limited period during which challenges can be brought to a union's initial grant of 9(a) recognition.

On the other hand, both our dissenting colleague and some commenters asserted that the Board did not provide an explanation in the NPRM for why the recordkeeping requirement under Section 103.22 that required parties in the construction industry to retain indefinitely positive evidence of a union's initial 9(a) recognition is

[263] Comments of AGC; NRTWLDF. Our dissenting colleague raises similar concerns about the possibility of collusion, observing that rescinding Sec. 103.22 risks a scenario where parties ''will routinely be in violation of Sec. 8(a)(2) and 8(b)(1)(A)—and, if their contract includes union security, of Sec[.] 8(a)(3) and 8(b)(2) as well.''

[264] Comments of ABC.

[265] Reply comments of NRTWLDF.

[266] Although unfair labor practice proceedings are available for challenging any instances of collusion, whether in the construction industry or elsewhere, we do not agree with our dissenting colleague's speculation that rescinding Sec. 103.22 will increase the likelihood that such unfair labor practices will be committed. Our dissenting colleague also claims that Sec. 103.22 protects employees' right to petition for an election where no lawful Sec. 9(a) relationship has been formed. However, we see no reason to question the parties' written memorialization of the union's 9(a) recognition and majority support in the absence of contrary evidence. If such contrary evidence exists to show that the union lacked majority support, there is no question that the parties violated the Act. In those instances, even in the absence of Sec. 103.22, an employee and/or rival union will be free to file a timely petition and challenge the purported 9(a) recognition. See *Casale,* 311 NLRB at 953.

[267] Comments of NRTWLDF.

[268] Reply comments of NRTWLDF.

[269] Comments of AFL–CIO/NABTU; GC Abruzzo; LA Federation.

[270] Comments of AFL–CIO/NABTU; GC Abruzzo; UA.

[271] Comments of GC Abruzzo.

[272] Comments of UA.

[273] Comments of LA Federation.

[274] Comments of UA.

[275] Comments of AFL–CIO/NABTU.

[276] Id.

onerous or unreasonable.[277] A commenter and our dissenting colleague suggested that Section 103.22 does nothing to imperil unions that truly enjoy majority support and that a recordkeeping burden cannot trump employees' Section 7 rights.[278] Our dissenting colleague noted that Section 103.22 applied prospectively only. Another commenter noted that any recordkeeping burden imposed by Section 103.22 is only relevant if a construction employer or union want to be able to insulate a voluntary recognition from challenge under the Board's contract bar rules.[279] One commenter cited the Board's recordkeeping requirements in other contexts, such as with respect to dues deduction authorization cards or union membership forms.[280] Additionally, a commenter noted that no examples were given in the NPRM of where the loss of a collective-bargaining relationship had actually occurred since Section 103.22 was adopted.[281]

We agree with those commenters who expressed concerns about the impact on labor relations stability and employee free choice by not having a limitations period on challenges to a union's 9(a) status. It is crucial to collective bargaining that parties are guaranteed some stability as to their bargaining relationship and know that it cannot be challenged at any time. Employees who have designated a union as their bargaining representative deserve as much. Our dissenting colleague and those commenters who claim that it is not much of a burden for a construction employer and union to retain indefinitely positive evidence of a union's majority support fail to appreciate the likelihood that such evidence could go missing or disappear and that, even if retained, may only raise more questions than it answers. Although Section 103.22 applied prospectively only, it could still cause significant disruption to longstanding collective-bargaining relationships years or even decades into the future for collective-bargaining relationships first formed after April 2020. In addition, unlike dues deduction authorization and union membership forms, which are only relevant if the employee who signed the form is still working for the employer, the evidence of a union's initial 9(a) recognition required under Section 103.22 could be based on support from employees who have long since stopped working for the employer but would nonetheless create a rebuttable presumption of the union's continued majority support. It could be practically impossible years later to assess the authenticity of any such evidence.

We reject the claim of one commenter that the retention of the evidence of a union's initial 9(a) recognition must not be a burden because no examples were given in the NPRM of where the loss of a collective-bargaining relationship had occurred.[282] This commenter ignored how the most significant burden imposed by Section 103.22 is not in the present but years down the road. Over time, it is inevitable that memories will fade and witnesses will disappear. As the Supreme Court recognized in *Bryan Manufacturing,* the Section 10(b) limitations period is appropriately applied to voluntary recognitions—including those in the construction industry—to promote stability in bargaining relations and prevent the Board from being bogged down in evidentiary challenges that would ultimately prove impossible to resolve. Accordingly, in rescinding Section 103.22, we reinstate the Board's previous case law in *Casale* and its progeny.

h. Comments Regarding Uniqueness of the Construction Industry

Multiple commenters had varying perspectives on whether unions representing construction employees should be treated the same as other unions. Relying on the longstanding principle articulated in *Deklewa,* several commenters argued that unions should not be treated less favorably when representing construction employees as opposed to employees in other industries.[283] One commenter pointed to the lack of any evidence that Congress intended for unions representing construction employees to be uniquely burdened in gaining 9(a) status.[284] This commenter asserted that *Staunton Fuel* merely sought to put these unions on an equal footing as all other unions seeking voluntary recognition under Section 9. As another commenter put it, until the promulgation of Section 103.22, the Board had long recognized that Section 8(f) did not deprive employees in the construction industry from having the same opportunity to designate a union as their bargaining representative as those who work in other industries.[285] This commenter argued that, as in all other industries, employers in the construction industry must be allowed to develop long-lasting bargaining relationships with the unions representing their employees in order to provide a level of certainty and industrial stability. One other commenter asserted that, if the contract bar rules in effect prior to Section 103.22, which reflect decades of experience under the Act, adequately protect the free choice of employees working in nonconstruction industries, they also adequately protect the free choice of employees in the construction industry.[286]

On the other hand, some commenters stated that unions representing employees in the construction industry are unique, as evidenced by the very legality of 8(f) agreements.[287] One commenter noted the prevalence of multiemployer bargaining within the construction industry.[288] Another claimed that the realities of the construction industry dictated the automatic addition of *Staunton Fuel* language into contracts providing for 9(a) recognition even where the union had not obtained majority support.[289] Several commenters asserted that Congress adopted Section 8(f) because of the need for temporary, fluid, and short-term employment common in the construction industry where proving majority support would be difficult, instead of the permanent, stable, and long-term employment relationships that require proof of majority support under Section 9(a).[290] A commenter postulated that, if a construction workforce is not temporary, the employment relationship is more akin to those in nonconstruction industries and the union should have to prove its majority status through the standard 9(a) process.[291]

As we have explained above, we agree with the principle articulated in *Deklewa* that unions representing construction employees should not be treated less favorably with respect to the opportunity to obtain voluntary recognition than other unions. There is no indication in the statutory text of Section 8(f) or its legislative history to suggest that Congress, by granting construction employers and unions an alternative path to recognition through

[277] Comments of AGC.

[278] Comments of CDW; NRTWLDF.

[279] Comments of NRTWLDF.

[280] Id.

[281] Reply comments of NRTWLDF.

[282] Id.

[283] Comments of AFL–CIO/NABTU; LA Federation; UA.

[284] Comments of UA.

[285] Comments of LA Federation.

[286] Comments of AFL–CIO/NABTU.

[287] Comments of AGC; NRTWLDF.

[288] Comments of AGC.

[289] Comments of Chamber.

[290] Comments of ABC; CDW; Greszler; reply comments of NRWLDF.

[291] Reply comments of NRTWLDF.

8(f) agreements, simultaneously intended to deny them from utilizing a common method by which unions had obtained recognition—voluntary recognition by an employer. Furthermore, the prevalence of multiemployer bargaining in the construction industry does not alter the legitimate prerogative of a construction employer, even one participating in multiemployer bargaining, to voluntarily grant 9(a) recognition to a union with majority support.

On the same note, as discussed above, the mere adoption of contract language in an agreement does not confer 9(a) status. Both a construction employer and a union that insert language into an agreement asserting 9(a) status where a union does not enjoy majority support commit violations of the Act. We agree with those commenters that contend that the Board's proper response in those circumstances is for the violations to be litigated as unfair labor practices, not for the Board to destabilize collective-bargaining relationships and interfere with employee free choice for those parties that have properly abided by the law. To the extent that one commenter is correct that the construction industry has relied less on temporary, fluid, and short-term employment, there is even more reason for unions representing construction employees to enjoy the same rights as all other unions in obtaining 9(a) status. Permanent and long-term employment relationships benefit the most from the stability that comes with the Board's voluntary recognition bar and contract bar rules. Where a construction employer has voluntarily granted 9(a) recognition to a union or the parties have negotiated a new collective-bargaining agreement, it is vital that the parties' bargaining relationship cannot be challenged at a moment's notice.

i. Comments Regarding Other Federal Legislative Enactments

We reject one commenter's argument that we should be guided by how other federal legislative enactments might affect the proliferation of 8(f) agreements.[292] This commenter posited that the 2021 Infrastructure Investment and Jobs Act, Public Law 117–58, will require more 8(f) agreements to be executed so that contractors can partake in federally funded contracts. This commenter claimed that employees working under 8(f) agreements will be forced to have a significant portion of their wages sacrificed to insolvent construction-industry union pension plans because they will not be employed long enough to become vested to receive pension benefits and that employers may become subject to liability for underfunded multiemployer pension plans. This commenter also asserted that special financial assistance afforded to multiemployer pension plans and the Pension Benefit Guaranty Corporation will affect taxpayers and urged the Board to put this rulemaking on hold for an economic analysis of its impact.

Our principal concern is with promoting the policies of the Act, regardless of the extent to which other federal legislative enactments, including the 2021 Infrastructure Investment and Jobs Act, have affected or will affect the number of 8(f) agreements. Nonetheless, we have not been presented with any evidence that the number of 8(f) agreements have risen or that it has had an actual impact on the administration of multiemployer pension plans and, therefore, refrain from weighing in on the commenter's speculation. In addition, the claim that employees working under 8(f) agreements will have their wages deducted to make contributions to insolvent construction-industry union pension plans and that this will have to be paid for in the future by taxpayers is purely conjectural. Moreover, even if these assertions were true, they would be true even if Section 103.22 continued in effect because, as the commenter notes, these considerations are just as relevant if a union is recognized under Section 8(f) as under Section 9(a). To the extent the commenter disapproves of 8(f) agreements generally, that is an issue for Congress.

j. Comments Regarding the Board's Promulgation of Section 103.22

One commenter noted that the promulgation of Section 103.22 was flawed in its overruling of *Casale* because nowhere in the 2019 NPRM was that case cited or any question raised about the appropriateness of the then-existing limitations period, giving commenters no opportunity to present their views on this issue.[293] This commenter argued that the decision in the April 2020 rule to overturn *Casale* was not a logical outgrowth of the 2019 NPRM and that, accordingly, the April 2020 rule was promulgated in violation of the APA. The commenter also claimed that Section 103.22 was not supported by a reasoned analysis because no case was cited nor were any examples provided in which employee free choice was undermined by the Board applying its pre-Section 103.22 contract bar rules to an agreement entered into between a construction employer and a union recognized as the 9(a) representative.

We acknowledge that the overruling of *Casale* was done without providing any notice in the 2019 NPRM and that it was not a logical outgrowth of the proposed rule that was ultimately promulgated as Section 103.22. We agree with the commenter that interested parties had no reason to know to provide comments on the possibility of *Casale* being overruled. However, regardless of the propriety of the Board overruling *Casale* as part of the promulgation of Section 103.22 without having provided advance notice to the public, we base our decision to rescind Section 103.22, and restore *Casale,* on policy grounds—specifically, that unions representing construction employees should not be treated less favorably than other unions and should not be required to maintain indefinitely positive evidence to support the initial 9(a) recognition, outside of a written memorialization of a construction employer's 9(a) recognition of a union, in the absence of contrary evidence of the union's majority support.[294]

k. Comments Suggesting Modifications to the Proposed Rule

Multiple commenters proposed modifications to the proposed rule, instead of rescinding Section 103.22 in toto. One commenter recommended that the Board modify Section 103.22 instead of getting rid of it entirely.[295] This commenter argued that the Board should restore *Staunton Fuel* as applied to timely RM petitions, thereby barring a construction employer from challenging its own initial grant of 9(a)

[292] Comments of Greszler.

[293] Comments of AFL–CIO/NABTU.

[294] Accordingly, we are unpersuaded by our dissenting colleague's view that the 2019 NPRM implicitly raised the possibility of *Casale* being overruled on the grounds that the ''issue was squarely raised in public comments.'' Even though two commenters sua sponte raised *Casale* in their comments to the 2019 NPRM, other commenters with relevant insight into the application of *Casale* had no reason to provide comments about the effects of the Board overruling *Casale* because of the content of the 2019 NPRM. Nonetheless, we return to *Casale* for policy reasons.

[295] Comments of GC Abruzzo. As noted above, see supra fn. 243, we reject our dissenting colleague's suggestion that we did not sufficiently consider this alternative. To the contrary, we recognize the competing considerations raised by these commenters and that reevaluating the standard for voluntary 9(a) recognition in the construction industry may be prudent in the future. Precisely for that reason, we have determined that returning to deciding issues in this area of Board law through adjudication is the best course. If the Board is presented with a case where revising the current standard is found to best effectuate the policies of the Act, including both promoting labor relations stability and protecting employee free choice, the Board will be able to do so in that case.

recognition to a union, but not to timely RD and RC petitions filed by a bargaining-unit employee or rival union. The same commenter also urged the Board to restore the 6-month limitations period under *Casale* but clarify that it does not begin to run until at least one statutory employee is hired or otherwise has constructive notice that the employer granted 9(a) recognition to a union without majority support.[296]

Another commenter argued that resolving challenges to the initial grant of 9(a) recognition in a representation proceeding under *Casale* was unique to the construction industry and that the better rule would be to require claims that the union lacked majority status at the time it was first recognized to be litigated exclusively in unfair labor practice proceedings, as is the case with unions representing employees in all other industries.[297] One commenter suggested expanding Section 103.22 beyond representation cases to require a union representing construction employees to have to provide positive evidence of its initial grant of 9(a) recognition in unfair labor practice proceedings to justify its presumption of continued majority support, for instance in cases where a construction employer is alleged to have a duty to bargain with a union upon expiration of the parties' collective-bargaining agreement.[298]

As explained more fully above, in considering these suggested modifications to Section 103.22, we have decided to rescind Section 103.22 in toto and not to replace it with a new rule regarding the application of the voluntary-recognition and contract bars to the construction industry. We have concluded that a replacement rule is unwarranted. The same policies and practices governing the voluntary-recognition and contract bars outside of the construction industry should apply with equal force to unions representing or seeking to represent employees in the construction industry—except for where different processes are either required by Section 8(f) or specifically provided for in Board case law predating the adoption of Section 103.22. We continue to rely on the critical principle articulated by the Board in *Deklewa* that, with respect to voluntary recognition, ''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.'' 282 NLRB at 1387 fn. 53.

Rescission of Section 103.22 in toto without replacement also has other benefits. As noted above, we agree with the comments asserting that regional directors should again be afforded the discretion they had prior to Section 103.22 to evaluate whether to process a construction industry petition based on the evidence offered by the parties. The factual circumstances of a specific case are uniquely important to resolving construction industry cases because of the special considerations required under Section 8(f), including whether a union representing construction employees had successfully demonstrated its majority status to rebut the 8(f) presumption. Regional directors will return to having that discretion in the absence of a replacement rule. Rescission in toto without replacement will also allow the Board to use adjudication (rather than further rulemaking) in deciding whether to revisit, at some point in the future, the Board's pre-Section 103.22 construction industry case law, which we reinstate through this rulemaking.[299] Finally, the Board received no comments specifically urging the use of rulemaking instead of adjudication to set forth and develop its rules for processing construction industry petitions.

VI. Response to Dissent

Our dissenting colleague advances several reasons for declining to join the majority in rescinding the April 2020 rule and replacing its provisions addressing the blocking charge policy and voluntary-recognition bar doctrine. Our colleague primarily defends the April 2020 rule on policy grounds, arguing that it better promotes employee free choice than will the final rule. The majority of our colleague's arguments are specific to the individual subjects covered by the final rule, and we have already addressed and rebutted many of these arguments above. The balance of the dissent makes four broader arguments. As we explain below, we are unpersuaded that any of these arguments provides an adequate justification for retaining the April 2020 rule or for declining to adopt the final rule we issue now.

First, our dissenting colleague contends that the majority has failed to demonstrate the existence of changed circumstances justifying the rescission of the April 2020 rule and replacement of its provisions addressing the blocking charge policy and voluntary-recognition bar doctrine. Our colleague argues that the final rule is an example of ''needless policy oscillation that tends to upset the settled expectations of the Agency's stakeholders.'' In addition, he argues that the majority has failed to ''present any evidence that the 2020 Rule has infringed on employees' rights'' or that ''the 2020 Rule has failed to protect employees' rights as intended.''

As discussed more extensively above, we strongly disagree with our colleague's characterization of the final rule and its justification. As an initial matter, we are of the view that it was the April 2020 rule that initiated a sharp break with existing practice and ushered in a new era of instability in the area of representation-case law and procedure at issue in this rulemaking proceeding. By restoring the Board's historical blocking charge policy, pre-*Dana* voluntary-recognition bar doctrine, and firmly established recognition standards in the construction industry, the final rule will again bring the Board's representation-case procedures in alignment with what had been longstanding practices.

As for our colleague's contention that we are disturbing the settled expectations of Agency stakeholders, our review of the extensive public comments we received during this rulemaking proceeding suggests otherwise. Many commenters expressed significant frustrations with the 2020 rule and advanced persuasive policy and legal arguments for restoring prior Board law. For the reasons detailed above, we found merit in those commenters' views. While we also received numerous comments that expressed support for the 2020 rule, we are of the view that the final rule, which merely returns to the familiar standards that preceded the 2020 rule, will not prove unduly disruptive. In any case, as discussed above, we find any costs associated with changing course justified by the importance of returning to policies which better comport with the Board's statutory obligations. The Board must conduct elections under laboratory conditions and give effect to employees' free and fair designations of support for their chosen bargaining representatives.

Our dissenting colleague's argument that we present no evidence that the 2020 rule infringed on employees' rights or failed to operate as intended is incorrect. Although our justification for rescinding the 2020 rule is ultimately rooted in our judgment that it is inconsistent with the policies underlying the Act, we have also highlighted data and empirical evidence that support our decision. And despite our colleague's critique, both he and the 2020 Board principally defend the 2020

[296] Id.

[297] Comments of AFL–CIO/NABTU.

[298] Comments of AGC.

[299] *Bell Aerospace,* 416 U.S. at 294.

rule on policy grounds. In short, our colleague offers no evidence that persuades us that we must adhere to the 2020 rule or that we should reconsider our decision to adopt the final rule.

Next, our colleague criticizes the majority's policy justifications for the final rule. Our colleague argues that ''[t]he 2020 Rule put provisions in place to protect employees' choice of representative and their ability to 'voice' that choice through the established, preferred method of Board-conducted secret-ballot elections'' and that the ''removal of these protections today is directly at odds with the Board's mandate under the NLRA.'' For the reasons advanced above, we respectfully disagree with our colleague's suggestion that the April 2020 rule's provisions represented the best accommodation of the Board's statutory interests. Instead, we are of the view that the final rule does a better job balancing the Board's obligations to protect employee free choice, preserve laboratory conditions in Board-conducted elections, and resolve questions of representation fairly and expeditiously.

Relatedly, our colleague criticizes the title of the final rule on the basis that ''the 2024 Rule appears to value 'fair choice' . . . over the essential policy of employee free choice that the 2020 Rule was designed to protect.'' Our colleague's argument proves too much. We refer to both ''fair choice'' and ''free choice'' throughout the preamble to this rule. We use both phrases because we aim to capture the multiple, competing statutory interests that the Act requires the Board to consider and accommodate when developing its representation-case procedures. As we have argued, by maintaining such a narrow view as to what constitutes employee ''free choice,'' the 2020 rule gave short shrift to the Board's equally significant obligations to conduct fair elections and protect its election machinery, ensure that employees are shielded from coercion, and give effect to valid expressions of majority support for bargaining representatives. By focusing on ''fair choice'' and ''employee voice,'' we aim to place the emphasis where it belongs: on employees' fundamental Section 7 rights ''to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing'' and ''to refrain from'' any of these activities, 29 U.S.C. 157, and on the Board's obligation to determine whether 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).

Finally, our colleague observes that, following the Supreme Court's recent decision in *Loper Bright Enterprises* v. *Raimondo,*[300] ''it is an open question to what extent reviewing courts must afford deference to my colleagues' decision to repeal the 2020 Rule and promulgate a new rule in its place.'' We acknowledge our colleague's view that the effect of *Loper Bright* is an ''open question.'' *Loper Bright,* however, did not address or call into question longstanding Supreme Court precedent indicating that Congress intended to grant policymaking authority to the Board over the kinds of representation-case procedures at issue in this rulemaking proceeding.[301] Thus, for the reasons set forth in Section IV above, we believe the final rule is an appropriate exercise of the Board's delegated authority grounded in the Board's special competence when it comes to matters involving the mechanics of representation-case procedure.

VII. Dissenting View of Member Kaplan

Four years ago, the Board issued a final rule (''the 2020 Rule'') that made three well-advised changes to our rules and regulations.[302] 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*[303] and reinstated the framework the Board adopted in *Dana Corp.*[304] to afford employees an opportunity to file a petition for a secret-ballot election[305] 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.[306] 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 at 18366. In my considered judgment, the 2020 Rule has been a hard-won success, one which required the expenditure of considerable Agency resources to thoroughly consider, analyze, and respond to numerous public comments.

With their 2022 Notice of Proposed Rulemaking (''NPRM''),[307] the majority effectively announced their intention to reverse the outcome of the intensive rulemaking process that the Board had undertaken just two years earlier. And with their final rule (''the 2024 Rule''), my colleagues bring this unnecessary and counterproductive plan to fruition. In doing so, my colleagues point to no changed circumstances as justification for the reversal. To the contrary, the 2024 Rule is simply the product of a new Board majority's disagreement with the 2020 Rule, which they 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.[308]

Worst of all, the rule my colleagues adopt is clearly inferior to the 2020 Rule. My colleagues have chosen to title this rulemaking ''Fair Choice Employee Voice.'' Consistent with its name, the 2024 Rule appears to value ''fair choice''—whatever that means—over the essential policy of employee free choice that the 2020 Rule was designed

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[300] 144 S. Ct. 2244 (2024).

[301] See *NLRB* v. *Waterman Steamship Corp.,* 309 U.S. 206, 226 (1940) (''The 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.''); see also *Linden Lumber Div., Summer & Co.* v. *NLRB,* 419 U.S. 301, 309–310 (1974) (''In light of the statutory scheme and the practical administrative procedural questions involved'' in determining the Board's representation-case procedures, the Court has deferred to the Board where its policy was not ''arbitrary and capricious or an abuse of discretion.''); *NLRB* v. *Wyman-Gordon Co.,* 394 U.S. 759, 767 (1969) (''Congress granted the Board a wide discretion to ensure the fair and free choice of bargaining representatives.''); *NLRB* v. *A.J. Tower Co.,* 329 U.S. 324, 330 (1946) (observing the ''wide degree of discretion'' that Congress has bestowed the Board ''in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representative by employees'').

[302] *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.*).

[303] 357 NLRB 934 (2011).

[304] 351 NLRB 434 (2007).

[305] 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.

[306] 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 I use the shorthand ''construction industry'' and ''construction employer.''

[307] See *Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships,* 87 FR 66890 (November 4, 2022).

[308] Several commenters agree. See, *e.g.,* Comments of Coalition for a Democratic Workplace and United States Chamber of Commerce.

to protect. The majority does not say who gets to decide what constitutes a ''fair choice''—my colleagues? labor unions?—or why it comes in order of priority before ''employee voice,'' a term that I am left to assume is intended as a synonym for employee free choice. Indeed, based on the final rule, it appears that the majority's concept of ''fair choice'' amounts to little more than coded language for prioritizing over employee free choice the actions of unions exercising their ''choice'' (1) to remain as exclusive representatives of bargaining units by delaying decertification elections indefinitely while they rebuild support; (2) to become exclusive bargaining representatives by accepting voluntary recognition without affording employees the opportunity to test those unions' support in a Board-conducted election; or (3) to upgrade their Section 8(f) status obtained in representing employees in the construction industry by becoming Section 9(a) exclusive representatives without ever having to reliably prove that a majority of unit employees have chosen them to be 9(a) rather than 8(f) representatives. In my judgment, the majority's apparent conception of ''fair choice'' is hardly fair at all.

Given that my colleagues pay mere lip service to employee free choice, it is hardly a surprise that they have decided to reverse all the protections to free choice embodied in the 2020 Rule. I cannot countenance the majority's unjustified policy reversals, and, therefore, I respectfully dissent. After supplying some general background on Board representation law, I will discuss and respond to each of my colleagues' proffered rationales justifying their abandonment of the 2020 Rule and promulgation of their final rule.

Finally, I note that, in the wake of the Supreme Court's decision in *Loper Bright Enterprises* v. *Raimondo,* 144 S.Ct. 2244 (2024), it is an open question to what extent reviewing courts must afford deference to my colleagues' decision to repeal the 2020 Rule and promulgate a new rule in its place.[309] I further note, however, that I do not agree with my colleagues that the Supreme Court precedent they cite establishes that ''Congress intended to grant policymaking authority to the Board'' over the issues involved in this rulemaking. None of the cases they cite suggest that the Court has afforded the Board ''wide discretion'' to enact rules that block employees' ability to exercise their fundamental statutory right to decide for themselves whether they wish to be represented by a union.[310]

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.[311] 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 2024 Rule imprudently reverses each of these refinements, at the expense of employee free choice.[312]

Discussion

I. 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

[309] In *Loper Bright,* the Court overruled *Chevron U.S.A.* v. *Natural Resources Defense Council,* 467 U.S. 837 (1984), finding that ''[c]ourts must exercise their independent judgment'' in determining the scope of authority delegated by Congress and ''deciding whether an agency has acted within its statutory authority, as the APA requires.'' 144 S.Ct. at 2273. Although the D.C. Circuit recently found that the Board was entitled to substantial deference for adjudicative decisions, that Court had no need to reach the question of the degree of deference due when the Board engages in notice-and-comment rulemaking under the Administrative Procedure Act. See *Hospital de la Concepcion* v. *NLRB,* ____ F.4th ____, 2024 WL 3308431 *3 (D.C. Cir. July 5, 2024).

[310] See *Linden Lumber Div., Summer & Co.* v. *NLRB,* 419 U.S. 301, 309–310 (1974) (finding that the Board's decision finding that the respondent did not engage in bad faith bargaining by refusing to recognize the union based solely on authorization cards, and finding that the union should have instead petitioned for an election, was neither ''arbitrary and capricious'' nor an ''abuse of discretion''); *NLRB* v. *Wyman-Gordon Co.,* 394 U.S. 759, 767 (1969) (finding that respondent was required to comply with Board order to provide union with names and addresses of employees prior to election); *NLRB* v. *A.J. Tower Co.,* 329 U.S. 324, 330 (1946) (finding that the Board had the discretion to deny an employer's late challenge to a voter's ballot); *NLRB* v. *Waterman Steamship Corp.,* 309 U.S. 206, 226 (1940) (finding that the Board had the statutory authority to require that a respondent ensure that two competing unions had equal pre-election access to employees, where it afforded such access to one of the unions).

[311] NLRB Casehandling Manual (Part Two) Representation Proceedings.

[312] 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 2024 Rule eliminates the 2020 Rule's protections.

will be certified where unfair labor practices have interfered with the free exercise of those rights. My colleagues undo these changes and resurrect the pre-2020 Rule blocking-charge policy. Although unions undoubtedly 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,[313] 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, upon request, petitioned-for elections are initially blocked at the time the relevant unfair labor practice charge is filed and may remain blocked for months, or years, if the requested election is ever 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 nonmeritorious charges over a long period of time. This is contrary to the central policy of the Act, which is to allow employees to freely choose their bargaining representative, or to choose not to be represented at all.'').

In 2014, the Board engaged in a broad notice-and-comment rulemaking review of the then-current rules governing the representation-election process. Many, if not most, of the changes that were proposed in the February 6, 2014, notice of proposed rulemaking[314] 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.''

[313] Except for certain evidentiary requirements, discussed below, that are set forth in Sec. 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.

[314] Representation-Case Procedures, 79 FR 7318.

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.[315] 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 Section 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,[316] 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.'' [317] 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.'' [318]

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.[319] 85 FR at 18369–18370, 18399.

C. Critique of the Majority's 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, my 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. My 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 would be slow. But scrutiny and revision are justified.'' [320] 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

[315] 79 FR 7334–7335.

[316] 79 FR at 74418–74420, 74428–74429.

[317] 79 FR 74429.

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

[319] 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 I stated my 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,'' I dissented in that decision because, inter alia, my 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).

[320] Oliver Wendell Holmes, Jr., The Common Law 37 (1881).

status,'' regardless of the type of petition (RD, RC, or RM) filed.[321] 85 FR at 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.[322] 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.'' [323] 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 2024 rule undoes this necessary progress, elevating history over substance. Illustrative of this point is my colleagues' heavy reliance on the Fifth Circuit's positive perceptions of the historical policy fifty years ago.[324] 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 at 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).[325]

In returning to the ''historical'' blocking-charge policy, the majority contends that this policy is necessary to ''provide laboratory conditions for ascertaining employee choice during Board-conducted elections'' and to ''protect the Sec[tion] 7 rights of employees to freely choose whether to be represented [by a union] for purposes of collective bargaining . . . by shielding employees from having to vote, and the Board from having to conduct elections, under coercive circumstances.'' In other words, my colleagues view the mere act of *conducting* an election—in the face of unlitigated and unproven accusations [326]—as injurious to

[321] The Board has long been aware of this gamesmanship. 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 Sec. 103.20 (currently Sec. 103.20(a)) of the Board's Rules and Regulations. However, Sec. 103.20(a), standing alone, was not adequate to the task of ending gamesmanship through blocking charges. I 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 Sec. 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 factual demonstration that it was the norm for unions to file nonmeritorious blocking charges—let alone to file frivolous charges—in order to delay elections in RD or RM cases when the historical blocking charge policy was in effect.'' 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. Indeed, the majority cites data purporting to show that ''[a]pproximately 66% (86 out of 131) of the decertification petitions that were blocked in FY 2016 and FY 2017 were blocked by meritorious charges.'' But if more than one third of decertification petitions during that timeframe were blocked by nonmeritorious charges, it is difficult to conclude that the ''historical'' blocking-charge policy properly protects employees' statutory right to decide whether to become represented by, or to continue existing representation of, a union. Furthermore, my colleagues' data suggests that the percentage of petitions blocked by ''meritorious'' charges is overstated. My colleagues define ''meritorious'' charges as charges that led the General Counsel to file a complaint. However, that definition is misleading because there is no assurance those ''meritorious'' actually had merit. Just because a regional director issues a complaint does not mean that an employer violated the Act; if it did, neither agency administrative law judges nor the Board would have much to do. In addition, my colleagues' data assume that all settlement agreements, even those with non-admission clauses, render the underlying charges ''meritorious.'' See 85 FR at 18377 (observing that ''a charge is not meritorious unless admitted or so found in litigation''). For obvious reasons, including litigation costs, employers might decide to settle unfair labor practice charges for reasons unrelated to their merit. For these reasons, my colleagues' suggestion that there is insufficient evidence that nonmeritorious or 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.

[322] The majority contends 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.

Further, the majority rejects the momentum concerns occasioned by application of the pre-2020 blocking charge policy ''where blocking charges are filed by a petitioning union in the initial organizing context'' because under that policy a union has the discretion to control the timing of the election by determining whether to request a block of its election petition. This observation proves too much. Indeed, my colleagues effectively highlight the historical power imbalance between union election petitioners and individual decertification petitioners pertaining to the use of blocking charges. Thus, a union can decide whether it prefers to delay an upcoming election or to hold the election, a decision that the union will almost certainly make based on its polling of bargaining unit employees' union sentiments. Decertification petitioners, in contrast, have no such power. In any event, blocking charges are overwhelmingly filed to block RD (and RM) elections in the decertification context, not RC elections petitioned for in the initial organizing context.

[323] 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; see also *Scomas of Sausalito, LLC* v. *NLRB,* 849 F.3d at 1159 (Henderson, J., concurring) (observing that ''an employer with a good-faith doubt about a union's majority status can call for an election, . . . but it is no cure-all [given that a] union can and often does file a ULP charge—a blocking charge—to forestall or delay the election'') (internal citations and quotation marks omitted). By reinstating the pre-2020 blocking charge policy, my colleagues create an incentive for employers to withdraw recognition rather than file a RM petition vulnerable to a block, contrary to the Board's avowed preference for RM elections and its creation, in *Levitz,* of rules to incentivize employers to file RM petitions. See *Levitz,* supra.

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

[325] The majority's dismissal of these cases as ''decades old'' not only discounts the cases' precedential value, but also underlines the folly of the Board's decades-old insistence on maintaining the blocking charge policy without necessary reforms. The circuit courts' criticisms are just as valid now as when first articulated. Incidentally, my colleagues' heavy reliance on *Bishop,* supra, decided in 1974, would itself appear to be a ''decades-old'' case. The majority somehow finds this observation ''puzzling,'' so let me be more direct: they cannot reasonably dismiss the relevance of cases based on age when they principally rely on a case of similar vintage (*Bishop*).

[326] The majority faults the 2020 Rule for its purported ''skepticism toward regional director administrative determinations in this context,''

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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 Section 3(b) of the Act.'' My 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 I 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 is itself premised on nothing more than an offer of proof. That initial determination, as the 2020 Rule recognized, generally reflects no investigatory finding of merit to the unfair labor practice charge, let alone a full adjudication of the charge's merits. See 85 FR at 18377 (''A regional director typically acts on a blocking-charge request soon after the request is made, if not on the same day, and a charge that appears facially sufficient based on an offer of proof may yet be dismissed as meritless after full investigation or may ultimately be withdrawn. Meanwhile, under the [pre-2020 blocking charge] policy, an election is delayed until that happens.''). Indeed, the majority acknowledges as much in ''declin[ing a commenter's] . . . suggestion that [the Board] should deprive regional directors of the authority to delay elections based on unfair labor practice charges supported by adequate offers of proof unless the regional director has made a formal merit determination.'' The majority misfires in asserting that my concerns with certain initial administrative determinations are ''internally inconsistent'' with the continuing availability of administrative merit-determination dismissals of pertinent unfair labor practice charges after the 2020 Rule. See *Rieth-Riley,* supra, slip op. at 8, 10–11 (Members Kaplan and Ring, dissenting) (agreeing with the majority that merit-determination dismissals continue to be available after the 2020 Rule ''at least where . . . the regional director has found merit to unfair labor practice charges and issued a complaint before the petition was filed,'' and a ''valid causal nexus'' has been found between the alleged unfair labor practices and employee disaffection in a hearing, as required by *Saint Gobain Abrasives, Inc.,* 342 NLRB 434 (2004)). In context, the 2020 Rule expressed concern with the occurrence of ''indefinite delay because of a *discretionary* administrative determination regarding the *potential* impact of the *alleged* misconduct on employees' ability to cast a free and uncoerced vote on the question of representation.'' 85 FR at 18367 (emphasis added). The problem is that the pre-2020 blocking charge policy stymies employee free choice by permitting an election block based on the ''discretionary'' evaluation of a charging party's offer of proof regarding the ''potential impact'' of misconduct that has been ''alleged'' but not found through either an investigation or an adjudication. An administrative determination of merit after an investigation carries more weight that an initial administrative evaluation of an offer of proof, albeit still less weight than a final Board determination on the merits. And, as discussed, the reliance on offers of proof and witness availability requirements alone are insufficient to curb known union abuse of blocking charges. Meanwhile, the majority falsely quotes my position as purportedly being skeptical of a regional director's ''mere administrative determination,'' as neither the 2020 Rule nor the dissent from the 2022 NPRM uses that phrase. It is easy for my colleagues to find an ''inconsistency'' when they selectively quote and outright misquote the 2020 Rule without regard for context.

In a similar vein, my colleagues strain to compare an administrative determination to issue a complaint in an unfair labor practice case with ''Board law permitting an employer to withdraw recognition from an incumbent union that had won employee free choice. This supposed imperative of ''shielding employees'' from voting *at all* under what the majority deems ''coercive circumstances''—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 final rule. I disagree that the mere possibility that a choice may be compromised justifies blocking employees from exercising their right to make that choice altogether.

I 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 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 untrammeled 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 untrammeled *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.[327] Assuming unfair labor

a Board-conducted election based merely on the General Counsel's administrative determination that a majority of the unit no longer desire union representation.'' The majority compares incommensurables. These two types of administrative determinations are not remotely the same, as determining whether there is sufficient evidence that an unfair labor practice was committed entails a level of complexity and an exercise of judgment—as is evident from my colleagues' own description of a regional investigation—simply not present in a tally of union supporters within a bargaining unit.

Ultimately, in my 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.

[327] My 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 conditions that interfere with employee free choice,'' which, they say, ''imposes unnecessary costs on the parties and the Board.'' Consistent with the express language of the 2020 Rule, I consider ''any consequential costs [to be] worth the benefits secured'' of safeguarding employee free choice by conducting petitioned-for elections. 85 FR at 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 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. Meanwhile, it warrants consideration that just last year, my colleagues essentially reinstated the 2014 Election Rule (79 FR 74308), which implemented a variety of amendments to the Board's representation procedures designed to speed up elections in the initial organizing context. *Representation-Case Procedures,* 88 FR 58076 (2023). Under the reinstated rules, the filing of a request for review of a decision and direction of election is routinely postponed until after the election has been held. If, for example, a request for review asserts that an election had been directed in an inappropriate unit, and the Board agrees, the election would have to be run again (unless the union disclaims interest), thereby ''impos[ing] unnecessary costs.''

The majority baselessly asserts that the 2020 Rule ''*appeared to suggest* that the pre-April 2020 blocking charge policy impeded settlement and that the policy should therefore be eliminated to promote settlement of blocking charges.'' (emphasis added). In fact, the 2020 Rule merely summarized a single comment as follows: ''[A]s one commenter notes, impoundment 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

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 pre-2020 blocking charge policy being reinstated will 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 approach, employees may be deprived of the opportunity to register any choice at all. The majority ''recognize[s] that the pre-April 2020 blocking charge policy can delay elections,'' including when nonmeritorious charges are filed with a request to block, but nevertheless asserts that ''the benefits of permitting regional directors to block elections . . . 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 ''coercive conditions,'' *every* election should be blocked whenever a properly supported blocking charge is filed, even though this means that elections will be blocked by nonmeritorious charges as well. This is rather like saying that all baseball games should be delayed indefinitely because some games, if played, would be called on account of rain. I believe the game should proceed and would therefore 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. The majority further asserts that the pre-2020 blocking charge policy ''preserv[es] employee free choice'' by eventually permitting employees to vote inasmuch as ''the regional director [is] to resume processing the representation petition to an election if the blocking charge [is] found to lack merit.'' But this is no answer to the very real problem of unions taking unfair advantage of the blocking charge policy to file successive charges, thereby creating successive blocks that continue to delay employees' ability to exercise their Section 7 rights. Without ascribing motives to my colleagues, I cannot avoid observing that the pre-2020 blocking charge policy to which they return 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.

Moreover, 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 at 18378. The effectiveness of these procedures cannot be attacked without calling into question decades of Board decisions. Yet my colleagues do exactly that.[328] 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.[329] That has not been the case in many rerun elections where employees have voted for union representation in a second or even third election.[330] 85 FR at 18378. I therefore

further frustrates and confuses employees waiting, possibly for an extended post-election period, to learn the results of the election.'' 85 FR at 18380 (emphasis added). At no point does the 2020 Rule endorse or adopt this commenter's view of settlement. Accordingly, my colleagues needlessly spill considerable ink setting up and knocking down straw men in this regard.

[328] In particular, my colleagues claim that ''when the Board sets aside an election because of employer unfair labor practice conduct, it does not erase the memory of that election outcome and the illegalities that led to it being set aside,'' and, citing *NLRB* v. *Savair Mfg. Co.,* 414 U.S. at 277–278, they further claim that ''employees who voted against union representation under the influence of the employer's coercion may well be unlikely to change their votes in the rerun election even if they vote in the second election.'' In other words, my colleagues ostensibly believe—at least for purposes of this rulemaking—that the Board's unfair labor practice remedies are wholly inadequate to the task of restoring the necessary laboratory conditions to hold a free and fair rerun election where pertinent unfair labor practices caused an initial election to be set aside despite eight decades of experience to the contrary. Meanwhile, they ignore the reality that votes against representation by a particular union may have nothing to do with them having been cast ''under coercive conditions'' and everything to do with dissatisfaction with the union.

Compounding the error is the majority's misplaced reliance on *Savair.* There, the Court observed that employees who had signed ''recognition slips'' amounting to public ''endorsements'' of the union in exchange for the union's waiver of initiation fees may ''feel obliged to carry through on their stated intention to support the union.'' Id. In stark contrast to the situation in *Savair,* the majority here posits that individual employees who vote in an initial *secret ballot* election ''may well be unlikely'' to later change their votes in a rerun *secret ballot* election even without individual employees' union sentiments ever being revealed (and presumably without a union attempting to buy their public endorsement). Naturally, opening and counting ballots reveals only *collective* union sentiment at a moment in time, not *individual* union sentiments. The majority seems to similarly misapprehend the nature of a secret ballot election in contending that employees who vote in the union's favor in a rerun election might ''risk incurring the wrath of their employer.'' Again, individual employee sentiments on union representation are not revealed during a tally of *secret* ballots.

[329] Indeed, longstanding judicial precedent holds that the Board's traditional remedies are perfectly capable of dissipating the coercive effects of unfair labor practices so as to permit a free and fair election in all but extreme cases. See, *e.g., Somerset Welding & Steel* v. *NLRB,* 987 F.2d 777, 779, 782 (D.C. Cir. 1993) (disapproving ''the Board's apparent partiality for bargaining orders'' and holding that '' 'where a fair rerun election is possible, it must be held' '' (quoting *Avecor, Inc.* v. *NLRB,* 931 F.2d 924, 934 (D.C. Cir. 1991)); *M.P.C. Plating, Inc.* v. *NLRB,* 912 F.2d 883, 888 (6th Cir. 1990) (stating that ''the election process is the preferred method'' and a bargaining order is warranted only in ''extreme cases''); *Rapid Manufacturing Co.* v. *NLRB,* 612 F.2d 144, 151 (3d Cir. 1979) (denying enforcement of bargaining order where record failed to show that possibility of ensuring a fair election was slight); *NLRB* v. *Pilgrim Foods, Inc.,* 591 F.2d 110, 120 (1st Cir. 1978) (denying enforcement of bargaining order where record did not show that the company would ignore the Board's traditional cease-and-desist order); *First Lakewood Associates* v. *NLRB,* 582 F.2d 416, 424 (7th Cir. 1978) (denying enforcement of bargaining order because the impact of the employer's violations ''will have dissipated prior to the next election, especially if the Board's ordinary remedies of a cease and desist order and a posted notice intervene''); *NLRB* v. *Ship Shape Maintenance Co.,* 474 F.2d 434, 442 (D.C. Cir. 1972) (denying enforcement of bargaining order because even though the unfair labor practice ''rendered the meaningful holding of that particular election impossible . . . . this does not mean that the effects of this unfair labor practice were sufficiently pervasive and lingering to warrant a determination that a subsequent election could not be held which would be reasonably free from the adverse influence of the Company's unlawful action''). Accordingly, there is no valid reason for my colleagues to assume that the Board's traditional remedies for pertinent unfair labor practices will necessarily be inadequate to ensure a fair rerun election in those cases where an initial election was held but later set aside under the 2020 Rule.

[330] 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. For instance, in each of the following cases, the employer violated Sec. 8(a)(1) or Sec. 8(a)(3) and (1), the union lost the initial election, and records

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disagree with my colleagues that the mere filing of an unfair labor practice charge alleging conduct that, if proven, would create a ''coercive atmosphere'' 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.[331]

Relatedly, the majority denies the reality that the Board's ruling in *Rieth-Riley Construction Co.,* 371 NLRB No. 109 (2022)—preserving the use by regional directors of merit-determination dismissals of election petitions in the face of pertinent unfair labor practices—undermines the justification for returning to their favored ''historical'' blocking charge policy. Citing *Rieth-Riley,* my colleagues stress that the merit-determination dismissal process is an ''aspect of the blocking charge policy'' that applies exclusively to Type II charges, *i.e.,* those that are ''inherently inconsistent with the petition itself.'' But they fail to acknowledge that even were one to generally accept their rationale for returning to the pre-2020 blocking charge policy—and I do not—there would be no need for that policy to be applied to Type II charges given that merit-determination dismissals continue to be available alongside the employee free choice protections embodied in the 2020 Rule. Indeed, the 2020 Rule already provides a vote-and-impound procedure for pertinent unfair labor practice charges and accompanying requests to block (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. In these circumstances, the election is held and the ballots are be impounded for up to 60 days from the conclusion of the election (or if a complaint issues during the 60-day period, until there is a final determination regarding the complaint allegation and its effect, if any, on the election petition).

Significantly, there is no indication that the majority has engaged in reasoned decision-making by seriously considering alternatives to the pre-2020 blocking charge policy. Given the protections afforded by the 2020 Rule and merit-determination dismissal procedure taken together, as well as the established fact that unions have frequently abused the pre-2020 blocking charge policy to indefinitely delay decertification elections for both types of petitions, the majority—in reinstating that policy—could have modified it to, for instance, include durational limits on an election block. Specifically, the majority might limit the duration of a Type II charge's block of an election to 60 days, with regional directors instructed to accord such cases investigative priority, and with the possibility for an extension of the block beyond 60 days where the employer refuses to cooperate with the Region's investigation. But unfortunately, my colleagues show no interest in cabining the duration of a block for any type of election petition, or in adopting any other reform alternative for that matter. Rather, they assure us that a wholesale return to the pre-2020 blocking charge policy is necessary and sufficient, even for Type II charges, because the regional director may not get around to investigating the charge in time to make a merit determination and consider dismissal before being required to hold an election under the 2020 Rule. This is no answer. Again, the majority could modify the pre-2020 blocking charge policy in some fashion, such as by including durational limits, to prevent abuse of the process rather than give

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maintained in the Board's NxGen case-processing system reveal that the union won the second election: *Kumho Tires Georgia,* 370 NLRB No. 32 (2020); *Union Tank Car Co.,* 369 NLRB No. 120 (2020); *Pacific Coast Sightseeing Tours & Charters, Inc.,* 365 NLRB No. 131 (2017); *First Student, Inc.,* 359 NLRB 1090 (2013). The union did so even where the employer had committed extensive and egregious unfair labor practices. See *Kumho Tires Georgia* (finding that employer repeatedly interrogated employees, repeatedly threatened loss of customers, loss of jobs, and plant closure, and threatened loss of benefits, transfer of work, and that electing the union would be an exercise in futility). Plainly then, the Board's traditional remedies are capable of rectifying the harm caused to the election process by pertinent unfair labor practices such that unions can and do win rerun elections.

[331] 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). My colleagues claim to have discovered an incongruity between holding ''elections in virtually all cases (no matter the severity of the employer's unfair labor practices) because of the availability of a rerun election'' and ''the Supreme Court's approval in *Gissel* of the Board's practice of *withholding* an election or rerun election and issuing a bargaining order'' in certain cases involving serious unfair labor practices. 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 at 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.''). Importantly, the fact that, in rare cases, employee free choice rights may be better protected by a bargaining order than by a rerun election does not justify the majority's general denial of the right to a prompt election to employees filing decertification petitions.

Finally, my colleagues claim that ''under the Board's limited remedial authority the Board can (absent a showing of a card majority) only conduct a second election after the unfair labor practice conduct—that interfered with the initial election—has been remedied certainly does not mean that requiring employees to vote under coercive conditions and then giving them a second chance to vote puts the employees and the labor organization at issue in the position that most closely approximates the position they would have occupied had no party committed unfair labor practices.'' The majority also claims that ''a return to the pre-April 2020 status quo better protects employee rights by putting the unit employees in a position that more closely approximates the position that the unit employees would have been in had no party committed unfair labor practices interfering with employee free choice.'' These claims rest on the faulty premise that a rerun election is a remedy. Plainly it is not. Whereas the Board *orders* remedies, it merely *directs* rerun elections after the appropriate remedies have been applied. It is not the purpose of a rerun election to put employees in the position they would have been in had no unfair practices ever been committed. Rather, that remedial purpose is accomplished by the traditional remedies the Board orders before the rerun election is directed.

In this connection, I reject my colleagues' extraordinary claim that one such traditional remedy, ''the posting of the remedial notice[,] reminds employees of those illegalities.'' This suggestion is absurd on its face. Posted remedial notices inform employees that a respondent's actions were found to be unlawful and that there were consequences for its unlawful actions. Posted remedial notices also inform employees that the unlawful actions have been remedied and reassures employees that neither those nor ''like or related'' unlawful actions will be committed in the future. Both components have long been viewed as sufficient to cleanse the atmosphere of the effects of the unfair labor practices before directing a rerun election. In fact, if my colleagues are actually worried about some negative lingering effect of posting remedial notices, I am baffled as to why they continue to order them in every case in which the Board finds that the Act has been violated. Or, for that matter, why they cite no Board decision voicing a similar concern about posting remedial notices. The answer, of course, is that my colleagues cannot actually be concerned about this.

Despite my colleagues' suggestions to the contrary, the 2020 Rule has protected employee free choice in cases of relevant, meritorious unfair labor practices through the Board's ordering and applying traditional remedies to cleanse the atmosphere from the effects of those unfair labor practices and to restore laboratory conditions before directing a rerun election. In contrast, the majority's return to the ''historical'' blocking charge policy better protects the choice of unions to remain in place as the exclusive representatives of bargaining units irrespective of unit employees' wishes.

unions and regional directors carte blanche to indefinitely delay elections based on blocking charges. Lastly, as discussed, the majority misses the mark in claiming that the offer of proof and witness availability requirements—which the 2020 Rule retained—are sufficient, standing alone, to curb any abuse of the blocking charge policy. Professor Hirsch—who has suggested the use of durational limits for blocking charges, among other reform alternatives to curb abuse—did not think so,[332] and neither do I.

The majority additionally claims that ''opening and counting ballots, yet delaying the certification of the results, might . . . frustrate employees who must await the outcome of the Board's investigation of the charge to learn whether the results of the election will be certified and, at worst, actively mislead them by conveying a materially false impression of the level of union support.'' According to my colleagues, application of the 2020 Rule may also cause employees to feel frustration at being ''required to vote under coercive circumstances.'' The reason for my colleagues' views is easy to understand; apparently, they have less faith in employees' intelligence than I do. They can rest assured that unions will be highly motivated to explain to employees why election results have not been certified and should be disregarded. Moreover, even where a regional director makes an 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 ''vote[d] under coercive circumstances.'' See 85 FR at 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 ''vote[d] under coercive circumstances,'' and it is entirely appropriate that employees promptly learn the election results in that case. Additionally, my 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 preserves employee free choice in representation cases,'' 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, my colleagues discount the potential for blocking charges to cause *years* of delay, during which extensive employee turnover is all too likely.[333]

Taking the debate from the obvious to the absurd, the majority faults the 2020 Rule for failing to ''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.'' Of course, this argument misses the point entirely. The 2020 Rule is not based on eliminating this risk. Rather, it is based, in part, on mitigating the risk of turnover where reasonably possible, consistent with ensuring that election results are not certified where the Board determines that the employer committed pertinent unfair labor practices that affected the outcome. Accordingly, 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. Crucially, the 2020 Rule facilitates prompt elections while safeguarding employee free choice. Indeed, a prompt opportunity for employees to vote in a Board election *itself* safeguards employee free choice. 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 my colleagues' estimation, the ''predicable results'' of such unlawful conduct will be (1) the expenditure of unions' resources on elections that ''will not reflect the free choice of the employees,'' and (2) ''a sense among employees that seeking to exercise their Section 7 rights is futile.'' This fallacious parade of horribles 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.

[332] Jeffrey M. Hirsch, *NLRB Elections: Ambush or Anticlimax?,* 64 Emory L.J. 1647, 1664 (2015) (observing that ''[t]he Board's new [2014] 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.'').

[333] As noted above, just last year my colleagues essentially reinstated the 2014 Election Rule (79 FR 74308), which implemented a variety of amendments to the Board's representation procedures designed to speed up elections in the initial organizing context. *Representation-Case Procedures,* 88 FR 58076 (2023). It is striking that my colleagues made it a priority to ensure that initial representation elections—which unions typically favor—will be held days or weeks sooner, but then found it necessary to promulgate blocking charge rules that, based on past experience, will have the result of delaying decertification elections—which unions typically disfavor—for months, if not *years.*

In any event, such employers would themselves presumably have to commit resources to an election. Meanwhile, as employers are undoubtedly aware, any such gamesmanship would be counterproductive given that, under the 2020 Rule, if an employer commits one or more unfair labor practices that would require setting aside the election, the results of that election would not be certified. In this connection, any rational employer will be equally disincentivized from committing unfair labor practices under either the 2020 Rule or the pre-2020 blocking-charge policy—under the former, because doing so will prevent the results of the election from being given effect, and under the latter, because doing so will prevent the election from taking place. Accordingly, under either scenario, the employer is discouraged from committing unfair labor practices. Additionally, I 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 my colleagues, does not merit curative action unless it is shown to be ''the norm.''

Finally, my colleagues discuss 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 at 18377. Further, the 2020 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. I agree. As the majority acknowledges, the Board is free to ''make a policy choice that does not depend on statistical analysis.'' 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 now.

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 effectively rescinds them. I cannot join them in taking this step.

II. 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. I believe this aspect of the 2020 Rule appropriately balances the sometimes-competing policies of labor-relations stability and employee free choice. My colleagues throw out this valuable framework. Because their final rule strikes the wrong balance, at the expense of employee free choice, I 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.[334]

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,'' [335] 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),[336] 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,[337] 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.[338]

[334] 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.

[335] Id. at 439.

[336] 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.

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

[338] 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).

Then-Member Hayes dissented in *Lamons Gasket,*[339] arguing that *Dana* was correctly decided for the policy reasons stated there, most importantly the statutory preference for a secret-ballot Board election to resolve questions of representation under Section 9 of the Act. He noted that the *Lamons Gasket* majority's efforts to secure empirical evidence of *Dana's* shortcomings by inviting briefs from the parties and amici ''yielded a goose egg.'' 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,[340] 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 at 18370, 18399–18400.

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

The majority now rescinds current Section 103.21 of the Board's Rules and Regulations—adopted in the 2020 Rule—and returns to (and codifies) the Board's recognition-bar jurisprudence 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. My 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, my 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 ''the Board's administrative experience'' shows that ''employees almost never reject the recognized union,'' and they characterize the 2020 Rule's notice-and-election procedure as ''serv[ing] no clear legitimate purpose'' and as ''a waste of the Board's resources, as well as those of the employer and the union, even apart from the procedure's harm to the collective-bargaining process.'' The majority defines this supposed ''harm to the collective-bargaining process'' as ''the potential harm to effective collective bargaining'' and ''a reasonable tendency to interfere with effective collective bargaining.'' Accordingly, my colleagues claim, the notice-and-election procedure ''is not necessary to preserve employee free choice.'' As I will explain, however, because each of these rationales is easily rebutted, my colleagues' reliance on these conclusions fails to demonstrate reasoned decision-making.[341]

To begin, there is no merit to the majority's supposedly data-driven argument that the 2020 Rule ''is not necessary to preserve employee free choice'' inasmuch as successful electoral overrides of voluntary recognition appear rare. Congress created the Act, as well as the Board, in significant part, to protect all employees' statutory rights to choose whether to be represented by a particular union, irrespective of whether they choose to exercise those rights. In contrast, my colleagues' final rule renders conclusive voluntary recognitions of unions without the right to a Board-conducted election—in which all employees may participate—to test the adequacy of union support and thereby ensure employee free choice. Even putting aside that fundamental point, my colleagues fail to say how many electorally overturned voluntary recognitions it would take to warrant retaining the modified *Dana* notice-and-election framework. Might a five percent override rate do so in my colleagues' view? How about ten percent? They cannot answer this question because, in reality, all employees should have the right to test the validity of a voluntary recognition.[342] The Board need not and

[339] Id. at 748–754.

[340] 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).

[341] In the 2022 notice of proposed rulemaking, the majority claimed that the notice requirement of the 2020 Rule ''invites'' the filing of an election petition, thereby compromising the Board's ''neutrality.'' See 87 FR at 66910. Despite acknowledging that several commenters continue to advance such arguments, my colleagues appear to have largely abandoned them, stating that they ''need not and do not rely on these arguments'' and expressly refraining from taking a position on the *Lamons Gasket* Board majority's embrace of ''neutrality'' arguments.

[342] My colleagues cite their recent decision in *Cemex Construction Materials, Pacific, LLC,* 372 NLRB No. 130 (2023), the holding of which they summarize as follows: ''an employer violates Sec. 8(a)(5) and (1) by refusing to recognize, upon request, a union that has been designated as the

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 point of fact, the majority's attempt to justify the elimination of the employee protections put into effect in the 2020 Rule by characterizing the ''error'' rate as low actually undermines their position. Certainly, it undermines their concern that the modified *Dana* framework undermines either the voluntary-recognition process or the statutory policies the majority discusses as supporting it (*e.g.,* ''effective collective bargaining'' and ''bargaining stability'' in labor relations).[343] Furthermore, if the modified *Dana* procedures set forth in the 2020 Rule so rarely result in a change in representation, one is left to question why the significant amount of resources spent on the instant rulemaking was necessary in the first place.[344]

Additionally, I 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 at 18383.[345] Indeed, the majority acknowledged in its 2022 notice of proposed rulemaking 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.'' 87 FR at 66909. My colleagues state that they ''disagree with the policy choice reflected by the 2020 rule . . . [and] make a different policy choice here.''

My colleagues also attempt to justify their action by claiming that the modified *Dana* framework promulgated in the 2020 Rule is a ''a waste of the Board's resources, as well as those of the employer and the union.'' This assertion is clearly without merit. There is hardly a more important use of the Board's resources than to protect employees' fundamental statutory rights.[346] Further, it is not clear how simply posting a *Dana* notice imposes a significant burden on Board resources; any purported burden arises only when employees choose to exercise their right to confirm that the majority of the unit actually wishes to be represented by the voluntarily recognized union.[347]

Sec. 9(a) representative by the majority of employees in an appropriate unit unless the employer promptly files an RM petition pursuant to Sec. 9(c)(1)(B) of the Act *to test the union's majority status* or the appropriateness of the unit, assuming that the union has not already filed an RC petition pursuant to Sec. 9(c)(1)(A).'' (emphasis added). In other words, my colleagues are comfortable compelling an employer to either ''voluntarily'' recognize a union or file an election petition ''to test the union's majority status,'' yet they are decidedly uncomfortable with the concept of allowing the *employees* on whom such ''voluntary'' recognition is imposed to themselves file an election petition ''to test the union's majority status'' once such recognition has been extended. This incongruity in the majority's approach to *establishing* versus *preserving* an employer's recognition of a union is impossible to miss.

[343] At least one commenter agrees. See Comment of Coalition for a Democratic Workplace. No matter, according to the majority, because ''even *potential* obstacles to productive bargaining should be avoided.'' (emphasis added). I happen to think that the Board's rulemaking resources would be better spent solving *actual,* rather than ''potential,'' problems. Meanwhile, the majority's suggestion that any argument based on a low error rate ''that the procedure does not, in fact, cast doubt on the union's status'' somehow ''would confirm that the procedure is only a formality'' is plainly a non sequitur. Contrary to my colleagues, it does not follow from a lack of a specific harm being caused by the notice-and-election procedure that no benefit from that procedure may obtain. Indeed, as noted, the procedure promotes and protects employee free choice by allowing employees to test the validity of a particular voluntary recognition of a union by an employer to ensure that the recognition extended is adequately supported.

[344] At least one commenter agrees. See Comment of Coalition for a Democratic Workplace.

[345] I disagree with my colleagues' suggestion that due to ''intervening events or . . . changing minds,'' ''the fact that an election *following* voluntary recognition results in the union's defeat does not necessarily demonstrate that the union lacked reliable majority support *at the time of recognition.*'' 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); *Struthurs-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, my 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). Likewise, the majority's unrealistic hypothetical scenario comparing ''two free and fair elections held in quick succession,'' but yielding different results, to testing the validity of a voluntary recognition with a subsequent election misses the mark. Even accepting the puerile premise of this two-election hypothetical, my colleagues falsely equate their imagined scenario with the real collection of authorization cards. As I have explained and the Supreme Court has recognized, a Board-conducted election is different from and superior to card collection.

Finally, my colleagues falsely equate the certification bar to the recognition bar, particularly inasmuch under certain circumstances, both bars may begin run from the first bargaining session. But it must be emphasized that while the recognition bar attaches when recognition is extended (typically based on authorization cards), 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. Accordingly, the recognition bar—coupled with the contract bar—may preclude a secret-ballot election for more than four years. In contrast, the certification bar arises from the superior Board-conducted election process and the bar period ordinarily begins to run when the certification issues. Only when the employer commits a technical Sec. 8(a)(5) refusal-to-bargain violation to test the certification is the start of the bar period delayed until the parties begin bargaining. See *Volkswagen Group of America Chattanooga Operations, LLC,* 367 NLRB No. 138, slip op. at 1 (2019). As such, in the ordinary case, the recognition bar has the potential to preclude an election for longer than does the certification bar under similar circumstances.

[346] By contrast, my colleagues seem unbothered by ''wasting'' agency resources on remedial measures that have never before been deemed necessary by the Board. See, *e.g., Noah's Ark Processors, LLC,* 372 NLRB No. 80, slip op. at 17 (2023) (Member Kaplan, dissenting) (pointing out that the majority's novel visitation remedy, which in that case required regional personnel from Overland Park, Kansas, to travel to Hastings, Nebraska—a 622 mile round-trip—was a waste of taxpayers' money and an ''unnecessary expenditure of Agency resources''), enfd. 98 F.4th 896 (8th Cir. 2024) (enforcing the Board's novel remedies on procedural grounds without reaching their merits).

[347] My colleagues quote my position questioning whether ''simply posting a *Dana* notice imposes a significant burden on Board resources'' before inexplicably and falsely asserting that I ''omit[ ] reference to the second part of the procedure, which may require the Board to conduct an election.'' In fact, the second clause of the sentence from which they quote expressly recognizes that ''any purported burden arises only when employees choose to exercise their right to confirm that the majority of the unit actually wishes to be represented by the voluntarily recognized union,'' *i.e.,* when employees petition for an election, an occurrence that the majority contends is rare in any event.

Furthermore, my colleagues falsely accuse me of holding the ''tacit view that it better protects employees' fundamental statutory rights to maximize the opportunity for a minority of unit employees to overcome the prior selection of a union by the majority of employees.'' My colleagues baselessly assume that any election testing the validity of a voluntary recognition with the preferred method of a Board-conducted election—which again, they say is rare—will naturally result in a contrary determination by a minority of the bargaining unit. In doing so, they once again call into question the Board's time-tested electoral machinery. The scenario they describe—a minority of eligible voters determining an electoral outcome due to potentially low turnout—could occur in any Board-conducted election. Contrary to the majority, this possibility inheres in the practice of workplace democracy under the Act and, when it occurs, it

Continued

Finally, my colleagues' attempt to justify their action by referencing union and employer resources is astonishing. The NRLA protects the rights of employees, not employers or unions. Any suggestion that the Board should place such considerable weight on party resource expenditures in rescinding rules that serve to protect employees' fundamental statutory rights is inconsistent with congressional intent.

The 2020 Rule clearly acknowledged that, ''voluntary recognition and voluntary-recognition agreements are lawful.[348] But, as the Rule further explained, 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.'' 85 FR at 18381. Therefore, ''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, my colleagues conceded in their notice of proposed rulemaking ''the implicit statutory preference for Board elections (insofar as certain benefits are conferred only on certified unions),'' [349] a concession they are careful not to make in their final rule. 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.[350] 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.[351] In the end, protecting employee free choice, as the 2020 Rule does, is among the Board's core responsibilities under the Act, and as such, the notion that doing so is ''a waste of the Board's resources'' seriously misapprehends the Board's role and how its resources necessarily serve that role.

Finally, my colleagues claim that the 2020 Rule raises the specter of ''harm to the collective-bargaining process,'' which they define as ''the *potential* harm to *effective* collective bargaining'' and ''a reasonable tendency to interfere with *effective* collective bargaining,'' and which they believe to be inconsistent with the principle that ''a rightfully established bargaining relationship must be given a fair chance to succeed before being tested,'' which is the central rationale underlying other Board bar doctrines that protect new bargaining relationships. (emphasis added). As a result, my colleagues claim, the 2020 Rule undermines the ''bargaining 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, ''employees almost never reject the recognized union,'' it is difficult to ascertain how the 2020 Rule ''discard[s] the critical role of bargaining stability in the administration of the Act.'' The majority cannot have it both ways. If Section 103.21's notice-and-election 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.[352]

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. Implicitly acknowledging this dearth of evidence, the majority ''invite[d] public comment on the effect of Section 103.21 on collective-bargaining negotiations.'' 87 FR at 66910 fn. 127. Unfortunately for my colleagues, supportive commenters were unable to supply them with the necessary evidence to support their theory. Indeed, they necessarily acknowledge that commenters in support of rescinding Section 103.21 ''d[id] not bring significant empirical evidence to bear'' on the question of its effect on collective bargaining. Instead, the majority reports that these commenters merely offer the Board their ''logic and experience'' suggesting that ''bargaining will be harmed,'' and my colleagues are all too ready to take their word for it in making the ''policy choice'' of rescission. Consequently, the majority resorts to rank speculation that employers ''*might* well refuse to invest the same time and effort into bargaining if the bargaining relationship might soon be terminated,'' and that unions ''*might* feel pressure to quickly produce positive results in bargaining to avoid losing support among employees—making a mutually satisfactory agreement with the employer more difficult and increasing the likelihood of labor disputes,'' if the voluntary recognition bar is delayed by the 2020 Rule's 45-day window. (emphasis added). Ultimately, however, my colleagues ''acknowledge that there likely can be no more than anecdotal evidence that the notice-and-election procedure, in fact, interferes with effective collective bargaining.'' Accordingly, they are content to eliminate the notice-and-election procedure in order to eliminate what they describe as the ''the *potential* harm to effective collective bargaining'' because, as they contend, ''even *potential* obstacles to productive bargaining should be avoided.'' (emphasis added). In my view, disturbing the status quo and rescinding an essential legal provision like Section 103.21 should be based on more than imagined harms—*i.e.,* those harms that ''might'' have the ''potential'' to occur—

does not automatically invalidate the results of Board elections conducted under laboratory conditions with the attendant procedural safeguards.

[348] Id. at 18381 and cases cited.

[349] 87 FR at 66911.

[350] 85 FR at 18381.

[351] Despite claiming that the Supreme Court in *Gissel* generally ''rejected the argument that union-authorization cards could not properly establish a union's majority support union-authorization cards constitute,'' the majority concedes, as it must, that the Court's holding pertaining to union-authorization cards arose ''in the context of issuing bargaining orders.'' Accordingly, the Court did not reach this broader 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.

[352] 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 employees,'' this is ''a reasonable trade-off for protecting employees' ability to express their views in a secret-ballot election.'' 85 FR at 18384–18385.

absent any concrete evidence that they have actually occurred in the *years* that the notice-and-election procedure has been in effect.

III. 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.[353] The 2020 Rule overruled *Staunton Fuel* for representation-case purposes, and the majority now reinstates it along with its procedural complement, *Casale Industries.*[354] This unfortunate result is unsurprising, since the majority recently reaffirmed *Staunton Fuel* for unfair-labor-practice-case purposes.[355] Nevertheless, the Court of Appeals for the District of Columbia Circuit has rejected *Staunton Fuel,* repeatedly and emphatically.[356] I agree with the D.C. Circuit's criticisms of that decision, and I 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 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); *Ruttmann Construction Co.,* 191 NLRB 701 (1971). As subsequently described in *John Deklewa & Sons,* 282 NLRB 1375, 1378 (1987), enfd. sub nom. *Iron Workers Local 3* v. *NLRB,* 843 F.2d 770 (3d Cir. 1988), *R.J. Smith* and *Ruttmann* viewed a Section 8(f) agreement as '' 'a preliminary step that contemplates further action for the development of a full bargaining relationship' '' (quoting from *Ruttmann,* 191 NLRB at 702). This preliminary 8(f) relationship/agreement could convert to a 9(a) relationship/agreement, within a few days or years later, if the union could show that it had achieved majority support among bargaining-unit employees during a contract term. ''The achievement of majority support required no notice, no simultaneous union claim of majority, and no assent by the employer to complete the conversion process.'' Id. Proof of majority support sufficient to trigger conversion included ''the presence of an enforced union-security clause, actual union membership of a majority of unit employees, as well as referrals from an exclusive hiring hall.'' Id. The duration and scope of the post-conversion contract's applicability under Section 9(a) would vary, depending upon the scope of the appropriate unit (single or multiemployer) and the employer's hiring practices (project-by-project or permanent and stable workforce). Id. at 1379.

The *Deklewa* Board made fundamental changes in the law governing construction-industry bargaining relationships and set forth new principles that are relevant to 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

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

[354] 311 NLRB 951 (1993).

[355] *Enright Seeding,* supra.

[356] 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).

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).[357]

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,[358] 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 Section 9(a)'s emphasis on employee choice with Section 8(f)'s recognition of the practical realities of the construction industry.'' Id. at 719. Additionally, the Board stated that under the *Staunton Fuel* test, ''[c]onstruction unions and employers will be able to establish 9(a) bargaining relationships easily and unmistakably where they seek to do so.'' 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 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).[359]

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 Section 8(f) exception is meant not to cede all employee choice to the employer or union, but to provide employees in the inconstant and fluid construction and building industries some opportunity for collective representation . . . . [I]t is not meant to force the employees' choices any further than the statutory scheme allows.'' Id. at 1039. Accordingly, ''[b]ecause the statutory objective is to ensure that only unions chosen by a majority of employees enjoy Section 9(a)'s enhanced protections, the Board must faithfully police the presumption of Section 8(f) status and the strict burden of proof to overcome it. Specifically, the Board must demand clear evidence that the employees—not the union and not the employer—have independently chosen to transition away from a Section 8(f) pre-hire arrangement by affirmatively choosing a union as their Section 9(a) representative.'' 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

[357] 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 Section 8(f).'' *In re Frank W. Schaefer, Inc.,* Case 9–CA–25539, 1989 WL 241614.

[358] *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).

[359] Then-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.

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*[360] in relevant part, ''declin[ing] to adopt a Section 10(b) 6-month limitation on challenging a construction-industry union's majority status by filing a petition for a Board election.'' 85 FR at 18370, 18390–18391, 18400.

C. Critique of the Majority's Rescission of Section 103.22

The majority fully rescinds Section 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 is 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. My colleagues' reasons for doing so, discussed below, lack merit and do not warrant revisiting the sound policy of the 2020 Rule.

In the 2022 notice of proposed rulemaking, the majority principally complained 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.'' 87 FR at 66912. In their final rule, my colleagues reiterate their claim that the overruling of *Casale* was effectuated ''without having provided advance notice to the public'' such that ''interested parties had no reason to know to provide comments on the possibility of *Casale* being overruled.'' First of all, my 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'' and that ''interested parties had no reason to know to provide comments'' on this issue. In fact, this issue was squarely raised in public comments requesting that the Board ''incorporate [in the final rule] a Section 10(b) 6-month limitation for challenging a construction-industry union's majority status.'' 85 FR at 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. In the 2020 Rule, the Board explained its reasoning by noting that 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 Section 10(b)'s 6-month limitation.'' Id.[361] Accordingly, as 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.[362] Further, 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).

[360] 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'').

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

[362] The majority claims that where an employer and union have ''falsely made [an] assertion [of the union's majority status], an employer's grant of 9(a) recognition and a union's acceptance of that recognition are both unlawful,'' and ''the most appropriate forum for challenging any claims of collusion is . . . an unfair labor practice proceeding alleging violations of Secs. 8(a)(2) and (1) and 8(b)(1)(A).'' In this connection, the majority denies that Sec. 103.22 is a ''reasonable safeguard'' against collusion. My colleagues miss the mark. Sec. 103.22 does not attempt to remedy unfair labor practices with a representation petition and Board-supervised election. 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. Crucially, 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 would typically go undiscovered under the majority's approach given that my colleagues would simply take the parties' word for it that they had established a valid 9(a) relationship—are subject to appropriate unfair labor practice proceedings and remedies under current law. Meanwhile, the majority's reinstatement of *Staunton Fuel* extends 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).

Moreover, I share 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 at 18391. In the 2022 notice of proposed rulemaking, my colleagues contended that ''[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. 87 FR at 66914. But it is plainly unreasonable to infer that employees and rival unions would effectively presume the opposite of the legal default relationship in the construction industry, and, given the known risk of collusion in the formation of 9(a) bargaining relationships in that industry, the burden of having to act on such an unreasonable assumption should not be placed on them. 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'').

Finally, regarding the supposedly ''onerous . . . recordkeeping requirement,'' the Board reasonably concluded, and I 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 at 18392.[363]

Significantly, there is little indication that the majority has engaged in reasoned decision-making by seriously considering alternatives to rescinding Section 103.22 ''in toto.'' Indeed, my colleagues acknowledge that the General Counsel proposed restoring *Staunton Fuel,* but limiting its application to employer RM petitions while excepting decertification RD petitions from bargaining unit employees and RC petitions from rival unions.[364] Under this proposal, a modified *Staunton Fuel* rule would bar a construction employer from challenging its own initial grant of 9(a) recognition to a union, but would not bar timely election petitions filed by unit employees or rival unions, as applicable. The General Counsel further proposed restoring the 6-month limitations period under *Casale* with the modification that it would not begin to run until at least one statutory employee is hired or otherwise has constructive notice that the employer granted 9(a) recognition to a union without majority support.[365] Although my view is that Section 103.22 should be retained without modification, I am struck by my colleagues' lack of meaningful engagement with the General Counsel's proposals, each of which is considerably less extreme than the majority's reflexive return to the pre-Section 103.22 status quo ''in toto.'' The majority does little more than dismiss these and other alternatives as ''unwarranted'' while citing the generally applicable principle that unions do not ''have less favored status with respect to construction industry employers than they possess with respect to those outside the construction industry.'' (quoting *Deklewa,* 282 NLRB at 1387 fn. 53).

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.

Conclusion

As noted at the outset, my colleagues have chosen to title this rulemaking ''Fair Choice Employee Voice.'' You have to admire their chutzpah. As elucidated at length above, the Rule they are promulgating does not in any way serve to protect employee free choice (*i.e.,* ''employee voice'') and in fact elevates union-driven ''fair choice'' interests over the statutory rights of employees. Unions, not employees, are protected when the General Counsel indefinitely blocks decertification petitions filed by employees seeking an election to determine whether a union is still supported by a majority of unit employees.[366] Unions, not employees, are protected by removing any chance for employees, who will never have had the chance to vote on whether to be represented by a union, to challenge voluntary recognition agreements.[367] And unions, not employees, are protected when they are given more latitude to enter into 9(a) relationships without providing employees adequate opportunity to challenge that change to their representation status. The 2020 Rule put provisions in place to protect employees' choice of representative and their ability to ''voice'' that choice

[363] The majority claims that such a need for recordkeeping in the absence of a limitations period ''destabilize[s] collective-bargaining relationships'' and ''detrimentally affects labor relations stability and employee free choice'' by permitting employers to ''at any time'' challenge voluntary recognitions for which there may be no available supporting evidence of majority status contemporaneous with the Sec. 9(a) recognition. But the language of the 2020 Rule itself makes clear that its evidentiary requirements for majority-based recognition in the construction industry apply only prospectively. Accordingly, 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. Meanwhile, the majority observes that, under *Staunton Fuel,* ''contract language alone'' does not ''create[ ] a 9(a) relationship,'' but ''simply serves as a contemporaneous memorialization of 9(a) recognition,'' and that commenters opposed to their final rule ''failed to appreciate the distinction between'' the two concepts. My colleagues' observation is little more than a red herring. The issue is, and has always been, whether contractual language alone is sufficient to prove the existence of a 9(a) relationship, not whether the contract creates the 9(a) relationship.

Further, I reject my 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. They go so far as to claim that Sec. 103.22 ''established a hard and fast rule to treat unions representing construction employees differently,'' and ''deprive[d] unions representing construction employees from utilizing the same procedure under Sec[.] 9(a) to obtain voluntary recognition—and its attendant benefits—that is available to all other unions.'' The majority's rhetoric does not match the reality. Indeed, 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'').

I also find it ironic that my colleagues extol the benefits of applying the Board's contract bar rules to contract language purporting to memorialize a 9(a) bargaining relationship, namely the benefit of precluding ''an employer from evading its bargaining obligations under the Act by falsely asserting that no 9(a) recognition had ever been granted.'' They maintain this posture notwithstanding (1) their return to the ''historical'' blocking charge policy, the gamesmanship of which by unions 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.'' See *Nova Plumbing,* 330 F.3d at 537.

[364] Comment of General Counsel Abruzzo.

[365] Id.

[366] According to my colleagues, the 2020 Rule represented ''a narrow view as to what constitutes employee 'free choice,'' even as their conception of ''employee voice'' leaves out the employee free choice interests of decertification petitioners entirely.

[367] The majority claims that by ''focusing on 'fair choice' and 'employee voice,' [they] aim to place the emphasis where it belongs: on employees' fundamental Section 7 rights,'' including by resolving any ''question of representation . . . by conducting 'an election by secret ballot.' '' (quoting 29 U.S.C. 159(c)). Yet my colleagues go out of their way to deprive employees on whom a voluntary recognition agreement is imposed of the right to pursue ''an election by secret ballot.'' They effectively do the same to construction employees who would challenge the Sec. 9(a) representative status of a union who began representing them pursuant to Sec. 8(f).

through the established, preferred method of Board-conducted secret-ballot elections. The removal of these protections is directly at odds with the Board's mandate under the NLRA.

Compounding the harm to employees and the Board's other stakeholders is the unnecessary and counterproductive policy oscillation represented in the 2024 Rule and other recent agency actions, such as the majority's two recent final rules rescinding and replacing separate, well-reasoned administrative rules defining joint employer status under the Act [368] and revising the Board's representation procedures.[369] Indeed, as noted at the outset, the 2024 Rule is simply the product of a new Board majority's disagreement with the 2020 Rule rather than any changed circumstances that might justify such a stark policy reversal. My colleagues cannot, nor do they, present any evidence that the 2020 Rule has infringed on employees' rights, nor can they present evidence that the 2020 Rule has failed to protect employees' rights as intended.

Just because my colleagues have the power to make the changes promulgated in this rule does not establish that they have a reasonable basis for doing so under the NLRA. Because I do not believe that they do, as well as for the reasons I have discussed above, I respectfully dissent.

VIII. Regulatory Procedures

A. The Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601–612, requires an agency promulgating a final rule to prepare a Final Regulatory Flexibility Analysis (FRFA) when the regulation will have a significant economic impact on a substantial number of small entities. An agency is not required to prepare a FRFA if the Agency head certifies that the rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). Although the Board believed that this rule would not have a significant economic impact on a substantial number of small entities, the Board issued an Initial Regulatory Flexibility Analysis (IRFA) with its proposed rule to provide the public the fullest opportunity to offer feedback. See 87 FR 66929. The Board solicited comments from the public that would shed light on potential compliance costs that may result from the rule that the Board had not identified or anticipated.

The RFA does not define either ''significant economic impact'' or ''substantial number of small entities.'' [370] 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.'' [371] After reviewing the comments, the Board continues to believe that the only direct cost of compliance with the rule is reviewing and understanding the rule. Given that low cost, detailed below, the Board certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

1. A Description of and an Estimate of the Number of Small Entities to Which the Rule Will Apply

To evaluate the impact of the final 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 building and 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 6,294,604 business firms with employees in 2021.[372] Of those, the Census Bureau estimates that about 6,274,916 were firms with fewer than 500 employees.[373] While this final 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.[374] Accordingly, the Board assumes for purposes of this analysis that all 6,274,916 small business firms could be impacted by the final 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.'' [375] The SBA's small business standard for ''Labor Unions and Similar Labor Organizations'' (NAICS #813930) is $8 million in annual receipts.[376] In

[368] *Standard for Determining Joint Employer Status,* 88 FR 73946 (2023).

[369] *Representation-Case Procedures,* 88 FR 58076 (2023).

[370] 5 U.S.C. 601.

[371] U.S. Small Business Administration (SBA) Office of Advocacy, A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act (SBA Guide) 18 (Aug. 2017), *https://advocacy.sba.gov/wp-content/uploads/2019/07/How-to-Comply-with-the-RFA-WEB.pdf.*

[372] U.S. Department of Commerce, Bureau of Census, 2021 Statistics of U.S. Businesses (''SUSB'') Annual Data Tables by Establishment Industry, Data by Enterprise Employment Size, *https://www.census.gov/data/tables/2021/econ/susb/2021-susb-annual.html* (from downloaded Excel Table entitled ''U.S. & States, 6-digit NAICS'' found at *https://www2.census.gov/programs-surveys/susb/tables/2021/us_state_6digitnaics_2021.xlsx*). ''Establishments'' refer to single location entities—an individual ''firm'' can have one or more establishments in its network. The Board has used firm level data. Census Bureau definitions of ''establishment'' and ''firm'' can be found at *https://www.census.gov/programs-surveys/susb/about/glossary.html.*

[373] The Census Bureau does not specifically define ''small business'' but does break down its data into firms with 500 or more employees and those with fewer than 500 employees. *See* U.S. Department of Commerce, Bureau of Census, 2021 SUSB Annual Data Tables by Establishment Industry, Data by Enterprise Employment Size, *https://www.census.gov/data/tables/2021/econ/susb/2021-susb-annual.html* (from downloaded Excel Table entitled ''U.S. & States, 6-digit NAICS'' found at *https://www2.census.gov/programs-surveys/susb/tables/2021/us_state_6digitnaics_2021.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).

[374] 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).

[375] 29 U.S.C. 152(5).

[376] 13 CFR 121.201.

2017, there were 13,137 labor unions in the U.S.[377] Of these, 12,771 (97.21% of the total) are definitely small businesses according to SBA standards because their receipts are below $7,499,999.[378] And, 104 additional unions have annual receipts between $7,499,999 and $9,999,999.[379] Since the Board cannot determine how many of those 104 labor union firms fall below the $8 million annual receipt threshold, it will assume that all 104 are small businesses as defined by the SBA.[380] Therefore, for the purposes of this IRFA, the Board assumes that 12,875 labor unions (97.73% of total) are small businesses that could be impacted by the final rule.

The number of small entities likely to be directly impacted by the final 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 .0026% of the 6,274,916 small entities that could be subject to the Board's jurisdiction.[381]

Similarly, the number of small entities likely to be directly impacted by the voluntary recognition bar doctrine is also very low. Since the modified voluntary recognition bar became effective on July 31, 2020, the Board has tracked the 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. During the first two years, the Board has received an average of 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 .0041% of the 6,274,916 small entities that could be subject to the Board's jurisdiction.

Throughout the IRFA, the Board requested comments or data that might improve its analysis, 87 FR 66915, 66932, but no additional data was received regarding the number of small entities and unions to which this change will apply.

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 building and 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 or representing members of the building and construction industry because Section 8(f) applies solely to those entities. Of the 764,546 building and construction-industry employers classified under the NAICS Section 23 Construction,[382] approximately 692,911 meet the SBA ''small business'' standard for classifications in the NAICS Construction sector.[383] The Department of Labor's Office of Labor-Management Standards (OLMS) provides a searchable database of union annual financial reports.[384] 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 and 2022

[377] The Census Bureau only provides data about receipts in years ending in 2 or 7. The 2022 data has not yet been published, so the 2017 data is the most recent available information regarding receipts. See U.S. Department of Commerce, Bureau of Census, 2017 SUSB Annual Data Tables by Establishment Industry, Data by Enterprise Receipts Size, *https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html* (from downloaded Excel Table entitled ''U.S., 6-digit NAICS'' found at *https://www2.census.gov/programs-surveys/susb/tables/2017/us_6digitnaics_rcptsize_2017.xlsx* (Classification #813930—Labor Unions and Similar Labor Organizations).

[378] Id.

[379] See id.

[380] The Board could not determine a definitive number of labor union firms that are small businesses because the small business thresholds for the relevant NAICS code is not wholly compatible with the manner in which the Census Bureau reports the annual receipts of firms. The small business threshold is $8 million in annual receipts for NAICS code 813930 (Labor Unions and Similar Labor Organizations), but the Census Bureau groups together all firms with annual receipts between $5 million and $7,499,999 and those with annual receipts between $7.5 million and $9,999,999. See 13 CFR 121.201; U.S. Department of Commerce, Bureau of Census, 2017 SUSB Annual Data Tables by Establishment Industry, Data by Enterprise Receipts Size, *https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html* (from downloaded Excel Table entitled ''U.S., 6-digit NAICS'' found at *https://www2.census.gov/programs-surveys/susb/tables/2017/us_6digitnaics_rcptsize_2017.xlsx*).

[381] In the first two years of the current blocking charge policy, of the 3,867 petitions filed, there were 66 requests that unfair labor practice charges block an election, which means only 132 entities of the 6,274,916 small entities (.0021%) that could be subject to the Board's jurisdiction were affected by the policy.

[382] 13 CFR 121.201. These NAICS building and construction-industry classifications include the following codes, 236115: New Single-Family Housing Construction; 236116: New Multifamily Housing Construction; 236117: New Housing For-Sale Builders; 236118: Residential Remodelers; 236210: Industrial Building Construction; 236220: Commercial and Institutional Building Construction; 237110: Water and Sewer Line and Related Structures Construction; 237120: Oil and Gas Pipeline and Related Structures Construction; 237130: Power and Communication Line and Related Structures Construction; 237210: Land Subdivision; 237310: Highway, Street, and Bridge Construction; 237990: Other Heavy and Civil Engineering Construction; 238110: Poured Concrete Foundation and Structure Contractors; 238120: Structural Steel and Precast Concrete Contractors; 238130: Framing Contractors; 238140: Masonry Contractors; 238150: Glass and Glazing Contractors; 238160: Roofing Contractors; 238170: Siding Contractors; 238190: Other Foundation, Structure, and Building Exterior Contractors; 238210: Electrical Contractors and Other Wiring Installation Contractors; 238220: Plumbing, Heating, and Air-Conditioning Contractors; 238290: Other Building Equipment Contractors; 238310: Drywall and Insulation Contractors; 238320: Painting and Wall Covering Contractors; 238330: Flooring Contractors; 238340: Tile and Terrazzo Contractors; 238350: Finish Carpentry Contractors; 238390: Other Building Finishing Contractors; 238910: Site Preparation Contractors; 238990: All Other Specialty Trade Contractors. *See* U.S. Department of Commerce, Bureau of Census, 2021 SUSB Annual Data Tables by Establishment Industry, *https://www2.census.gov/programs-surveys/susb/tables/2021/us_state_6digitnaics_2021.xlsx.*

[383] The Board could not determine a definitive number of building and 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 $19 million in annual receipts for NAICS codes 238110–238220, 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 $45 million in annual receipts, but the Census Bureau groups together firms with annual receipts between $40 million and $49,999,999. *See* 13 CFR 121.201; U.S. Department of Commerce, Bureau of Census, 2017 SUSB Annual Data Tables by Establishment Industry, Data by Enterprise Receipts Size, *https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html* (from downloaded Excel Table entitled ''U.S., 6-digit NAICS'' found at *https://www2.census.gov/programs-surveys/susb/tables/2017/us_6digitnaics_rcptsize_2017.xlsx.*

[384] U.S. Department of Labor, Office of Labor-Management Standards, Online Public Disclosure Room, Download Yearly Data, Union Reports, Yearly Data Download, available at *https://olmsapps.dol.gov/olpdr/.*

IFRAs, the Board identified 3,929 labor unions primarily operating in the building and construction industry that met the SBA ''small business'' standard.[385] Although unions that do not primarily operate in the building and construction industry could still be subject to the final rule if they seek to represent employees engaged in the building and construction industry, comments received in response to the 2019 and 2022 IRFAs 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 categories of small entities that would likely take special interest in a change in the standard for using contract language to serve as sufficient evidence of majority-supported voluntary recognition in the building and construction industry.[386] Therefore, at this time, the Board assumes that this portion of the final rule could only affect 696,840 of the 6,274,916 small entities that could be subject to the Board's jurisdiction.

The Board is also unable to determine how many of those 692,911 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 and 2022 IRFAs, 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).[387] Between October 1, 2017, and November 2022, the issue only came before the Board once.[388]

2. Estimate of Economic Impacts on Small Entities

The RFA requires an agency to determine the amount of ''reporting, recordkeeping and other compliance requirements'' imposed on small entities.[389] 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.[390]

We conclude that the final 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 final rule; no lost sales and profits directly resulting from the final rule; no changes in market competition as a direct result of the final 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 final rule; and no direct costs of hiring employees dedicated to compliance with regulatory requirements.[391] The Board did not receive any comments that identified any direct costs on small entities. Moreover, the final rule may 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 final rule or by engaging in a representation case proceeding that would have otherwise been barred by a voluntary recognition. And, the final rule rescinds the information collection, recordkeeping, and reporting requirements that the 2020 Rule imposed on small entities. Accordingly, the Board asserts that the only direct cost to small entities will be reviewing the rule.

To become generally familiar with the final 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 or union may take at most ninety minutes to read the text of the rule and the supplementary information published in the **Federal Register** and potentially to consult with an attorney.[392] We estimate that an attorney would spend one hour consulting on the changes.[393] Using the Bureau of Labor Statistics' estimated wage and benefit costs, we have assessed these costs to be between $195.57 and $214.31.[394]

For the limited number of small construction 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 potentially to consult with an attorney. We estimate that an attorney would spend one hour consulting on the changes.[395] Thus, the

[385] 84 FR 39955 & fn. 136; 87 FR 66930 & fn. 223. The small business threshold for labor unions has since increased to include entities with annual receipts of less than $16.5 million. 13 CFR 121.201.

[386] 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.*

[387] 84 FR 39955; 87 FR 66931.

[388] *Enright Seeding, Inc.,* 371 NLRB No. 127 (2022).

[389] See 5 U.S.C. 603(b)(4), 604(a)(4).

[390] 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.'').

[391] See SBA Guide at 37.

[392] 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 2023, 13–1075 Labor Relations Specialists, found at *https://www.bls.gov/oes/current/oes131075.htm,* with Occupational Employment and Wages, May 2023, 13–1071 Human Resources Specialists, found at *https://www.bls.gov/oes/current/oes131071.htm.*

[393] The Board based its estimates of how much time it will take to review the final rule and consult with an attorney on the fact that the final 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 business.

[394] For wage figures, see May 2023 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 2023, average hourly wages for labor relations specialists were $45.49 and for human resources specialists were $36.57. The same figure for a lawyer (BLS #23–1011) is $84.84. Accordingly, the Board multiplied each of those wage figures by 1.4 and added them to arrive at its estimate.

[395] The Board estimates that a labor relations attorney would require one hour to consult with a

Continued

Board has assessed labor costs for small employers and unions representing employees in the construction industry to be between $221.17 and $246.15.[396]

The Board does not 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.[397] 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 competitive ability, particularly against larger firms); and whether the cost of the final 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.[398] 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 $246.15 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. The Board received no comments from the public to the contrary. Moreover, the Board did not receive any comments regarding its calculations or asserting any additional direct costs of compliance on small entities not identified by the Board.

B. The Paperwork Reduction Act

In the NPRM, the Board explained that the proposed rule would not impose any information-collection requirements and accordingly, the proposed rule is not subject to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.* See 87 FR 66932. We have not received any substantive comments relevant to the Board's analysis of its obligations under the PRA.

C. Congressional Review Act

The provisions of this rule are substantive. Therefore, the Board will submit this rule and required accompanying information to the Senate, the House of Representatives, and the Comptroller General as required by the Small Business Regulatory Enforcement Fairness Act (Congressional Review Act or CRA), 5 U.S.C. 801–808. Pursuant to the CRA, the Office of Information and Regulatory Affairs has designated this rule as a ''major rule.'' Accordingly, the rule will become effective no earlier than 60 days after its publication in the **Federal Register**.

Final Rule

This rule is published as a final rule.

List of Subjects in 29 CFR Part 103

Jurisdictional standards, Election procedures, Appropriate bargaining units, Joint Employers, Remedial Orders.

For the reasons set forth in the preamble, the National Labor Relations Board amends part 103 of title 29 of the Code of Federal Regulations as follows.

PART 103—OTHER RULES

■ 1. The authority citation for part 103 continues to read:

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.

(a) 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 the 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.

(b) If the regional director determines that the party's offer of proof describes evidence that, if proven, would interfere with employee free choice in an election, the regional director shall, absent special circumstances, hold the petition in abeyance and notify the parties of this determination.

(c) If the regional director determines that the party's offer of proof describes evidence that, if proven, would be inherently inconsistent with the petition itself, the regional director shall, absent special circumstances, hold the petition in abeyance and notify the parties of this determination; in appropriate circumstances, the regional director should dismiss the petition subject to reinstatement and notify the parties of this determination.

(d) 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.

(e) If, after holding a petition in abeyance, the regional director determines that special circumstances have arisen or that employee free choice is possible notwithstanding the pendency of the unfair labor practices, the regional director may resume processing the petition.

(f) If, upon completion of investigation of the charge, the regional director determines that the charge lacks merit and is to be dismissed, absent withdrawal, the regional director shall resume processing the petition, provided that resumption of processing is otherwise appropriate.

(g) Upon final disposition of a charge that the regional director initially determined had merit, the regional director shall resume processing a petition that was held in abeyance due to the pendency of the charge, provided that resumption of processing is otherwise appropriate.

(h) The provisions of this section are intended to be severable. If any paragraph of this section is held to be unlawful, the remaining paragraphs of this section not deemed unlawful are intended to remain in effect to the fullest extent permitted by law.

■ 3. Revise § 103.21 to read as follows:

§ 103.21 Processing of petitions filed after voluntary recognition.

(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

small employer or labor union about all three rule changes.

[396] See fn. 292.

[397] See SBA Guide at 18.

[398] Id. at 19.

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) Notwithstanding paragraph (a), an employer's voluntary recognition of a labor organization as exclusive bargaining representative of a unit of the employer's employees will not preclude the processing of a petition filed by a competing labor organization where authorized by Board precedent.

(f) This section shall be applicable to an employer's voluntary recognition of a labor organization on or after September 30, 2024.

(g) The provisions of this section are intended to be severable. If any paragraph of this section is held to be unlawful, the remaining paragraphs of this section not deemed unlawful are intended to remain in effect to the fullest extent permitted by law.

§ 103.22 [Removed]

■ 4. Remove § 103.22.

Dated: July 23, 2024.

Roxanne L. Rothschild,

Executive Secretary.

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