UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITE HERE INTERNATIONAL UNION'S

PETITION FOR RULEMAKING

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UNITE HERE International Union[1] submits this Petition for Rulemaking to the National Labor Relations Board[2] pursuant to Rules 102.124 through 102.125 of the Board's Rules and Regulations and the Administrative Procedure Act.[3] The Petition requests the Board to revoke Rule 103.21 of the Board's Rules and Regulations.[4]

The Board promulgated Rule 103.21 on April 1, 2020 as part of rulemaking that added three new rules to the Board's Rules and Regulations (§§ 103.20 – 103.22).[5] Modifying the NLRB's historic recognition bar doctrine, the Rule 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. The Rule also obligates employers to provide notice to employees alerting them of the union's recognition and advising them of the means to seek decertification. The Rule effectively returns the Board to its brief-lived recognition bar rule promulgated in *Dana Corp*.[6] In 2011, the Board recognized the fallacies of the Rule's underlying rationale when it reversed *Dana* in *Lamons Gasket Co.*[7]

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[1] "UNITE HERE." UNITE HERE is a labor union that represents 300,000 working people across the United States and Canada directly and through its affiliate local unions. UNITE HERE members work principally in the hotel, gaming, food service, manufacturing, textile, distribution, laundry, transportation, and airport industries.

[2] NLRB or "the Board."

[3] 5 U.S.C. § 553(e).

[4] "Rule 103.21" or "the Rule."

[5] United States, National Labor Relations Board, Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships. 85 Fed. Reg. 18366 *et seq*. (April 1, 2020). References to the final published rule will be made as 85 Fed. Reg. _____.

[6] 351 NLRB 434 (2007) ("*Dana*").

[7] *In re Lamons Gasket Co*., 357 NLRB 72 (2011) ("*Lamons Gasket*").

In November 2021, the American Federation of Labor–Congress of Industrial Organizations (AFL-CIO) and North America's Building Trades Unions (NABTU) filed a petition for rulemaking requesting that the Board repeal in their entirety each of the three concurrently promulgated rules, § 103.20, § 103.21, and § 103.22. As that petition demonstrated, serious flaws in the rulemaking process prevented interested parties from having a fair opportunity to provide input and prevented the Board from fully considering the proposals and prudently deciding whether to adopt final rules. UNITE HERE joins fully in the AFL-CIO and NABTU's arguments and requests for rulemaking with respect to each of the three rules. We submit this Petition to outline additional policy grounds for the repeal of Rule 103.21.

I. STATEMENT OF GROUNDS FOR REVOKING RULE 102.31.

A. Background.

Federal labor law has long recognized two separate, legitimate paths toward unionization: NLRB-conducted elections and voluntary employer recognition.[8] Like Board elections, voluntary recognition requires a showing of majority support within the bargaining unit.[9] Unlike in an NLRB election, support for the union must be shown by a majority of *all* bargaining unit employees, as opposed to a mere majority of those voting.[10] It must also be an objectively reasonable showing of support; an employer cannot simply recognize a union

[8] *See, e.g., NLRB v. Gissel Packing Co.*, 395 U.S. 575, 596-97 (1969); *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 72 fn. 8 (1956) ("Board election is not the only method by which an employer may satisfy itself as to the union's majority status.")

[9] *Ladies' Garment Workers v. NLRB (Bernhard-Altmann),* 366 U.S. 731 (1961).

[10] *See Lamons Gasket Co.* 357 NLRB at 745.

voluntarily based on good faith.[11]

In 1966, the NLRB held in *Keller Plastics Eastern, Inc.*[12] that a legal bargaining relationship derived from voluntary recognition must be afforded a "reasonable period of time" before an employer could seek to withdraw recognition.[13] Soon after, in *Sound Contractors Association*,[14] the Board extended *Keller Plastics* to bar employee election petitions for the same period. The Board grounded these policies in the same principles of employee choice that had guided it in constructing its election bar doctrine, established ten years earlier with the Supreme Court's approval.[15] For the following 41 years, *Keller Plastics*'s recognition bar doctrine went largely undisturbed.

Over the past three decades, meanwhile, unions have increasingly resorted to private agreements leading to voluntary recognition agreements to organize workplaces in place of ordinary Board elections.[16] This shift came primarily in response to the increasingly aggressive tactics employed by companies within the framework of traditional NLRB elections, which afford significant structural advantages to employers to influence employee choice, both lawfully and unlawfully.[17] Card-check recognition, by contrast, allows workers

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[11] *See Bernhard-Altmann*, 366 U.S. at 737.

[12] 157 NLRB 583 (1966).

[13] *Id.* at 587.

[14] 162 NLRB 364 (1966).

[15] *See Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944); *Brooks v. NLRB*, 348 U.S. 96 (1954).

[16] *See* James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 824-32 (2005).

[17] *See id.*; Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 HARV. L. REV. 1769 (1983).

to request recognition through signed cards or private elections. Often—but not always—card-check agreements include the stipulation that companies remain neutral on unionization, further diminishing the likelihood of undue employer influence.

In response to employer hostility to voluntary recognition agreements, a divided Board in *Dana* overruled the over-four-decade standard established in *Keller Plastics* to create a new, "modified" recognition bar, allowing employee-led election petitions to be filed within 45 days of voluntary union recognition. Recognizing the factual, legal, and policy flaws of *Dana*, the Board quickly reversed itself in *Lamons Gasket*, returning to the doctrine in *Keller Plastics* while also establishing a 6- to 12-month range for determining what constitutes a "reasonable period of time" for the bar's duration.[18] In April 2020, however, the Board abruptly re-imposed the abandoned *Dana* rule through rulemaking.

Congress observed in enacting the NLRA that the "refusal by some employers to accept the procedure of collective bargaining lead[s] to strikes and other forms of industrial strife or unrest" that obstruct commerce.[19] To redress these barriers to the free flow of commerce, Congress made it the express policy of the United States to "encourage[e] the practice and procedure of collective bargaining."[20] For some 40 years, there was an unbroken consensus among Board members appointed by both Republican and Democratic administration that the recognition bar served the statutory purpose of encouraging collective bargaining. In promulgating the Rule, the Board deviated from that purpose, and privileged

[18] *See Lamons Gasket*, 162 NLRB at 748.

[19] 29 U.S.C. § 151.

[20] *Id.*

the Section 7 rights of employees who might oppose unionization over the Section 7 rights of the majority of their coworkers who desire immediate representation without the destabilizing effect of a decertification proceeding. The Board pointed to no empirical evidence to justify the Rule, but instead grounded its reasoning in conjecture that fundamentally misapprehends the voluntary recognition process. Strong policy reasons exist for rescinding the Rule and reverting to the approach that the Board articulated in *Lamons Gasket*.

B. The central role of voluntary recognition under the NLRA.

In adopting the Rule, the Board expressed a deep mistrust of the legitimacy of voluntary recognition to establish a union's status as exclusive bargaining representative under Section 9(a) of the Act.[21] Although acknowledging that "[i]t is well established that voluntary recognition and voluntary-recognition agreements are lawful," the Board nonetheless made clear that it considered voluntary recognition not only inferior to Board-supervised representation elections, but in fact a threat to employees' Section 7 rights. It postulated several reasons to distrust the legitimacy of voluntary recognition, none of them supported by empirical evidence. First, it hypothesized that "signatures on authorization cards may be the result not merely of peer pressure, but of threats, intimidation, coercion, harassment, or other conduct that falls far short of the 'laboratory conditions' the Board seeks to ensure during elections."[22] Second, it considered that, even where a union's effort to convince employees to sign authorization cards "is not unlawfully coercive," the

[21] 29 U.S.C. § 159(a).

[22] 85 Fed. Reg. 18381.

demonstration of majority support is nonetheless unreliable given that "employees may sign cards because they are susceptible to peer pressure or do not want to appear nonconformist or antagonistic."[23] Third, the Board opined that "employees often sign cards due to misunderstandings, misrepresentations, or lack of information about the consequences of unionization," a situation which is assertedly exacerbated by the fact that "a card check often is accompanied by formal or informal employer neutrality, which may effectively deprive employees of any exposure to information or argument that might cause them to decline representation."[24] Thus, while reluctantly doffing its hat to the principle that voluntary recognition is lawful, the Board made clear that it considered it a danger to be guarded against.[25]

The hostility towards voluntary recognition underlying the Rule is fundamentally at odds with the text of the NLRA, its legislative history, and with Supreme Court decisions interpreting the statute. These authorities make clear that "voluntary recognition has been

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[23] *Id.*

[24] *Id.*

[25] The Board's hypothetical concerns about coercion during voluntary recognition organizing campaigns not only lack factual support but are contradicted by the empirical data. Survey studies have shown little if any undue pressure on the part of unions to sign cards during card-check campaigns. *See* Adrienne E. Eaton & Jill Kriesky, *NLRB Elections Versus Card-Check Campaigns: Results of a Worker Study*, 62 INDUS. & LABOR RELATIONS REV. 157 (2009); *Brudney*, *supra* note 16 at 862. Indeed, workers actually tend to report lower rates of duress than during Board election campaigns, particularly on the part of employers. *See Eaton & Kriesky, supra*, at 165, tbl. 2 (showing a more than 12-percentage-point increase in employees who report a "a great deal" of pressure to oppose the union from their employer during Board elections as opposed to card-check campaigns.). Noting these figures, labor scholars have argued that card-check offers a *superior* method for reflecting employee choice than traditional Board's elections. James Y. Moore & Richard A. Bales, *Elections, Neutrality Agreements, and Card Checks: The Failure of the Political Model of Industrial Democracy*, 87 IN. L. J 147, 161-63 (2012).

woven into the very fabric of the Act since its inception,"[26] and that far from constituting a threat to employees' Section 7 rights, it plays a vital and legitimate role in advancing them.

The practice of voluntary recognition predated the adoption of the NLRA in 1935, and Congress designed the Act to preserve its legitimacy. Various statutory provisions make this clear. First, the Act envisions that the NLRB's authority to conduct representation elections would be exercised only as a backstop when an employer refused to voluntarily recognize a bargaining representative. Section 9(c) of the Act states that the Board's electoral processes are triggered after it receives a petition filed by employees alleging that they "wish to be represented for collective bargaining *and that their employer declines to recognize their representative as the representative defined in section 9(a)*."[27] It flows logically from this that Section 9(a) does not limit the exclusive representative of employees to representatives chosen in a Board-supervised election. Rather, Section 9(a) provides that "[r]epresentatives *designated or selected* for the purposes of collective bargaining by the majority of the employees" shall be the exclusive collective-bargaining representatives.[28] Correspondingly, Section 8(a)(5) of the Act requires an employer to bargain collectively with "the representatives of his employees," but does not specify that such representatives must be chosen in a Board-supervised election.[29] It states rather that the employer's obligation to bargain with its employees' representative is "subject to the provisions of section 9(a)."[30]

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[26] *Lamons Gasket*, 357 NLRB at 742.

[27] 29 U.S.C. § 159(c)(1)(A)(emphasis added).

[28] 29 U.S.C. § 159(a) (emphasis added).

[29] 29 U.S.C. § 158(a)(5).

[30] *Id.*

The Supreme Court has repeatedly affirmed the legitimacy of voluntary recognition to establish Section 9(a) relationships in accordance with the text of the Act. It explained in *Arkansas Oak Flooring Co*. that a "Board election is not the only method by which an employer may satisfy itself as to the union's majority status," since Section 9(a), "which deals expressly with employee representation, says nothing as to how the employees' representative shall be chosen."[31] In *Gissel*, the Court cited *Arkansas Oak Flooring Co*. approvingly, stating that "[w]e have consistently accepted this interpretation of the Wagner Act and the present Act, particularly as to the use of authorization cards."[32] It recognized that the legislative history of the 1947 Taft-Hartley amendments reinforces the conclusion that Congress considered voluntary recognition to be on equal footing with representation elections in terms establishing Section 9(a) status. In enacting that amendment, Congress considered, but rejected, an amendment to Section 8(a)(5) that would have permitted the Board to find that an employer had unlawfully refused to bargain only with "a union 'currently recognized by the employer or certified as such [through an election] under section 9.'"[33] In *Lamons Gasket*, the Board explained that "[t]he purpose of the rejected amendment was to prevent the Board from issuing a bargaining order in favor of a union that had been *neither* voluntarily recognized nor selected in a Board-supervised election. Significantly, the proposed amendment did not so much as question the practice of voluntary recognition, but, in fact, equated voluntary recognition with certification after an election."[34]

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[31] *Arkansas Oak Flooring Co.*, 351 U.S. at n. 8 & 71.

[32] *Gissel*, 395 U.S. at 597.

[33] *Id*. at 598 (citing H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 41 (1947)).

[34] *Lamons Gasket*, 357 NLRB at 741 (emphasis in original).

For over three-quarters of a century, there was an unbroken consensus by members of the Board appointed from both sides of the aisle as to legitimacy of voluntary recognition to establish Section 9(a) relationships. The antagonism to it that the Board evinced in justifying the Rule is at odds with both the Act and caselaw construing it.

C. The Board's recognition bar doctrine and its role within the statutory policies underlying the NLRA.

The purpose of the voluntarily recognition bar is to ensure that voluntary recognition, once lawfully bestowed, has a reasonable opportunity to lead to the establishment of a collective bargaining agreement. This advances the Section 7 rights of employees to designate an effective representative for the purpose of collective bargaining. The Supreme Court admonished in *Franks Brothers Co*. 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."[35] The Court subsequently explained in *Brooks* 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."[36] According to the Board, "the *Franks* and *Brooks* decisions provided the underlying foundations for the 'general Board policy of protecting validly established bargaining relationships during their embryonic stage.'"[37]

Allowing bargaining relationships the opportunity to succeed has justified the bar

[35] *Franks Bros. Co.*, 321 U.S. at 705 (upholding the Board's remedy of requiring an employer to bargain with a union that had lost its majority due to employer unfair labor practices and therefore violated Section 8(a)(5)).

[36] *Brooks*, 348 U.S. at 100.

[37] *Lamons Gasket*, 357 NLRB at 744 (quoting *NLRB v. Cauyga Crushed Stone, Inc*., 474 F.2d 1380, 1384, n. 5 (2d Cir. 1973).

doctrines that the Board has developed preventing the processing of election petitions for periods of time under various scenarios. Germane here, the Board established the recognition bar in *Keller Plastics*.[38] There, the Board examined the lawfulness of an employer's collective bargaining agreement with a union where, subsequent to the union's lawful recognition but before reaching a collective bargaining agreement, the union had lost majority support. Finding no violation of the Act, 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."[39] The Board extended *Keller Plastics* to representation cases in *Sound Contractors*,[40] ruling that a petition seeking to challenge a recognized union's status is barred for a reasonable period of time following the recognition. Thereafter, the legitimacy of the recognition bar went unquestioned by successive configurations of the Board for the next 40 years.

D. The *Dana* and *Lamons Gasket* decisions.

The legal consensus regarding the recognition bar changed in 2007 when the Board ruled in *Dana* that the bar should be modified. As it would subsequently do in promulgating the Rule, the Board postulated that "[t]here is good reason to question whether card signings

[38] 157 NLRB at 583.

[39] *Id.* at 587.

[40] 162 NLRB at 364.

. . . accurately reflect employees' true choice concerning union representation."[41] It disparaged voluntary recognition based upon perceived threats to employees' Section 7 rights that it offered without empirical evidence.[42] Having thus posited a problem, the Board proposed to solve it by modifying the recognition bar to achieve what it called a "'finer balance' of interests that better protects employees' free choice."[43] The Board announced that no election bar would be imposed based on a "card-based recognition" unless employees received notice in the form of an agency posting of their right to decertify the union and 45 days pass from the date of the notice without the filing of such a petition.[44] This was the first and only time that the Board had ever mandated a posting notifying employees of their rights under the Act in response to a wholly lawful process and outside the commission of unfair labor practices.

In overruling *Dana* in *Lamons Gasket*, the Board pointed to empirical evidence that had become available since *Dana* debunking the Board's assumption that voluntary recognition agreements are based on unreliable evidence of majority employee support:

> 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*

[41] 351 NLRB at 439.

[42] *Id.*

[43] *Id.* at 434.

[44] *Id.* The Board's reference to a "card-based recognition" seemed to assume that that is the only allowable evidence of majority support by which an employer may lawfully recognize a union. It is not.

> procedures in only 1.2 percent of the total cases in which *Dana* notices were requested. Those statistics demonstrate that, contrary to the *Dana* majority's assumption, the proof of majority support that underlay the voluntary recognition during the past 4 years was a highly reliable measure of employee sentiment.[45]

In promulgating the Rule, the Board acknowledged *Lamons Gasket*'s findings, but refused to assign any importance to the fact that in the 1,213 cases where a *Dana* notice was requested, there was no decertification petition filed. The Board insisted that "[w]e know nothing about the reasons for that outcome. Specifically, we know nothing about the reliability of the proof of majority support that underlay recognition in each of these cases, not do we know why no petition was filed."[46] It is remarkable that the Board argued that no conclusion could be drawn about employee sentiment vis-à-vis union representation from the fact that the employees declined the Board's invitation to decertify it. The Board could only be contending that employee behavior is so irrational that the posting serves no rational purpose in the first place, a contention that could only lead a reasonable decision-maker to reject the *Dana* rule as senseless. The better conclusion is that employees do act rationally, and under *Dana*, they rarely sought to decertify the union that a majority of them supported.

The fact that employees might on rare occasion choose to decertify a union that they recently supported says nothing about the quality of the majority support that existed at the time that the union was recognized. As the Board observed in *Lamons Gasket*, "whenever voters are given a chance to revisit their choice—whether that choice was expressed in an election or by signing cards—some individuals will likely change their minds. There is no

[45] *Lamons Gasket*, 357 NLRB at 742.

[46] 85 Fed. Reg. 18383.

reason to think that the same small degree of 'buyer's remorse' would not occur after a secret-ballot election. . . . [T]he fact that in a small percentage of cases, a vote held a month or two after a majority of employees have expressed their desire to be represented produces a contrary result says little about the validity of those employees' initial choice to vote yes or sign a card."[47]

In addition to explaining why empirical evidence had clarified that the *Dana* experiment had proven unnecessary, the Board set out reasons based on law and policy why the *Dana* rule was unjustified. These reasons—to which the Board gave insufficient consideration in promulgating the Rule—remain valid and justify the Rule's rescission.

E. Rule 103.21 is unnecessary to protect employees' Section 7 rights.

The principal hypothesis that the Board cited in defending the Rule is that unions will coerce employees to obtain union authorization cards and that complicit employers will recognize the union without an uncoerced showing of majority support. Putting aside that the Board merely speculated about these dangers, existing safeguards already provide sufficient protection to employee free choice in the context of voluntary recognition. In critical respects, these safeguards are more protective of employee freedom of choice than available in Board-supervised elections. They render the Rule unnecessary and a waste of agency resources even assuming the soundness of assertions about the superiority of Board

[47] The Board cited as *Brooks* as an example. There, the union won a Board election by a vote of 8 to 5, but a week later, the employees presented the employer with a petition signed by nine employees stating that they no longer wanted union representation. The Supreme Court nevertheless held that the employer could not question the certified union's majority status for a period of 1 year. *See also Gissel*, 395 U.S. at 604 (recognizing that a voter "may think better of his choice" shortly after an election).

elections.

First, in order for voluntary recognition to be lawful, it must be based on a showing that a majority of all employees in the bargaining unit wish to be represented.[48] This is a more demanding standard than in a Board election, where just a majority of votes cast determines the outcome. In this respect, there is a greater likelihood that a recognized union has the support of a majority of unit employees than a certified one. In cases closed during fiscal year 2021, the Board held 840 elections in response to representation petitions. Of the 48,037 employees eligible to vote in these elections, only 33,117 did, yielding an overall participation rate of 69 percent.[49] Thus on average, a union could be certified with only 35 percent of eligible employees voting in its favor, significantly lower than the 50 percent plus one required for an employer validly recognize a union.[50]

In defending the Rule, the Board stated that "elections provide a 'snapshot in time' while card signings may take place over a period of time, during which employee sentiment can change."[51] This justification never sufficiently addressed the fact that under the Board's procedures, a minority of employees in a bargaining unit voting in favor of representation is sufficient to result in a union's certification—as low as 35 percent at present. But as questionable as this justification was when the Rule was published in April 2020, the argument has been further undermined by the fact that during the last two years, the Board

[48] *Bernhard-Altmann*, 366 U.S. at 737.

[49] Data available at https://www.nlrb.gov/reports/agency-performance-report/election-reports/election-reports-fy-2021.

[50] The current average turnout of less than 70 percent is down from the average turnout of over 80 percent cited by the Board in *Lamons Gasket*. 357 NLRB at 746.

[51] 85 Fed. Reg. 18383.

has successfully reverted to mail ballots as a common practice. Between March and November of 2020, for example, up to 90% of NLRB elections were conducted by mail in order to minimize in-person exposure during the COVID-19 pandemic.[52] Since then, the Board has continued operating under a highly favorable standard for mail-in elections;[53] between October 1, 2021, and January 29, 2022, 304 of the Board's 378 union elections were conducted by mail.[54] Just as important, Board members have indicated an increased willingness to embrace greater use of mail-in balloting moving forward, regardless of pandemic conditions.[55] Given these realities, the Rule's "snapshot in time" rationale for favoring Board elections proves even less availing than it was two years ago.[56]

Second, as the Board explained in *Lamons Gasket*, employees who may contend that their employer unlawfully assisted a recognized union in gaining recognition or that they or their coworkers were coerced in expressing their preference regarding unionization have greater recourse in the voluntary recognition context than under the Board's election

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[52] See NLRB Office of Public Affairs (press release), *NLRB Establishes Standards for Mail- and Manual-Ballot Elections During the COVID-19 Pandemic* (Nov. 9, 2020), https://www.nlrb.gov/news-outreach/news-story/nlrb-establishes-standards-for-mail-and-manual-ballot-representation#:~:text=Since%20March%2C%20approximately%2090%20percent,concerns%20raised%20by%20the%20pandemic.

[53] *See Aspirus Keweenaw*, 370 NLRB No. 45, *2 (2021).

[54] *See KMS Commercial Painting, LLC*, 371 NLRB No. 69, (2022).

[55] *See Aspirus Keweenaw*, 370 NLRB at *9 (Member McFerran concurring) ("[E]ven when we can see an end to the current crisis, it is time for the Board to ask itself…whether it is finally to move beyond manual elections as the default method. The Board should consider expanding and normalizing other ways to conduct representation elections on a permanent basis, including mail, telephone, and electronic voting.")

[56] The "snapshot in time" rationale also shows that the Rule is overinclusive, because it encompasses private election agreements conducted, for example, by the American Arbitration Association.

procedures. Recognition of a minority union violates Sections 8(a)(2) and 8(b)(1)(A) of the Act, and the remedy is to order the employer not to recognize or bargain with the union, and the union not to accept recognition, until the union is certified by the Board following a Board-supervised election.[57] If an employer that has violated Section 8(a)(2) by recognizing a union absent uncoerced majority support subsequently enters into a contract with the union and deducts dues or fees pursuant to a union-security clause, it is jointly and severally liable along with the union to repay such deductions.[58] Coercion by an employer or a union during the organizing campaign violates Sections 8(a)(1) and 8(b)(1)(A). Anyone—including any employee—may file an unfair labor practice charge alleging such conduct. The Board's General Counsel then investigates and, if probable cause is found, prosecutes. This contrasts with procedures in representation cases, where only parties to the proceeding (usually the employer and the petitioning union) may file objections, and where the objecting party must present its own evidence in favor of the objection. Moreover, employees have 6 months following any unlawful coercion or improper recognition to file a charge, whereas objections to conduct affecting the results of an election must be filed within 5 business days of the tally.[59]

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[57] *See Lamons Gasket*, 357 NLRB at 747-748; *Berhnard-Altmann*, 366 U.S. at 737-740; *Dairyland USA Corp*., 347 NLRB 303, 313-314 (2006), *enfd*. 273 Fed. Appx. 40 (2d Cir. 2008).

[58] *See, e.g*., *Dairyland*, *supra*, 347 NLRB at 314.

[59] *See* Rule 102.69(a)(8) of the NLRB's Rules and Regulations, 29 C.F.R. § 102.69(a)(8) ("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 which shall contain a short statement of the reasons therefor and a written offer of proof in the form described in § 102.66(c) insofar as applicable, except that the Regional Director may extend the time for filing the written offer of proof in support of the election objections upon request of a party showing good cause.").

The Board found "considerable support" for the Rule in the fact that employees might be deprived of the opportunity to decertify their union for four years or more as a result of the recognition bar and the contract bar in the circumstance where a recognized union successfully negotiates a collective bargaining agreement.[60] In this regard, the Board's hyper-concern for the rights of employees who oppose unionization is at odds with the Act's mandate of "encouraging the practice and procedure of collective bargaining,"[61] including through representatives that have been designated without a Board-supervised election.[62] In any event, as discussed above, the Board's concern regarding the reliability of showings of majority support absent a Board election is unfounded. Moreover, employees who object to their union representation are not without recourse even during the term of a collective bargaining agreement. They may resign membership from the union at any time.[63] They may also seek to deauthorize the union from enforcing a union-security clause because no contract bar is available with respect to such a petition.[64] In short, even if one privileges the Section 7 rights of employees who oppose unionism over the Section 7 rights of employees who desire stable union representation and a collective bargaining agreement (something that the Board clearly did in promulgating the Rule), dissenters retain important rights in the event that their bargaining representative successfully negotiates a collective bargaining

[60] 85 Fed. Reg. 18383.

[61] 29 U.S.C. § 151.

[62] 29 U.S.C. § 159(a) & (c).

[63] *Pattern Makers' League of N. Am., AFL-CIO v. NLRB*, 473 U.S. 95 (1985).

[64] *Truth Tool Co.*, 111 NLRB 642, 643 (1955). ("The Board has long held that normal contract-bar principles established by the Board are inapplicable in deauthorization proceedings.")

agreement.

F. Rule 103.21 undermines collective bargaining because it delays the point at which serious collective bargaining will commence.

The inevitable effect of the Rule is to delay the point in time at which serious collective bargaining will commence. This is because, irrespective of the technical obligation to bargain upon recognition, "the knowledge that an election petition may be filed gives the employer little incentive to devote time and attention to bargaining during the first 45 days following recognition."[65]

The Board in *Lamons Gasket* cited agency records revealing that the average time between an employer informing a Regional office of voluntary recognition and its posting the *Dana* notice was 18.7 days, signifying that "meaningful bargaining is likely to be delayed at least 63 days, not including the time between negotiation and when the employer informs the Regional Office that recognition has been granted."[66] That delay disserves the very free choice that the Rule is purportedly designed to protect, because employees who support the union do so because they want meaningful representation as soon as practical. As the Board stated, "the recognition bar 'effectuates rather than impedes employee free choice.' This is because '[w]hen employees execute authorization cars during a union organizing drive, their hope is to obtain union representation as soon as possible. The Board provides no benefit to these employees by delaying the implementation of their designation in order to reconfirm

[65] *Lamons Gasket*, 357 NLRB at 747 (quoting *Dana*, 351 NLRB at 447 (dissenting opinion of Members Liebman and Walsh).

[66] *Id*.

through an election the desires they have already expressed.'"[67]

Without certainty as to the continuity of either the bargaining representative or attendant bargaining obligations, parties suffer from a classic holdout problem. Both employers and unions lack the incentives to spend time, grant concessions, or otherwise invest in the negotiating process so long as their relative positions might imminently change.[68] The problem is compounded by the fact that initial contract negotiations tend to be much more intensive and laborious than negotiations on successor agreements.[69] In one survey, a majority of new bargaining units (52%) failed to reach a contract within the first year of NLRB certification, while a full 25% failed to reach an agreement within three years.[70] This problem has worsened sharply over time.[71] According to the most recent data available, it takes unions on average 409 days to sign a first contract, and in some industries

[67] *Id*. (quoting *Smith's Food & Drug*, 320 NLRB 844, 848 (1996) (Chairman Gould, concurring)).

[68] *See* Juliet P. Krotritsky, *Uncertainty, Reliance, Preliminary Negotiations and the Holdup Problem*, 61 SMU L. REV. 1377, 1378, 1384-91 (2008); Pierpaolo Battigali & Giovanni Maggi, *Rigidity, Discretion, and the Costs of Writing Contracts*, 92 AM. ECON. REV. 798, 798 (2002) (outlining the costs of contracting from game theory perspective).

[69] Initial contract negotiations mark a crucial phase in the parties' bargaining relationship, as they help to set the tone for bargaining and "usually involve special problems, such as in the formation of contract language, which are not present if a bargaining relationship has been established over a period of years and one or more contracts have been previously executed." *N. J. MacDonald & Sons, Inc.*, 155 NLRB 67, 71-72 (1965).

[70] See Ross Eisenbrey, *Employers Can Stall First Union Contract for Years*, ECON. POL'Y INST. (May 20, 2009), https://www.epi.org/publication/snapshot_20090520/.

[71] Lawrence Mishel, Lynn Rhinehart, and Lane Windham, *Explaining the erosion of private-sector unions*, ECON. POL'Y INST. (2020) https://www.epi.org/unequalpower/publications/private-sector-unions-corporate-legal-erosion/ (finding that "while 0.46% of the workforce was able to make it across the unionizing finish line in the 1966–1968 period, only 0.17% of the workforce was able to do so by 1978–1980").

the average is more than 500 or even 600 days—if they are able to secure an agreement at all.[72]

The Board acknowledged the concern of delayed bargaining in justifying the Rule, but dismissed it without a meaningful response. It principally cited the truism that "the final rule does not affect established precedent holding that an employer's obligation to bargain with the union attaches immediately upon voluntary recognition."[73] That, of course, is both true and irrelevant. In the end, ignoring its *own* lack of empirical evidence justifying the Rule, the Board dismissed the concern by stating "there is 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."[74] It did not attempt to refute the logic of the concern, and was obviously unable to do so.

G. If elections are the "preferred" means of resolving questions of representation, it is not because the demonstration of majority support underlying voluntary recognition is unreliable but because certification brings legal protections that voluntarily recognition does not.

Certification after an election places unions in a different legal status than voluntary recognition. Certification results in a 12-month irrefutable presumption of majority support, barring both an election and withdrawal of recognition. After *Lamons Gasket*, voluntary

[72] *How Long Does It Take Unions to Reach First Contracts?*, BLOOMBERG LAW, June 1, 2021, https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-how-long-does-it-take-unions-to-reach-first-contracts.

[73] 85 Fed. Reg. 18384.

[74] *Id.*

recognition results only in a minimum of six months of such a presumption. In addition, certification, unlike voluntary recognition, provides protection against recognitional picketing by rival unions under Section 8(b)(4)(C); bestows the right to engage in certain secondary and recognitional activity under Sections 8(b)(4)(B) and 8(b)(7)(A); and, in certain circumstances, creates a defense to allegations of unlawful jurisdictional picketing under Section 8(b)(4)(D).[75] Both before *Dana* and after *Lamons Gasket*, "[a]n election remains the only way for a union to obtain Board certification and its attendant benefits."[76] Thus, the Board's observation in promulgating the Rule that "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" does not warrant imposing conditions on the recognition bar. The election-year bar and the statutory protections afforded certification are *themselves* the statutory benefits of certification. They do not justify destabilizing bargaining relationships created by the congressionally-approved means of voluntary recognition.

H. Rule 103.21 compromises the NLRB's neutrality with respect to whether and how employees should exercise their Section 7 rights.

As the Board observed in *Lamons Gasket* with respect *Dana* notices, the Board now requires that employees be affirmatively notified of only two of their many rights under Section 7 outside the context of remedial notices for violations of the Act: their right not to

[75] *See Lamons Gasket*, 357 NLRB at n. 35.

[76] *Id*. at 748.

join and to limit their financial support of a lawfully chose representative,[77] and under the Rule, their right to file a petition seeking to decertify their lawfully recognized bargaining representative. Only for the latter purpose does the Board require that an official notice be posted.[78] This circumstance defies the Board's role as an impartial "referee" administering a law that "wholly neutral when it comes to [employees'] basic choice" of whether to be represented. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970). "The Board in its supervision of union elections may not sanction procedures that cast their weight for the choice of a union and against a nonunion shop or for a nonunion shop and against a union." *NLRB v. Savair Mfg. Co*., 414 U.S. 270, 280 (1973). In no other context does the Board give notice to employees of their right to change their minds about the exercise of their Section 7 rights. This is even true in the mirror image situation when a majority of employees have registered their desire *not* to be represented by non-electoral means and their employer voluntarily recognizes their wishes. When an employer lawfully withdraws recognition based on a petition or other non-electoral showing of lack of majority support, the Board does not require the employer to post a notice informing employees that they can file a petition for an election in order to regain representation.

The Board attempted to address the lack of neutrality inherent in the Rule by modifying the language of the former *Dana* notice to state that the Board does not endorse any choice about whether employees should file a petition to certify the current union, in

[77] *NLRB v. General Motors*, 373 U.S. 734 (1963); *Communications Workers v. Beck*, 487 U.S. 735 (1988).
[78] *Lamons Gasket*, 357 NLRB at 743.

addition whether they should file a petition to decertify it.[79] But merely modifying the text of the notice does not address the larger critique that the Rule requires notification of a Section 7 right only in the context of voluntary recognition, and in no other context of lawful activity.

CONCLUSION

Rule 103.21 was premised on unsupported assumptions about the dangers of voluntary recognition that reveal a misplaced hostility towards voluntary recognition as a legitimate means of establish a union's status as representative. Not only does it seek to solve imagined problems that do not exist, the Rule undermines the very Section 7 rights it purports to safeguard. The recognition bar protects the associational rights of employees who desire union representation, and who want their designated representative to commence effective collective bargaining on their behalves without the instability posed by the threat of an immediate decertification filed by a minority of their coworkers. The Rule places the Board in the untenable position of requiring a notification of the right to decertify a union simply because an employer and union have formed a bargaining relationship in a manner that the Act expressly condones. Weakening the recognition bar is unnecessary to protect the rights of the minority of employees because they have access to the Board's unfair labor practice procedures in the event either the employer or the union restrains or coerces them in the exercise of their Section 7 rights. The Board should reassert its position of neutrality with respect to the exercise of Section 7 rights and realign itself with the Act's approval of voluntary recognition as a legitimate means for establishing representative status. It should

[79] 85 Fed. Reg. 18388.

revoke Rule 103.21, and clarify in doing so that it is returning to its previous view of the law under *Lamons Gasket*.

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Respectfully submitted,

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