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TESTIMONY BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND WORKFORCE

FIELD HEARING: "WORKERS IN CHARGE: RESTORING CHOICE AND ACCOUNTABILITY IN THE WORKFORCE"

NOVEMBER 13, 2026

Chairman Walberg, Ranking Member Scott, and Members of the Committee:

Thank you for the opportunity to testify today. I am the Vice President and Legal Director of the National Right to Work Legal Defense Foundation. Since its founding in 1968, the Foundation has provided free legal aid to employees who want to exercise their right to not associate with unions.

It is fitting that today's field hearing on restoring choice and accountability in the workforce is taking place in North Carolina. The state's labor policies are a successful model of voluntary unionism the federal government should emulate. In North Carolina, public employees are not compelled to accept a union's exclusive representation; public employers are not compelled to bargain with unions; and employees cannot be compelled to join or financially support a union to keep their jobs. *See* N.C. Gen. Stat. §§ 95-78 to 95-84, 95-98. North Carolina's labor laws protect individual liberty, freedom of speech, and freedom of association.

In contrast, federal labor law is predicated on government compulsion. The National Labor Relations Act ("NLRA") compels unwilling employees to accept exclusive union representation; compels unwilling employers to bargain with unions

they don't wish to speak with; and authorizes compelling employees to financially support a union to keep their jobs. *See* 29 U.S.C. §§ 158(a), 159(a), 159(d). In these and other ways, federal labor law suppresses individual liberty, compels speech, and compels association.

To truly reform federal labor law to empower workers, Congress should shift from a system of compulsory unionism to a system of voluntary unionism like that used in North Carolina's public sector. The first and most important step would be to pass the National Right-to-Work Act (H.R. 1232) to guarantee that every employee has the right to choose whether to financially support a union.

There are a number of smaller reforms Congress or the National Labor Relations Board ("NLRB") can make, and should make, to facilitate employee free choice. These reforms include the following.

Require Secret-Ballot Elections. If the federal government is going to persist in compelling groups of employees to collectively accept exclusive union representatives, the government should at least provide employees with something akin to a democratic process for choosing or rejecting union representation. At a minimum, this means secret ballot elections conducted in an atmosphere of free and open debate.

Unfortunately, employees are often denied these minimal democratic protections. Employees are sometimes stripped of their ability to vote in the privacy of a voting booth in favor of a practice in which union organizers collect "votes" from employees by soliciting them to sign union cards. The NLRB often censors speech about the actual or potential downsides of unionization, which deprives employees of

information they need to make informed decisions. Under President Biden, the NLRB deliberately exacerbated these problems with its infamous decision in *Cemex Construction Materials Pacific*, 72 NLRB No. 130 (2023). Under *Cemex*, if a union demands card-check recognition, the employer must either (1) recognize the union as the exclusive representative of its employees based on union cards; or (2) request an election that the NLRB will invalidate, and install the union into power, if the employer utters speech or takes actions that run afoul of NLRB censors.

The NLRB should rectify this situation in a number of ways. The NLRB should overrule *Cemex* and not compel employers to recognize unions without a secret ballot election. The NLRB should take seriously the free speech protections of NLRA Section 8(c), 29 U.S.C. § 158(c), by interpreting that section to bar the agency from censoring speech unless the censorship would satisfy strict scrutiny. And the NLRB should mitigate the collusive arrangements and backroom deals that usually precipitate card check campaigns by adopting the positions taken by former NLRB General Counsel Peter Robb in Memorandum GC 20-13, *Guidance Memorandum on Employer Assistance in Union Organizing* (Sept. 4, 2020).[1] Congress could also mandate these reforms by statute or, even better, amend the NLRB to only allow employees to be unionized pursuant to secret ballot elections.

[1] Memorandum GC 20-13 was rescinded by Acting General Counsel Ohr in Memorandum GC 21-02, *Rescission of Certain General Counsel Memoranda* (Feb. 1, 2021), but that memorandum was in turn rescinded in turn by Memorandum GC 25-05, *Rescission of Certain General Counsel Memoranda* (Feb. 14, 2025).

Require That a Majority of Employees Vote for a Union Before It Becomes Their Exclusive Representative. NLRA Section 9(a) states that a union can be an exclusive representative if it is "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes." 29 U.S.C. § 159(a). Notwithstanding this statutory language, the NLRB permits a union to become an exclusive representative if it wins a majority of only employees *who vote* in an election. For example, if there are 100 employees in a unit, a union can become the exclusive representative of all 100 employees based on a vote of 6 to 4 for the union. This result violates NLRA Section 9(a)'s requirement that a union must have the support of a "majority of the employees in a unit" to be an exclusive representative. It also wrongfully allows a minority of employees to dictate who represents everyone in a unit. The NLRB should correct this error in *Constellation Energy Generation LLC,* 13-RC-372880, or another suitable case.

Eliminate Non-Statutory Bars to Elections. The NLRB has taken it upon itself to create a host of non-statutory "bars," or prohibitions, on when it will conduct elections. These bars include (1) a recognition bar that bans petitions for decertification elections for up to one year after the first bargaining session following card-check recognition; (2) a successor bar that bans decertification petitions for up to one year from the first bargaining session after a change in employer ownership; (3) a settlement bar that bans elections after a union and employer settle unfair labor practice allegations; and, worst of all, (4) a contract bar that bans petitions for decertification elections for the first three years of a collective bargaining agreement,

except during a 30-day period before the agreement expires or its third anniversary. Taken together, these bars severely restrict unionized employees' ability to obtain elections in which they can vote on whether they want to be represented by a union.

The NLRB should stop disenfranchising unionized employees and rescind all of its non-statutory bars to elections. The NLRB's election bars violate the text of Section 9 of the NLRA, as the U.S. Court of Appeals for the D.C. Circuit recently recognized with respect to the successor bar in *Hospital Menonita de Guayama, Inc. v. NLRB*, No. 22-1163 (D.C. Cir. July 21, 2026). The bars are also contrary to the NLRB's statutory mission to protect and facilitate employees' right to choose or reject union representation in secret-ballot elections. If the NLRB refuses to rescind its disenfranchisement policies, Congress should abolish them by statute.

Rescind the Merger Doctrine. If the NLRB's bars on elections were not bad enough, the agency also disenfranchises unionized employees with a "merger doctrine" that allows unions and employers to gerrymander bargaining units that are impossible for employees to decertify. Under the merger doctrine, if a union and employer agree to merge separate smaller bargaining units into one large unit, the merged unit becomes the only appropriate unit for decertification purposes. This means an employee petitioner must obtain a showing of interest from thirty percent of all employees in the merged unit to obtain an election. This is functionally impossible when the merged unit consists of thousands or tens of thousands of employees scattered across a large geographic area. Through the Board's merger doctrine, a union can insulate itself from ever having to face an employee vote.

Consider the situation in *First Student, Inc.*, 19-UD-357422. That case concerned roughly 170 First Student bus drivers who serve two school districts in or around Battle Ground, Washington. One of the drivers petitioned for a deauthorization election with the support of over thirty percent of her coworkers. An NLRB Regional office dismissed the driver's petition because the Teamsters and First Student had merged these drivers into the single, nationwide unit that includes around 22,000 employees who work in around 260 locations in dozens of states. As a practical matter, bus drivers at one or more First Student locations will never be able to obtain a sufficient number of driver signatures on a showing of interest to obtain an election in this massive, multi-state unit. The NLRB's merger doctrine has disenfranchised over 20,000 employees at First Student, as well as employees in other merged units.

The NLRB should repudiate its merger doctrine because it suppresses employees' right to vote on union representation and conflicts with several provisions of the NLRA, such as Sections 9(b), 9(c)(2), and 9(c)(5), 29 U.S.C. §§ 159(b), 159(c)(2), 159(c)(5). The NLRB should replace its merger doctrine with one that allows unionized employees in individual facilities, or in other appropriate bargaining units, to obtain votes on whether they want to be represented by a union.

Eliminate Blocking Charges. Even when employees can petition for a decertification election notwithstanding the NLRB's election bars and merger doctrine, their struggle to obtain an election likely will not end there. In 2024, the NLRB issued a rule that reinstated a "blocking charge" policy that enables unions to easily delay employee-requested elections by filing unfair labor practice charges

against their employer. 29 C.F.R. § 103.20. NLRB Regional offices routinely block the processing of election petitions while they investigate whatever unfair labor practice allegations the union came up with to delay the election. Under *Rieth-Riley Construction Co.*, 371 NLRB No. 109 (2022), NLRB Regional offices will dismiss employee election petitions if the office levies allegations against the employer in an unfair labor practice complaint. Under the NLRB's blocking charge regulation and *Rieth-Riley*, employees are disenfranchised and forced to accept unwanted unions for months or years while the NLRB takes its time processing a union's unfair labor practice allegations against the employees' employer.

The NLRB's policy encourages union officials to file spurious unfair labor practice charges to block elections whenever they think they may lose the election. Even if the union's charges are dismissed as unmeritorious months later, the union will have bought itself more time in power and more time to campaign.

The NLRB should reverse its blocking charge policy by allowing employees to expeditiously vote in elections and then considering the impact of alleged unfair labor practices on the election only *after* the employees have voted. This approach is not only a far more rational order of operations, but it would disincentivize unions from filing meritless unfair labor practice charges just to block elections.

Limit the Presumption of Majority Support to a Fixed Term. The NLRB irrationally presumes that, if a union wins a certification election or is recognized by an employer, this one-time event justifies a never-ending presumption that a majority of unit employees support that union's representation. Even if a union won an election

by one vote in 1956, the NLRB will presume that a majority of unit employees support that union seventy years later, in 2026, even though there is probably not one person left in that workplace who voted in 1956. The NLRB's baseline presumption of "one vote, one time" defies basic democratic precepts and denies employees periodic opportunities to decide whether they want union representation.

This NLRB policy is the principal reason over 90% of unionized private-sector employees have never voted on whether they want that union's representation.[2] The NLRB does not require unions to periodically prove, either through an election or other means, that a majority of employees support that union. So unions remain in power by default.

It does not have to be this way. Nothing in the NLRA's text states that one union election victory creates an eternal presumption that a majority of unit employees support that union. This presumption is just an NLRB policy the agency can change.

The NLRB should change this policy to one in which a union election victory creates a presumption that a majority of employees support that union for a limited time, such as three or four years. Unlike the agency's current policy, this presumption would be rational and consistent with the American electoral principle that an election victory confers only a limited term in office. This reform would also go a long way to remedying the shameful current state of affairs in which 9 out of 10 unionized employees have never voted on whether they want union representation.

[2] *See* F. Vincent Vernuccio and Akash Chougule, *Unions Need Democracy: 95 Percent of Union Workers Never Voted for Their Union*, Inst. for the Am. Worker (Sept. 2024).

In June 2026, the National Right to Work Legal Defense Foundation, Inc. petitioned the NLRB to engage in rulemaking to enact several of these reforms. The Foundation's rulemaking petition, which discusses several of these reforms in greater detail, is attached and I request it be included in the hearing record.

Thank you for your attention. I look forward to answering any questions you may have.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of	)	
	)	
Proposed Rule Concerning	)	Petition of the National Right to Work
Representation-Case Procedures;	)	Legal Defense and Education
Election Bars; Merger Doctrine;	)	Foundation, Inc.
Presumptions of Majority Support	)	

RULEMAKING PETITION

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TO THE HONORABLE MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD:

Petitioner National Right to Work Legal Defense and Education Foundation, Inc. respectfully submits this rulemaking petition for the National Labor Relations Board's consideration.

INTRODUCTION

Over 90% of unionized private sector employees have never voted on whether they want union representation.[1] This statistic makes clear that the National Labor Relations Board is failing to satisfy its Congressional mandate to facilitate employee freedom of choice and workplace democracy. No nation in which 9 out 10 citizens have never voted on the political regime in power could call itself a democracy.

The Board should be doing all it can to reduce this statistic and enfranchise employees. Instead, the Board has taken the opposite approach and created a slew of policies to disenfranchise unionized employees. The Board irrationally finds that a union prevailing in one election supports a perpetual presumption that a majority of employees support that union, even if the election occurred decades ago. The Board fast tracks union representation elections, but prohibits employees from voting in decertification elections at most times with several non-statutory elections bars: the contract bar, recognition bar, successor bar, and settlement bar. The Board recently reinstituted a blocking charge regulation that allows unions to easily stall employee

[1] See F. Vincent Vernuccio and Akash Chougule, *Unions Need Democracy: 95 Percent of Union Workers Never Voted for Their Union*, Inst. for the Am. Worker (Sept. 2024); James Sherk, *Unelected Representatives: 94 percent of Union Members Never Voted for a Union*, Heritage Foundation (Aug. 2016).

decertification elections by leveling unproven accusations against their employer.[2] The Board created a merger doctrine that allows unions and employers to assimilate small bargaining units of employees into a massive, singular bargaining unit that is impossible to decertify.

The Board should rescind these policies that disenfranchise employees. The Board should do so not only to fulfill its statutory mandate to facilitate employee free choice, but because it's non-statutory election bars and blocking charge policies violate NLRA Section 9(c), 29 U.S.C. § 159(c). Section 9(c) mandates that, if "a question of representation exists, [the Board] *shall* direct an election by secret ballot and *shall* certify the results thereof." *Id.* (emphasis added). The Board's refusal to conduct an election when a question of representation exists because the union has a contract with the employer, was recognized by the employer, or filed unfair labor practice charges against the employer, defies this statutory command. In the wake of *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the Board must discard its election bars and blocking policies or a federal court will do it for the agency.

The Foundation petitions the Board to: (1) eliminate its non-statutory bars to decertification elections; (2) eliminate or curtail blocking charges; (3) rescind its merger doctrine and allow decertification elections in appropriate single facility units; and (4) set limits on how long a Board certification supports a presumption

[2] *Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships*, 89 Fed. Reg. 62952 (Aug. 1, 2024).

that a union has the support of a majority of employees. In the alternative, the Board should modify these policies or related policies.

STANDING OF PETITIONER

The Administrative Procedure Act ("APA") and NLRB Rules and Regulations permit interested persons to submit petitions for issuance, amendment, or repeal of a rule or regulation. 5 U.S.C. § 553(e); NLRB Rules & Reg. § 102.124. A person under the APA includes "an individual, partnership, corporation, association or public or private organization other than an agency." 5 U.S.C. § 551(2).

The National Right to Work Legal Defense Foundation, Inc. is an interested person under the APA and NLRB Rules and Regulations. It is a nonprofit corporation that provides free legal aid to employees affected by the Board's representation rules and regulations. *See Nat'l Right to Work Legal Def. Found. v. U.S.*, 487 F. Supp. 801 (E.D. N.C. 1979). Foundation staff attorneys have represented individual petitioners in many of the leading cases that concern decertification. *E.g.*, *Rieth-Riley Constr. Co., Inc.*, 371 NLRB No. 109 (2022); *Mountaire Farms, Inc.*, 370 NLRB No. 110 (2021); *Johnson Controls, Inc.*, 368 NLRB No. 20 (2019); *Lamons Gasket Co.*, 357 NLRB 739 (2011); *Dana Corp.*, 351 NLRB 434 (2007). As an interested person, the Foundation submits this written request for rulemaking under APA Section 553(e) and NLRB Rules and Regulations Section 102.124.

PROPOSED RULE

The Foundation petitions the Board to issue the following rule, or a similar rule, under the power granted to it by NLRA Section 6, 29 U.S.C. § 156. The Board should rescind the language currently in 29 C.F.R. §§ 103.20 & 103.21 in its entirety and replace it with the following:

29 C.F.R. § 103.20. Election bars, appropriate units, and blocking charges.

(a) There shall be no bars or similar restrictions on when elections can be requested or directed other than those expressly set forth in Sections 9(c)(3) and 9(e)(2) of the Act. If, upon investigation, thirty-percent or more of employees in an appropriate bargaining unit support an election petition filed under Section 9(c)(1)(A)(ii) of the Act, the regional director shall find that a question concerning representation exists, shall direct an election by secret ballot, and shall certify the results thereof notwithstanding:

(1) the existence of a collective bargaining agreement;

(2) the employer's recognition of an exclusive representative;

(3) the employer being a successor of another employer;

(4) the settlement of an unfair labor practice charge or complaint; or

(5) any other similar circumstance.

(b) An appropriate unit for a petition filed under Section 9(c)(1)(A)(ii) is not limited to the unit in which an employer currently recognizes an individual or labor organization to be an exclusive representative, but also includes any appropriate

unit, including the unit in which an individual or labor organization was originally certified to be an exclusive representative.

(c) A regional director shall not dismiss an election petition, hold an election petition in abeyance, or otherwise delay when an election is directed or conducted based on allegations in unfair labor practice charges or unfair labor practice complaints. The regional director may consider the effect of an unfair labor practice allegation on a representation proceeding only after the ballots are opened and tallied and under the objections to conduct affecting an election procedures set forth in Section 102.69.

(d) If the Board has issued a final decision on the merits finding that a party to a representation proceeding committed an unfair labor practice before the date of the hearing on the representation petition, the regional director may hold that petition in abeyance for up to three months after the unfair labor practice is remedied if the regional director determines that the unfair labor practice would interfere with employee free choice in the election.

29 C.F.R. § 103.21. Presumption of majority status.

(a) A Board certification under Section 9(c) of the Act that a majority of employees in an appropriate unit wish to be represented by an individual or labor organization for purposes of collective bargaining shall:

(1) create an irrebuttable presumption that the individual or labor organization has the support of a majority of unit employees for one year from the date of the certification;

(2) create a rebuttable presumption that the individual or labor organization has the support of a majority of unit employees for exactly three years after the time period in § 103.21(a)(1) expires; and

(3) not constitute evidence that the individual or labor organization has the support of a majority of unit employees after four years from the date of the certification.

(b) An employer's recognition of an individual or labor organization to be the exclusive representative of an appropriate unit of the employer's employees, based on proof of the union's majority status, shall:

(1) support a rebuttable presumption that the individual or labor organization has the support of a majority of unit employees for one year from the date of recognition; and

(2) not constitute evidence that the individual or labor organization has the support of a majority of unit employees after one year from the date of recognition.

(c) The provisions of this section and Section 102.20 are intended to be severable. If any paragraph of this section or Section 102.20 is held to be unlawful, the remaining paragraphs of this section and Section 102.20 not deemed unlawful are intended to remain in effect to the fullest extent permitted by law.

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STATEMENT OF GROUNDS IN SUPPORT OF PETITION

I. The Board Should Engage in Rulemaking Because Its Policies Are Disenfranchising Employees and Violate the NLRA.

1. The Board's current regime of election bars, blocking charges, a merger doctrine, and presumptions concerning employee support for union representation are disenfranchising employees. The statistics say it all: over 90% of private-sector employees who are subject to union representation have never voted on that union representation. *See supra* n. 1. And even when employees petition for a decertification election, fewer than half of those petitions result in an election.[3]

These statistics are unsurprising given the gauntlet the Board forces employees to run through to vote on whether they want to remain represented by a union. The Board first presumes that, if a union wins a certification election or is recognized by an employer, this one-time event justifies a never-ending presumption that a majority of unit employees support that union's representation. Even if a union won an election by one vote in 1956, the Board will presume that a majority of unit employees support that union seventy years later, in 2026. The Board's irrational baseline presumption of "one vote, one time" defies basic democratic precepts and denies employees periodic opportunities to decide whether they want union representation.

[3] Calculated from the Board's data from 2016-2025 on the number of decertification petitions filed and elections held from 2016 to 2025, available at Decertification Petitions—RD, NLRB, https://www.nlrb.gov/reports/nlrb-case-activity-reports/representation-cases/intake/decertification-petitions-rd (last visited Mar. 12, 2026); *see* Karen Harned, *Stacked Deck: How the NLRA Favors Organized Labor and Fails Workers*, Institute for the Am. Worker, at 21 (Feb. 2026).

The Board severely limits when employees can attempt to rebut this perpetual presumption of support for a union with a decertification election. These limits are not found in the Act. The Act's singular restriction on petitioning for an election is prohibiting elections for one year after an election was held. 29 U.S.C. § 159(e)(2). The Board has taken it upon itself to create several non-statutory bars to elections, including: (1) a recognition bar that bans decertification petitions for at least six months or up to one year from the first bargaining session after the recognition;[4] (2) a successor bar that bans decertification petitions for at least six months or up to one year from the first bargaining session after a change in employer ownership;[5] (3) a settlement bar that precludes elections after a union and employer settle unfair labor practice allegations;[6] and, worst of all, (4) a contract bar that bans decertification for the first three years of a collective bargaining agreement, except for a short 30-day period before its third year anniversary or the expiration of a contract.[7]

If this were not bad enough, the Board's merger doctrine allows unions and employers to gerrymander bargaining units that are impossible for employees to decertify.[8] Under this doctrine, if a union and employer agree to merge separate smaller bargaining units into one large unit, the merged unit becomes the only appropriate unit for decertification purposes. This means an employee petitioner must obtain a showing of interest from thirty-percent of all employees in the merged

[4] NLRB Rules & Reg. § 103.21.
[5] *UGL-UNICCO Serv. Co.*, 357 NLRB 801 (2011).
[6] *TruServ Co*rp., 349 NLRB 227 (2007).
[7] *Mountaire Farms, Inc.*, 370 NLRB No. 110 (2021).
[8] *Albertson's, Inc.*, 307 NLRB 338 (1992); *First Student, Inc.* 359 NLRB 279 (2012).

unit to obtain an election. This is functionally impossible when the merged unit consists of thousands or tens-of-thousands of employees scattered across a large geographic area. Through the Board's merger doctrine, a union can insulate itself from ever having to face an employee vote.

If employees manage to overcome all of these Board-created obstacles to petitioning for an election, their struggle for an election likely will not end there. The Board recently reinstated a blocking charge policy that enables unions to easily delay employee-requested elections by just levying unfair labor practice charges against their employer.[9] Regional Directors routinely block the processing of election petitions while they investigate whatever unfair labor practice allegations the union came up with to delay the election. Under *Rieth-Riley Construction Co.*, 371 NLRB No. 109 (2022), Regional Directors can dismiss election petitions entirely based on unproven allegations made in unfair labor practice complaints.

The foregoing would lead reasonable outside observers to believe the Board's statutory mission is to suppress the ability of unionized employees to vote on union representation. Of course, the opposite is true. The Board's statutory mission is to protect and facilitate employees' right to choose or reject union representation in secret-ballot elections, not to disenfranchise employees. Given the Board's policies have led to widespread disenfranchisement of employees—over 9 in 10 unionized employees have never voted on whether they want union representation—the Board should engage in rulemaking to remove the obstacles it created to stop employees

[9] NLRB Rules & Reg. § 103.20.

from voting on union representation.

2. The Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), should further motivate the Board to promptly engage in rulemaking. In *Loper Bright*, the Supreme Court held that federal courts must review de novo whether an agency's regulations adhere to the Court's best reading of a statute's text, rather than defer to agency interpretations. *Id*.

As discussed below, the Board's non-statutory election bars and blocking charge regulation violate the text of Section 9(c)(1): that, if "a question of representation exists, [the Board] *shall* direct an election by secret ballot and *shall* certify the results thereof." 29 U.S.C. § 159(c)(1) (emphasis added). The Board's refusal to conduct an election when an employee petition makes clear a question of representation exists defies this statutory command. In the wake of *Loper Bright*, the Board must seek to conform its regulations and policies to the text of the Act.

II. The Board Must Rescind Its Non-Statutory Election Bars and Blocking Charge Regulation Because They Are Inconsistent With Sections 7 and 9 of the Act.

A. Section 9(c) commands that the Board "shall" conduct an election when a question of representation exists.

1. Section 9(c) of the Act states, as is relevant to decertification elections:

> (1)Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees . . . (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section (a); or
> . . .

> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C. § 159(c)(1). The last sentence is the most important here: "If the Board finds . . . that such a question of representation exists, *it shall direct an election by secret ballot* and *shall certify the results thereof*." (emphasis added).

There is only one way to interpret this unambiguous language: the Board must conduct and certify an election if a question of representation exists. Or, stated conversely, the Board lacks the authority or discretion to *not* conduct an election when a question of representation exists.

Congress' repeated use of the word "shall" makes this conclusion inescapable. The ordinary meaning of "shall" is "must." *See, e.g.*, *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory "shall" . . . normally creates an obligation impervious to judicial discretion."); *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (noting Congress' "use of a mandatory 'shall' . . . to impose discretionless obligations"); *Ass'n of Civilian Technicians, Mont. Air Chapter No. 29 v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive."); *Allied Pilots Ass'n v. PBGC*, 334 F.3d 93, 98 (D.C. Cir. 2003) (noting the "well-recognized principle that the word shall is ordinarily the language of command") (cleaned up).

Congress' use of contrasting permissive language in Section 9(c) confirms this meaning of "shall." Congress twice used the permissive "may" in Section 9(c), which states that regulations "*may* be prescribed by the Board" and that a hearing "*may* be conducted" by certain regional office employees. 29 U.S.C. § 159(c) (emphasis added). The Board uses this discretion to determine the time, place, and manner of elections and promulgate regulations setting standards for holding elections. But Congress did not give the Board the same discretion with respect to holding an election. Congress directed that the Board "shall direct an election by secret ballot" when a question of representation exists. 29 U.S.C. § 159(c)(1). Congress' use of the terms "shall" and "may" shows the former is meant to be mandatory, for when Congress juxtaposes mandatory and permissive language in the same statute, the former "is as mandatory as a statute can be." *Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1243 (D.C. Cir. 2009); *see also Jama v. Immigr. & Customs Enf.*, 543 U.S. 335, 346 (2005); *Lopez*, 531 U.S. at 241; *United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 359–60 (1895).

Congress also showed it meant what it said in using the term "shall" when it enacted exceptions to Section 9(c)'s command. Congress carved out an exception for petitions filed where "in the preceding twelve-month period, a valid election shall have been held." 29 U.S.C. § 159(c)(3). When Congress combines a mandatory command with a specific exception, the canons "'of avoiding surplusage and *expressio unius* are at their zenith' because 'they apply in tandem.'" *Beverly Health & Rehab. Servs. v. NLRB*, 317 F.3d 316, 321 (D.C. Cir. 2003) (citations omitted); *see Esteras v.*

United States, 606 U.S. 185 (2025); *Chevron U.S.A. v. Echazabal*, 536 U.S. 73, 80 (2002); *Russello v. United States*, 464 U.S. 16, 23 (1983).

B. The Board's election bars and blocking charge regulation violate Section 9(c).

1. The Board's election bars and blocking charge regulation are Board policies to *not* investigate petitions or conduct elections when a question of representation exists because some other condition exists—there is a contract, a recent recognition, a recent successorship situation, or a pending unfair labor practice charge. It is hard to conceive of an action more directly contrary to Section 9(c)'s directive that when a petition is filed "the Board shall investigate such petition" and if "a question of representation exists, [the Board] shall direct an election by secret ballot and shall certify the results thereof." 29 U.S.C. § 159(c)(1). With its bars and blocking charge policies, the Board is refusing to investigate petitions or conduct elections when there is a question of representation, violating Section 9(c).

The Fifth Circuit recognized that the Board defies the Act by refusing to process decertification petitions when a question of representation exists. In *Templeton v. Dixie Color Printing Co.*, a majority of employees petitioned to decertify their union. 444 F.2d 1064, 1066 (5th Cir. 1971). The Region dismissed the petition based on a seven-year-old unfair labor practice charge filed against their employer. *Id.* The employees sued the Board, seeking an election. *Id.* Relying on the mandatory language of Section 9(c), the Fifth Circuit found the "Board has ignored its responsibility contrary to a *specific mandate* of the Act and thereby worked injury to

the statutory rights of the employees." *Id.* at 1069 (emphasis added). Dismissing the petition was "tantamount to castrating § 7, the heart of the Act." *Id.* at 1070.

A year later, the Fifth Circuit again relied on the mandatory language of Section 9(c) to uphold an injunction commanding the Board to reinstate a decertification petition. *Surratt v. NLRB*, 463 F.2d 378, 381 (5th Cir. 1972). The Court again relied on the Board's "clear duty under § 9(c)(1) of the Act to consider, investigate, and act upon the decertification petition." *Id.* By ignoring that clear duty "the employees were disarmed" of their rights by a "mechanical application of [the] blocking charge [policy]." *Id.* And while the Board tried to distinguish *Templeton* based on the length of the delay (the election in *Surratt* had only been delayed for slightly over a year), the Court found that distinction one of "degree" and "legally [in]significant." *Id.* Instead, what mattered was Congress' command and the Board's abdication of its "clear duty" to "act upon the decertification petition." *Id.*; *see also 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.").

The Board's lack of statutory authority to invent election bars is reinforced by Congress' decision to include an express bar in Section 9(c)(3), 29 U.S.C. § 159(c)(3). Congress' inclusion of this one time-period exception to Section 9(c)(1)'s requirement that the Board "shall" conduct elections when there is a question of representation strongly infers that no other exceptions are permitted.

2. The Board cannot create limits on when it must investigate petitions or conduct elections under Section 9(c) by just decreeing, *ipse dixit*, that a question of representation cannot exist during certain time periods, such as during the first three years of a contract or when "the merits of the charge have been determined," 89 Fed. Reg. at 62969 n.105. Under Section 9(c)(1)(A), a "question of representation" refers to whether a "*substantial number of employees* . . . assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative." 29 U.S.C. § 159(c)(1)(A) (emphasis added). If the Board receives evidence that a "substantial number of employees"—which the Board has long defined as 30% or more of a bargaining unit[10]—oppose a union's representation, the Board *must* find that a "question of representation exists." The Board cannot turn a blind eye to this evidence or artificially decree that questions of representation do not exist when they actually do exist. That would be as irrational as a hospital declaring there cannot be heart attacks on weekends, and then refusing to treat people who actually suffer heart attacks on weekends.

For example, assume an employee files a decertification petition supported by cards opposing a union's representation signed by 75% of unit employees. Those cards prove a question of representation exists as a factual matter. The Board cannot pretend this is not so during the first three years of the contract or after a successorship situation. The cards exist irrespective of whether the contract exists or

[10] NLRB Rules & Reg. § 102.61.

if the employer is a successor to another. The Board would act arbitrarily and capriciously by refusing to acknowledge reality—that the cards prove a question of representation exists under Section 9(c).

Case law confirms that, when Congress requires a federal agency to do something when a certain circumstance arises, the agency has to do it if that circumstance arises. *See Welch v. United States*, 409 F.3d 646, 652 (4th Cir. 2005); *NYPIRG v. Whitman*, 321 F.3d 316, 331 (2d Cir. 2003). For example, *Her Majesty the Queen v. EPA* concerned an EPA statute that linked a finding (the EPA Administrator having "reason to believe"' that an air pollutant contributes to pollution) to a consequence ("the Administrator 'shall' notify" the state in which the emissions originate). 912 F.2d 1525, 1533 (D.C. Cir. 1990). The D.C. Circuit found that "[o]nce [the] finding is made . . . the remedial action that follows is both specific and mandatory." *Id*. So too under Section 9(c). If a question of representation exists, the Board's duty to conduct and certify an election is both specific and mandatory.

3. Finally, the fact that Congress granted the Board discretion regarding *how* to investigate a petition or conduct an election does not mean that Congress gave the Board discretion to *not* conduct an investigation or hold an election. Again, Section 9(c) is clear—upon receipt of a representation petition "the Board shall investigate such petition . . . . If the Board finds upon the record . . . . a question of representation exists, it shall direct an election . . . ." 29 U.S.C. § 159(c)(2). The election bar in Section 9(c)(3) further supports this conclusion, and not only because the existence of this statutory exception to when elections must be conducted strongly infers that no other

exceptions are permissible. That subsection states: "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). Section 9(c)(3) does not state that questions of representation cannot exist with this year period. Rather, the subsection states the Board cannot conduct an election during this period. This shows that Congress did not give the Board discretion to dictate when a question of representation can exist or when an election must be conducted.

This is no surprise given that entities that administer political elections also lack authority to not hold elections. All states have an agency or commission that administers political elections. These election agencies and commissions have varying degrees of discretion over the details of how elections are conducted, such as the location of polling places. But, to the Foundation's knowledge, no state election agency or commission has discretion to just not conduct an election required by a state statute or constitution. The same is true for the Board.

"[A]n agency is not free simply to disregard statutory responsibilities." *Lincoln v. Vigil*, 508 U.S. 182, 190–91 (1993). That is what the Board is doing with its election bars and blocking charge policies. It is shirking its statutory responsibility under Section 9(c) to conduct elections during the first three years of a contract (contract bar), after an employer recognizes a union (recognition bar), after one employer succeeds another (successor bar), or when a blocking charge is pending. The Board's election bars and blocking charge regulation "violat[e] Congress's precise instructions." *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir.

2011). Under the APA, "that is the end of the matter." *Id.* (internal quotations omitted). The Board should issue regulations that rescind its election bars and blocking charge policy for conflicting with Section 9(c).

C. The Board's election bars and blocking charge policy are inconsistent with Sections 7, 9(a), and 9(c)(2) of the Act.

1. "The *raison d'être* of the [NLRA]'s protections" is to "empower *employees* to freely choose their own labor representatives." *Colo. Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031, 1038 (D.C. Cir. 2018). Congress enacted Sections 7 and 9 to accomplish this goal. Section 7 of the Act guarantees employees the right to engage in collective activity and the right to "refrain from any or all of such activities." 29 U.S.C. § 157. Similarly, Section 9(a) provides the right to seek an election and states that only unions "selected" by the "majority of the employees . . . shall be the exclusive representatives of all the employees." 29 U.S.C. § 159(a). By barring employees from voting on union representation when a question of representation exists, the Board is suppressing these two statutory rights the agency is supposed to protect.

The Board's policy of disenfranchising unionized employees inevitably leads to them being exclusively represented by unions that lack majority support—i.e., by unions the employees would vote out of power if given the opportunity. This grievously infringes on employees' rights under the Act. "There could be no clearer abridgment of § 7 of the Act," than "grant[ing] exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority." *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S.

731, 737 (1961); *see Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring).

The Board's policies also are an affront to Congress' desire to have the "Board . . . adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily." *Id.* In support of the 1947 Taft-Hartley amendments, Senator Taft emphasized that Section 9 was designed to avoid "dilatory tactics in representation proceedings." *Boire v. Greyhound Corp.*, 376 U.S. 473, 479 (1964). Congress reaffirmed this objective in 1959 by enacting Section 3(b), which authorized the delegation of representation matters to Regional Directors. As Senator Goldwater explained, this amendment aimed "to speed the work of the Board." *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 141 (1971) (quoting Cong. Rec.).

Preventing unionized employees from voting on union representation for months and years at a time frustrates these objectives. The contract bar can preclude elections for up to three years. The recognition and successor bars preclude elections for up to a year from the start of bargaining (which can result in elections barred for well over a year). *See* NLRB Rules & Reg. § 103.21; *UGL-UNICCO Serv. Co.*, 357 NLRB at 809. Blocking charges allow unions to "achieve an indefinite stalemate designed to perpetuate the union in power," *NLRB v. Midtown Serv. Co.*, 425 F.2d 665, 672 (2d Cir. 1970), as a single charge can derail an election for years. *See, e.g.*, *Cablevision Sys. Corp.*, 367 NLRB No. 59 (2018) (blocking charge followed by settlement bar delayed election petition for over four years).

2. The Board's embrace of policies designed to delay employees' right to vote in decertification elections violates the foundational principle of administrative law that "like cases must receive like treatment." *Balt. Gas & Elec. Co. v. FERC*, 954 F.3d 279, 286 (D.C. Cir. 2020) (cleaned up). This principle is codified in Section 9(c)(2) of the Act, which states that "the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought." 29 U.S.C. § 159(c)(2). While the Board has repeatedly acted to frustrate employees' ability to vote unions *out* of power, the Board expedited employees' ability to vote unions *into* power with its "Ambush Election Rule," *Representation-Case Procedures*, 88 Fed. Reg. 58076 (Aug. 25, 2023).

In the Ambush Election Rule, the Board shortened the pre-election period and deferred resolving certain disputes until after the vote to expedite representation elections. The Board's "need for speed" in representation elections outweighed other considerations. *See id.* at 58084 (finding that employers being "rushed" by the rapid pace of elections is outweighed by "the statutory interest in expeditiously resolving questions"). The Board claimed that Congress saw an "exceptional need for expedition" in representation cases, *id.* at 58089, that there is an "essential animating principle that representation cases should be resolved quickly and fairly," *id.* at 58077, and that the Board has a "statutory duty to ensure that representation cases are resolved expeditiously." *Id.* at 58092. Even a six-day delay under a prior regulation was considered incompatible with the Board's asserted duty to quickly conduct elections. *Id.* at 58086.

But when it comes to decertification elections, the Board abandons these professed principles. While delaying a certification election for just a few days is supposedly unconscionable, quashing employees' right to vote in a decertification election for up to three years with the contract bar is perfectly acceptable. In *General Cable Corp.*, the Board callously claimed that "an added delay of but 1 year" to the two-year contract bar "is relatively slight and fully warranted when viewed in the light of countervailing considerations." 139 NLRB 1123, 1125 (1962). In its most recent rule reinstituting blocking charges, the Board asserts that "a speedy election is not desirable in and of itself if it does not reflect the free choice of the unit employees." 89 Fed. Reg. at 62987.

The Board's double standard defies the fact that the Act "guards with equal jealousy employees' selection of the union of their choice and their decision not to be represented at all." *Balt. Sun Co. v. NLRB*, 257 F.3d 419, 426 (4th Cir. 2001). The Board must stop treating employees' Section 7 right to refrain from union representation, and Section 9 right to vote in decertification elections, as inferior or disfavored rights. The Board's statutory duty is to facilitate employees' exercise of their Section 7 right to choose to reject union representation and Section 9 right to vote in decertification elections. The Board should finally live up to its duty by rescinding its election bars and blocking charge regulation.

III. The Non-Statutory Election Bars Should Also Be Reconsidered Because They Are Not a Product of Reasoned Decision Making.

The Board's election bars are not only incompatible with the Act's text, but also are flawed in other ways. All share a common impermissible basis—the illogical

notion that an interest in collective bargaining can overcome employees' right to choose whether they want to engage in collective bargaining. *See* Section III(A) *infra*. The contract bar irrationally bans elections at the best time to have an election—when employees know the terms of the contract the union negotiated. *See* Section III(B) *infra*. The recognition bar is based on the unwarranted assumption that a majority of unit employees support their employer-recognized union. *See* Section III(C) *infra*. The Board should reconsider all of these policies.

A. Employees' Section 7 and 9 rights cannot be balanced against an interest in collective bargaining because the latter is predicated on the former.

The Board's election bars rest on an untenable premise: that the Board can balance employee free choice against an interest in collective bargaining and restrict the former to serve the latter interest.[11] This balancing is statutorily impossible because collective bargaining is predicated on employee free choice. The Act only favors collective bargaining through an exclusive representative *if* a majority of employees support the representative.

This is clear from the text of the Act. Section 7 grants employees an individual right to "bargain collectively through representatives of their own choosing" or to "refrain" from so doing. 29 U.S.C. § 157. Section 9(a) authorizes an exclusive representative for collective bargaining only when it is designated or selected "by the majority of the employees in a unit appropriate for such purposes." 29 U.S.C. § 159(a).

[11] *See, e.g.*, *Gen. Cable Corp.*, 139 NLRB at 1125-26; *Lamons Gasket Co.*, 357 NLRB at 744-45.

Taken together, Section 9(a) permits the suppression of employees' individual Section 7 right to refrain from collective bargaining only when a majority of employees support collective representation. As the Board stated in *MV Transportation*:

> It is well established that two of the fundamental purposes of the Act are (1) the protection and promotion of employee freedom of choice . . . with respect to the initial decision to engage in or refrain from collective bargaining, and choice regarding the selection of a bargaining representative; and (2) the preservation of the stability of bargaining relationships. The first of these is explicitly set forth in Section 7 of the Act. The second is a matter of policy and *operates with respect to those situations where employees have chosen a bargaining relationship*.

337 NLRB 770, 772 (2002) (citations omitted) (emphasis added).

The Act does not just disfavor exclusive union representation when a majority of employees do not support it. The Act prohibits it. "The [Supreme] Court has held that both union and employer commit unfair practices when they sign a collective bargaining agreement recognizing the union as the exclusive bargaining representative when, in fact, only a minority of the employees have authorized the union to represent their interests." *NLRB v. Iron Workers' Local 103*, 434 U.S. 335, 344 (1978); s*ee Ladies' Garment Workers*, 366 U.S. at 737–38 (similar).

The Board turns the Act on its head by finding that an interest in collective bargaining justifies restricting employees' right to choose whether to engage in collective bargaining. It is like proposing that an interest in swimming overcomes the need for water. The proposition is irrational because swimming requires water. Under the NLRA, collective bargaining requires a union with majority support. Consequently, the Board cannot find that an interest in collective bargaining overcomes the need for majority employee support for that bargaining.

The Board's non-statutory election bars are built on a foundation of sand. The Board should abandon them all for this reason.

B. The contract bar bans elections at irrational times and is difficult for employees to navigate.

1. The contract bar disenfranchises employees for the first three years of a collective bargaining agreement, except for a 30-day window period that opens either 90 or 120 days before the earlier of the expiration or third anniversary of the contract. *See Mountaire Farms, Inc.*, 370 NLRB No. 110 (2021). As a matter of policy, prohibiting employees from voting after a union signs a contract makes little sense. This is the *best time* for an election because the employees will know the employment terms the union negotiated and can make an informed choice on whether they want to be subject to the union's contract or representation.

Under the contract bar, employees usually can only vote on a union's representation when they don't know the employment terms the union will negotiate.[12] Employees have to make a decision based on unenforceable union predictions about what it will supposedly obtain at the bargaining table in the future. Unions have every reason to exaggerate those predictions to remain in power, just as politicians have good reason to promise the moon before an election.

The Board should facilitate employees' ability to make informed decisions on whether they want to be represented by a union. The Board can go a long way towards

[12] The narrow exception would be when the union and employer are a party to a contract with a duration of more than three years and the employees petition for an election after the third year.

this goal by rescinding its contract bar so employees can vote on whether they want to be subject to a union contract.

2. The contract bar also should be rescinded because it is difficult for employees to navigate and for the Board to administer. The Board and Regional Directors have often had to adjudicate cases concerning whether and when a union and employer entered into a bar-quality contract and the exact days on which the window period for filing an election petition opens and closes.[13] These fact-intensive cases show how difficult it can be for rank-and-file employees, who often lack information about negotiations between the union and their employer, to know if and when they are subject to the contract bar.

There is also the "danger that unions and employers may collude to defeat employees' representational wishes on the basis of illusory or fabricated agreements." *YWCA of W. Mass.*, 349 NLRB 762, 764 (2007); *see Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531, 537 (D.C. Cir. 2003). A union that fears that employees will soon try to decertify it has a strong incentive to sell employees out at the bargaining table to obtain a contract that will entrench the union in power for three years, no matter how much employees oppose it. As former General Counsel Robb wrote in a brief that concerned the contract bar, "the very structure of the contract bar doctrine lends itself to placing union institutional interests over the interests of

[13] *See* Petitioner's Request for Review, at **16–21, *Republic Serv. (Int'l Bhd. of Teamsters, Local 728),* 10-RD-384068 (Apr. 28, 2026) (citing cases), available at https://www.nlrb.gov/case/10-RD-384068; Petitioner's Request for Review, at **12–26 (Aug. 21, 2020), *Mountaire Farms (UFCW)*, Case 05-RD-25688 (citing cases), available at https://apps.nlrb.gov/link/document.aspx/09031d45831fc901.

the employees they represent—employees who have little control over the parties' bargaining strategy and whose rights are largely left in the trust of the Board."[14] General Counsel Robb was right. The Board should remove this incentive by rescinding the contract bar.

C. The recognition bar disenfranchises employees based on unwarranted speculation that employees support the union.

The recognition bar disenfranchises employees if their employer recognizes a union to be the employees' representative. NLRB Rules & Reg. § 103.21. The bar lasts for at least six months and up to one year from the date of the first bargaining session after recognition. *Id*. The bar is irrational because the Board imposes it when it has reason to doubt whether the employer-recognized union actually enjoys the support of a majority of employees.

1. The fact "that an employer bargains with a union does not tell [the Board] whether the *employees* wish to be represented by the union." *Seattle Mariners*, 335 NLRB 563, 567 n.2 (2001) (Member Hurtgen, dissenting). Nor is an agreement between an employer and a union that claims the union had majority support prove the union had that support. *See Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003); *Colorado Fire Sprinkler v. NLRB*, 891 F.3d 1031 (D.C. Cir. 2018).

Unions and employers have a host of self-interested reasons to enter into recognition agreements that have nothing to do with effectuating employee free

[14] Gen. Counsel's Amicus Br. to the NLRB, at *6 (Oct. 7, 2020), *Mountaire Farms (UFCW)*, Case 05-RD-25688, available at https://apps.nlrb.gov/link/document.aspx/09031d458327ff98.

choice. A union's motive is obvious: to gain more dues-paying members and fee payers. Employers recognize unions, or agree to do so in the future, to satiate perceived business interests. This includes obtaining union promises to cease coercive "corporate campaigns" against them;[15] to obtain union political assistance;[16] to cut off organizing campaigns of unions less-favored by the employers;[17] to obtain union concessions at the expense of employees the union already represents;[18] or to obtain union concessions at the expense of employees the union seeks to organize.[19] Given the self-interests at work, it would be naïve for the Board to assume that an employer's decision to recognize a union means that employees truly want that union's representation. *See Auciello Iron Works v. NLRB*, 517 U.S. 791, 790 (1996) (finding "nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom").

The Supreme Court has recognized that deferring even to "good faith" employer and union beliefs about employee representational preferences "place[s] in

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[15] *See* Laura J. Cooper, *Privatizing Labor Law: Neutrality/Card Check Agreements and the Role of the Arbitrator,* 83 Ind. L.J. 1589, 1591-93 (2008); Daniel Yager & Joseph LoBue, *Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century*, 24 Empl. Rel. L.J. 21 (1999); *Pichler v. UNITE,* 228 F.R.D. 230, 234-40 (E.D. Pa. 2005)*, aff'd*, 542 F.3d 380 (3d Cir. 2008); *Smithfield Foods v. UFCW,* 585 F. Supp. 2d 789, 795-97 (E.D. Va. 2008).

[16] *See, e.g.*, *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1289 (11th Cir. 2010).

[17] *See, e.g.*, *Price Crusher Food Warehouse*, 249 NLRB 433 (1980).

[18] *See, e.g.*, *Adcock v. Freightliner*, 550 F.3d 369, 372 (4th Cir. 2008); *Aguinaga v. UFCW*, 993 F.2d 1463, 1471 (10th Cir. 1993); *Kroger Co.*, 219 NLRB 388 (1975).

[19] *See, e.g.*, *Patterson v. Heartland Indus. Partners*, 428 F. Supp. 2d 714, 716 (N.D. Ohio 2006) (moot on appeal); *Adcock,* 550 F.3d at 372.

permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives." *Ladies' Garment Workers*, 366 U.S. at 738–39. In *Nova Plumbing*, the D.C. Circuit sharply reprimanded the Board for deviating from this principle and accepting that an employer-union recognition agreement proves the employees want union representation. 330 F.3d at 536-37. The court reasoned that proposition "runs roughshod over the principles" of employee choice, "completely fails to account for employee rights," and creates a risk of the union and employer "colluding at the expense of employees and rival unions." *Id.* "[B]y focusing exclusively on employer and union intent," the court held that "the Board . . . neglected its fundamental duty to protect employee § 7 rights." *Id.* at 537; *see Colorado Fire Sprinkler*, 891 F.3d at 1038–40 (similar)

2. Even if a recognized union actually possesses authorization cards from a majority of employees, the Board has no knowledge of the conditions under which those cards were procured from employees. The Board does not know whether the cards were obtained through coercive means or whether employees revoked those cards. When the Board applies its recognition bar, the Board does not know whether an un-coerced majority of employees support the employer-recognized union.

Union authorization cards are far less reliable indicators of employee representational preferences than votes in a secret ballot election. *See Dana Corp.*, 351 NLRB 434, 438–39 (2007), overruled by *Lamon's Gasket Co.*, 357 NLRB 739

(2011). Unions can, and almost always do, engage in conduct during card-check campaigns that would never be tolerated in a Board-conducted election. For example, the Board would deem an election tainted if union officials were present in the voting booths, urging employees to vote for the union and recording how they voted. Equivalent conduct occurs in every card-check campaign as union organizers urge employees to "vote" for the union by signing a card in the organizers' presence and by recording which employees sign a card and which refuse to do so.

The fact that employees filed a decertification petition within a year of the recognition (i.e., during the recognition bar) is itself strong evidence that employees might not support the recognized union. For example, assume an employer recognizes a union and, two weeks later, an employee files a decertification petition supported by a showing of interest against the union signed by 75% of the workforce. Under the Board's recognition bar policy, the Regional Director would dismiss the petition based on presumption that a majority of employees support the recognized union, despite tangible evidence to the contrary. It makes no sense for the Board to presume that a majority of employees support a recognized union when the Board has evidence they do not support that union.

The Board should rescind its recognition-bar regulation in favor of a more rational policy: if employees petition for an election after their employer recognizes a union to be their representative, the Board should conduct an election to determine if those employees actually want that union to represent them.

IV. The Blocking Charge Regulation Should Be Reconsidered Because It Is Not a Product of Reasoned Decision Making.

The Board should rescind its blocking charge regulation, NLRB Rule & Reg. § 103.20, because it conflicts with Sections 7 and 9 of the Act. *See* Section II, *supra*. The Board also should reconsider the regulation because the Board did not engage in reasoned decision making under the APA when it adopted that policy in its "2024 Rule," *Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships*, 89 Fed. Reg. 62952 (Aug. 1, 2024), which overruled the Board's "2020 Rule," *Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships*, 85 Fed. Reg. 18366 (Apr. 1, 2020).

The practical and policy problems with blocking charges are discussed at length in the 2020 Rule, 85 Fed Reg. at 18366–67, 18373–80, Member Kaplan's dissent to the 2024 Rule, 89 Fed. Reg. at 63005–14, and the Foundation's comments opposing the proposed 2024 Rule. The Foundation will not rehash those arguments, but incorporates them by reference as reasons for the Board to reconsider the blocking charge policy it adopted in the 2024 Rule.

The Foundation urges the Board to eliminate blocking charges entirely by issuing a regulation requiring Regional Directors to deal with any unfair labor practice allegations just like any other objection to the conduct of an election—after the votes are counted. Sample regulatory language can be found at page 5, *supra*. This simple solution will prevent the gamesmanship that will inevitably arise from anything less than a bright-line rule.

A return to the 2020 Rule's blocking charge regulation would also be a significant, though lesser, improvement over the present state of affairs. If the Board chooses to propose this option, it should also improve its prior blocking charge regulation in two ways: (A) provide all parties with an opportunity to be heard concerning a union's offer of proof in support of a blocking charge; and (B) curtail merit-based dismissals under *Rieth-Riley Construction Co.*, 371 NLRB No. 109 (2022).

A. All parties to a representation proceeding should be provided with a meaningful opportunity to evaluate and contest a party's request to block the election.

The 2024 Rule's blocking charge regulation states that a party seeking to block an election "shall simultaneously file, but not serve on any other party, a written offer of proof in support of the charge." NLRB Rule & Reg. § 103.20. The 2020 Rule's regulation had the same language. 85 Fed. Reg. at 18399. When a union files a blocking charge after a decertification petition is filed—which is often the case—this language allowing unions to submit their offer of proof confidentially makes it impossible for employee petitioners and employers to assess or challenge the union's claims. This, in turn, makes it difficult for Regional Directors to determine whether the union's new allegations have any merit because all the Regional Directors have to go on are the *ex parte* assertions of a self-interested party.

While a Regional Director can reject a union's offer of proof, they rarely do so. In the experience of Foundation attorneys, Regional Directors usually block decertification elections shortly after a blocking charge is filed as if it were a matter of course. Employee petitioners only learn weeks, months, or years later that the

union's charge was spurious when it is suddenly withdrawn or dismissed. [20]

This policy makes no sense. If the Board is going to permit any blocking charges, it should at least give petitioners and employers a meaningful opportunity to review and challenge a union's grounds for blocking an election. This means requiring the union to serve its offer of proof on all parties and granting those parties a reasonable amount of time to respond to the offer of proof. This requirement is necessary to give employee petitioners a modicum of due process—i.e., an opportunity to be heard before they are deprived of their right to prompt election. *See United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993); *Zinermon v. Burch*, 494 U.S. 113, 127–28 (1990). This requirement also will help Regional Directors make informed decisions about whether the allegations a union is making to stop employees from voting on its representation might have merit.

B. The Board should curtail merit-based dismissals of representation petitions.

The Board should overrule *Rieth-Riley* and curb its merit-dismissal policy in any regulation it issues concerning representation procedures. *Rieth-Riley* was an end run around the 2020 Rule's provisions that significantly narrowed the circumstances in which a charge could block a petition. Under *Rieth-Riley*, a Regional Director can

[20] For example, in *The Andersons Reed & Perrine Lawn Products (UFCW Local 152)*, 22-RD-354977, an employee filed a decertification petition on November 14, 2024. The union filed a blocking charge on November 20, which Region 22 granted just two days later. The election was blocked until April 2026 when the union withdrew the charge (likely because it was going to be dismissed) and then disclaimed representation. Region 22 and a union had disenfranchised employees for a year and a half based on meritless charges. https://www.nlrb.gov/case/22-RD-354977; https://www.nlrb.gov/case/22-CA-355187 (blocking charge).

dismiss an election petition subject to reinstatement—which is functionally the same thing as an election block but under a different label—by issuing an unfair labor practice complaint against the employer. 371 NLRB No. 109, slip op. at *7. *Rieth-Riley* requires that all of a complaint's allegations be accepted as true and that it be assumed that all relief requested would be obtained. *Id*. Whether the alleged unfair labor practice actually impacted employees in a way that would taint an election was irrelevant. *Id*. All a Regional Director had to do was seek a bargaining order in a complaint to justify summarily dismissing employee decertification petitions.

Unsurprisingly, *Rieth-Riley* led to an increase in merit dismissals, litigation, and disenfranchisement of employees as unions turned to these dismissals when blocking charges were unavailable to stop employees from voting. The Starbucks litigation is illustrative. The Board has conducted well over 400 certification elections at Starbucks at the behest of SEIU. But when baristas sought an election to vote on whether they want to remain represented by SEIU under the 2020 Rule, the Board disenfranchised these employees with merit-based dismissals of their petitions. For example, Starbucks barista Ariana Cortes petitioned for a decertification election in April 2023, and three years later is still far from an election because Regional Directors twice conditionally dismissed her petition under *Rieth-Riley*. *See* Case No. 03-RD-316974. Under *Rieth-Riley*, and now the Board's blocking charge regulation, the Board incongruously only allows Starbucks employees to vote on SEIU representation if and when SEIU wants those employees to vote on its representation.

The Board should not again allow a regulation meant to curtail blocking charges to be circumvented with conditional dismissals of election petitions or other devices. It makes little difference to rank-and-file employees whether a Region "blocks" their election, "holds it in abeyance," or "dismisses" their petition subject to reinstatement. The practical consequence is the same: the employees are disenfranchised by unproven union unfair labor practice allegations against their employer.

If the Board chooses to readopt the language of its 2020 Rule, it should limit the availability of merit dismissals to cases in which there is a final Board order finding that unfair labor practices were committed and that these practices caused the union to lose majority support. *Rieth-Riley's* holding that mere allegations of unfair labor practices warrant dismissal of a petition should be overruled.

V. The Board Should Repudiate Its Merger Doctrine.

Under the Board's merger doctrine, unions and employers can disenfranchise employees by consolidating multiple bargaining units into a single, multi-facility unit without employee consent. Once that happens, the Board considers "the larger, merged unit . . . the only unit appropriate for purposes of a representation election." *Wisconsin Bell, Inc.*, 283 NLRB 1165, 1165 (1987). This usually precludes the subsumed employees from ever obtaining a decertification or deauthorization election because merged units include geographically separate facilities and can have large numbers of employees.

Take the shameful situation in *First Student, Inc.*, 19-UD-357422. That case concerned roughly 170 bus drivers employed by First Student that served two school

districts in or around Battle Ground, Washington. One of the drivers petitioned for a deauthorization election with the support of over 30% of her coworkers. The Regional Director dismissed the driver's petition because the Teamsters union and their employer merged these drivers into the single, nationwide unit covered by a National Agreement.[21] This merged unit includes around 22,000 employees who work in at least 260 locations in dozens of states.[22] As a practical matter, bus drivers at one or more First Student locations will never be able obtain a sufficient number of driver signatures on a showing of interest to obtain an election in this massive, multi-state unit. The Board's merger doctrine has disenfranchised over 20,000 employees at First Student, as well as employees in other merged units.

The Board should repudiate its merger doctrine because it has a devastating impact on employees' Section 7 and 9 right to vote on union representation and to vote on deauthorization. Employees at a single facility who are assimilated into the Borg of a much larger bargaining unit will be unable to escape it even if every employee at that facility vehemently oppose the union's representation. The Board should not countenance this suppression of employees' rights.

The Board also should jettison its merger doctrine because it conflicts with several provisions of Section 9 of the Act. *First*, Section 9(b) states, "[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising

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[21] *See* Regional Director's Decision and Order Dismissing Petition, *First Student, Inc.*, 19-UD-357422 (Jan. 28, 2025), available at https://apps.nlrb.gov/link/document.aspx/09031d4583f1f3ab.

[22] *See* Compl. ¶¶ 2, 8, 23-26, ECF No. 1, *First Student Inc. v. Int'l Bhd. of Teamsters, Local 1205*, 2:26-cv-1770 (E.D. N.Y. Mar. 25, 2025).

the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. 159(b). With its merger doctrine, the Board is neglecting its duty to determine a unit that assures employees "the fullest freedom in exercising" their rights. The doctrine requires the Board to instead defer to whatever merged unit an employer and union cobble together even if that unit quashes employees' freedom to vote on union representation.

Second, the merger doctrine violates Section 9(c)(5), which prohibits the Board from using "the extent to which the employees have organized" as controlling factor in determining an appropriate unit. The parameters of a merged unit are generally controlled by "the extent to which the employees have organized." 29 U.S.C. 159(c)(5). As the union organizes new units of employees, those units are assimilated into the merged unit. The merger doctrine defies Section 9(c)(5).

Third, Section 9(c)(2) requires the Board to apply the same rules regardless of the persons petitioning or the relief sought. The merger doctrine violates this principle because it allows a union to be certified in a particular unit, but prohibits employees from decertifying *that very same unit*. This disparate treatment not only runs afoul of Section 9(c)(2), but makes no sense. The Board's certification of a union to be the exclusive representative of a single-location unit necessarily means the Board found it to be "an appropriate unit." But under the merger doctrine, if employees request a decertification election in the same unit after it is merged with another, the Board

considers the unit it certified not to be an appropriate unit.[23] The notion that an appropriate unit for certification purposes is not an appropriate unit for decertification purposes cannot be reconciled with the Act. *See Midwest Div. RMC v. NLRB*, 170 F.4th 1109, 1117 (8th Cir. 2026) (holding there is "no basis in the NLRA to distinguish between initial certification and decertification elections").

Finally, Section 9(e)(1) grants employees a right to petition for a deauthorization election "in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3) of this title." 29 U.S.C. § 159(e)(1). Of course, agreements "made pursuant to section 158(a)(3)"—so-called union-shop or agency-shop agreements—are prohibited in the nation's twenty-six Right to Work states. A union-shop agreement in a nationwide or multi-state unit would only apply to employees who work in non-Right to Work states. Yet, under the Board's merger doctrine, the only appropriate unit for deauthorization would be a merged unit that includes employees in Right to Work states who are not subject to the union-shop agreement at issue in the election. The merger doctrine deviates from the text of Section 9(e)(1), as well as common sense.

While there are many reasons for the Board to abandon its merger doctrine, none exist for retaining it. Employers and unions can agree to bargain on a multi-facility

[23] For example, in *Wisconsin Bell*, the Board found a single-location unit of "employees in the Public Service Center at Kossow Road location" to be an appropriate unit for a certification election in 1986. One year later, in 1987, the Board incongruously found that same unit inappropriate for decertification simply because the employer and union agreed to merge it into a larger unit in the contract. 283 NLRB at 1166 (1987) (Chairman Dotson, dissenting).

basis, and enter into a collective bargaining agreement that applies to multiple facilities, without merging the units into a single unit. Merging bargaining units serves no purpose other than the illegitimate purpose of disenfranchising employees.

Consider again the example of the Teamsters and First Student. If the Board rescinds its merger doctrine, the Teamsters and First Student can still bargain over and agree to a nationwide bargaining agreement covering 22,000 employees at hundreds of locations if they so choose. The only thing that would change is that employees at any given location would gain the ability to vote on whether they want the Teamsters' representation or want to subsidize that union. This is a laudatory change the Board should support.

VI. The Board Should Establish That a Certification or Recognition Only Supports a Presumption That a Union Enjoys Majority Employee Support for a Limited Amount of Time.

The most significant step the Board could take to enfranchise employees is to limit how long a Board certification or an employer's recognition supports a presumption that a majority of employees support a union. A primary reason that over 90% of unionized employees have never voted on union representation is the Board's irrational policy that a union electoral victory supports a perpetual presumption that a majority of unit employees support the union. For example, under the Board's current policy, if a union won a certification election in a unit on June 1, 1976, the Board will presume based on that election result that a majority of unit employees still support the union fifty years later, on June 1, 2026, even though there is probably not one person left in the unit who was eligible to vote in 1976.

The Board's "one-vote, one-time" presumption is not required by the Act and so defies democratic norms as to be arbitrary and capricious. Common sense dictates that an election result can only evidence the preference of an electorate for so long.

The Board should establish through rulemaking that a union winning a certification election creates an irrebuttable presumption that a majority of employees support that union for one year and a rebuttable presumption for the three following years. And an employer recognizing a union should support a rebuttable presumption of majority support for only one year.

This salutary reform will go far to giving more employees a chance to vote on union representation. The reform will not interfere with employee-supported bargaining relationships or result in unnecessary elections because employers can recognize unions that maintain current showings of majority employee support.

1. Nothing in the Act's text provides that the Board's certification of an election under Section 9(c) creates an eternal presumption that a majority of unit employees support the certified union. The Act is silent on this matter. However, it is safe to believe the individuals who enacted the NLRA intended that the results of any election would only evidence employee-representational preferences for some period. The Representatives, Senators, and President who supported the Wagner Act and Taft-Hartley Act were all products of the American political system in which an electoral victory establishes that a majority of an electorate support a candidate for office for a fixed amount of time—two years, four years, or six years. The notion that a candidate for office winning one election establishes that a majority of voters forever

want that candidate to remain in office would have sounded as absurd to their ears as it does to ours.

It is irrational for the Board or anyone else to presume that, because a majority of unit employees voted for union representation on one date in time, a majority of unit employees support that union five, ten, twenty, thirty, forty, or fifty years later. This is not only because the representational preferences of those eligible to vote in the initial election could have changed. It is also because the identity of the persons in a unit changes over time—i.e., because there is turnover as some individual leave the unit and other individuals enter it. How employees voted in an initial election on union representation says nothing about how an employee hired after that election feels about the union or would vote on its representation.

This observation is intuitively obvious to anyone with a passing familiarity with political elections. The voting preferences of electorates in fixed political jurisdictions, such as states, often change over time. A majority of voters in a state may vote for a Republican President one year and then, four years later, support a Democrat President. The reason is that, over time, the preferences of voters change and the identity of voters in a given jurisdiction change. The same is true of employee bargaining units.

2. The Board should issue a regulation that recognizes that a union's victory in a certification election or a card-check campaign can only support an inference that a majority of unit employees support the union for a fixed amount of time. The Foundation proposes that the Board's certification of a union after a secret-ballot

election should create an irrebuttable presumption of majority support for one year—a time frame that corresponds with current Board law and Section 9(e)(2)'s election bar—and a rebuttable presumption for three more years. *See supra,* 4. On the four-year anniversary of the certification, the union's four-year-old election win will no longer support an inference that a majority of employees support that union's representation. A four-year period is reasonable because it corresponds with the term of the President and the terms of governors in 48 states.

An employer's decision to recognize a union, based on what the employer and union claim is proof that a majority of employees support the union, should support a rebuttable presumption that a majority of unit employees support the union for one year. The reason for this time period is that employee-signed cards or petitions supporting union representation are generally considered valid evidence of such support for one year.[24] So it is rational, if not overly generous, for the Board to establish an employer's recognition of a union based on such cards can support a rebuttable presumption of majority status for one year.

3. The benefit of this reform is readily apparent: more employees will be able to vote on union representation. There is little to no downside to this reform because, if a union has proof that it has the support of a majority of current employees in a unit, an employer can recognize that union without an election.

[24] *See Aircap Mfrs.*, 287 NLRB. 996, 1033 (1988); *Blade-Tribune Publish'g Co.*, 161 NLRB 1512, 1513, (1966).

This simple fact rebuts any argument that this reform will interfere with collective bargaining relationships that employees strongly support or will result in the Board having to conduct unnecessary elections whose results will not be in doubt. If a union and employer want to continue a productive bargaining relationship, and the union has proof that a majority of current employees support it, the employer can recognize that union at regular intervals based on that showing of support. The union and employer can choose to require this in a collective bargaining agreement. As long as a majority of employees support the union, the proposed limit on how long a certification or recognition will support a presumption of majority employee support will not interfere with desired bargaining relationships.

The proposed limit will instead generally lead to elections being held where a majority of current unit employees may not support a union's representation. And that is a good thing. If a majority of employees may not support a union four years after its certification, or a year after its recognition, an election is warranted to determine if the employees want to be represented by that union. If the employees do not, the Act favors freeing the employees from the unwanted union's representation. *See Ladies' Garment Workers*, 366 U.S. at 737-38. And if the employees vote to remain represented by the union, the certification will solidify the union's status as the employees' exclusive representative. Either result is a good one under the Act.

What is not a good result under the Act is the status quo: few unionized employees are voting on whether they want union representation because their exclusive representative was certified or recognized many years, if not decades, in the past. The

Board should recognize that such outdated events do not prove that current unit employees support union representation, and require more contemporary evidence of employee support for the union.

CONCLUSION

The Board should engage in rulemaking to eliminate its non-statutory bars to decertification elections, to eliminate or curtail blocking charges, to rescind its merger doctrine, and to set limits on how long a Board certification supports a presumption that the union has the support of a majority of employees. In the alternative, the Board should engage in rulemaking to modify these or related policies.

Respectfully submitted this 10th day of June 2026,

/s/ William L. Messenger
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