February 2, 2023

Ms. Roxanne L. Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

Re: National Labor Relations Board Proposed Rule: Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships [RIN 3142-AA22]

Submitted via www.regulations.gov.

Dear Ms. Rothschild:

I appreciate this opportunity to provide comment on the proposed rule, "Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships."[1]

Proposed Rule Summary

The proposed rule makes three notable changes to unionization procedures.

First, the proposed rule replaces the current blocking charges policy—whereby election proceedings continue but results are not finalized until impending charges are resolved—with a policy whereby unions can halt a decertification election process by filing unfair labor practice (ULP) charges, even if those charges are unsubstantiated or unrelated to the union decertification process. This policy would undermine worker-led efforts to obtain the representation that workers desire by delaying the election process by months or even years.

Second, the proposed rule alters the current process through which employers can voluntarily recognize unions, eliminating workers' rights to petition for a secret ballot election within 45 days of being informed of their employers' voluntary recognition. The proposed rule would also ban workers from attempting to decertify a union for up to three years after an employer's voluntarily recognition of a union. These restrictions are especially harmful to workers because eliminating the right to a secret ballot election—particularly when that right serves as a backstop against a voluntary unionization process that is often fraught with misinformation, intimidation, and coercion from union organizers—eliminates workers' voices. Moreover, the ban for up to three years is increasingly detrimental in today's labor market, where turnover is high and a

[1] National Labor Relations Board, "Notice of Proposed Rulemaking; Request for Comments," *Federal Register*, Vol. 87, No. 213, November 4, 2022, pp. 66890-66933 https://www.govinfo.gov/content/pkg/FR-2022-11-04/pdf/2022-23823.pdf (hereinafter 'proposing release').

company's workforce even two years following unionization may be vastly different than its workforce at the time of unionization.

Third, the proposed rule would expand the ability of construction industry employers and unions to establish an official collective bargaining relationship without "positive evidence" of a majority support of workers. The proposed rule would do this by expanding a process intended for limited instances such as pre-hire project labor agreements to areas in which workers can and should have the right to express their support or lack thereof for unionization. This policy would result in continued unionization of workers—beyond just a project-basis—without any evidence of their support for a union.

All three components of the proposed rule undermine workers' rights to their chosen representation by making it easier to unionize workers and to keep them unionized without a secret ballot vote and even without evidence of majority worker support. In doing so, the proposed rule could also limit workers' ability to obtain the compensation packages they desire, and it could subject workers to lost compensation and employers to added costs as a result of union pension plans' unfunded liabilities.

My comments will focus on the unintended consequences of the proposed rule, including: workers' loss of their rights to an unfettered opportunity to vote for their representation; the ability for employers to conspire against workers by instigating employer-supported unions; and the potential detriment to workers' compensation and employers liabilities.

The Rule Takes Away Workers' Rights to Secret Ballot Elections

The right to secret ballot elections is fundamental to America's founding. The secret ballot is the purest way for individuals to express their true desires, as it is void of outside influence and group pressure, which scientific studies show can cause individuals to vote in opposition to their true desire.[2] The supremacy of the secret ballot is why no state in America allows elections to be decided by way of candidates' campaign staffers going door-to-door to solicit votes in favor of their candidate.

Although it is lawful to establish a collective bargaining relationship without a vote from workers and instead through employers' voluntary recognition of workers' signed union authorization cards, the "card check" process by which union organizers solicit the signatures of workers in support of the union is subject to significant flaws and abuse. At the most basic level, workers who are asked to effectively vote in public are subject to outside influence and group pressure. Moreover, authorization cards can be collected over an extended period of time, such that they can capture the support of workers who only momentarily supported the union (perhaps based on changes in expressed priorities and promises). Finally, union card solicitation

[2] Kai Ostwald and Guillem Riambau, "Voting Behavior under Doubts of Ballot Secrecy: (Un)Intentionally Nudging Voters Towards a Dominant Party Regime," University of British Columbia, May 17, 2021, http://guillemriambau.com/Ostwald%20Riambau%20Voting%20under%20doubts%20of%20ballot%20secrecy.pdf (accessed January 31, 2023).

campaigns often obtain workers' signatures illegitimately through intimidation[3] and misinformation.[4]

The Supreme Court has noted that the card check process is ''admittedly inferior to the election process.''[5] This is because voluntary recognition of a union through the card check process can easily result in workers becoming unionized despite a majority of those workers being opposed to unionization under the ideal conditions of a secret ballot election. To help prevent against false outcomes that do not represent workers actual desires, workers currently have a right to challenge their employer's voluntary recognition of a union by filing a petition, within 45 days of receiving notice of their employer's voluntary recognition, to request a secret ballot election.

The proposed rule takes away workers' rights to petition for a secret ballot election and places an effective gag on workers' ability to choose their representation and affect their working conditions for up to three years following unionization that occurred without a secret ballot election.

The Board fails to demonstrate adequate reasoning for taking away workers' rights. The Board argues that taking away workers' rights to petition for a secret ballot election "better serves the policies of the National Labor Relations Act, respecting—indeed, vindicating— employee free choice, while encouraging collective bargaining and preserving stability in labor relations."[6] But this claim does not hold up. For one thing, the statement is predicated on the assumption that the card check process adequately vindicates worker free choice. But the agency fails to grapple with the real impingement on worker choice that the card check process can present. Without serious attention to this issue, there is no basis to uphold the agency's assumption that its rule would promote free choice. To make a rational decision, the agency would need to examine carefully the benefits to employee choice that voluntary recognition by itself supposedly facilitates and then compare them to the benefits that obtain under the current arrangement.

One way to substantiate the assumption that voluntary recognition adequately protects worker free choice would be for the Board to assess how often a secret ballot election reverses the results of voluntary recognition. But the Board did not examine this data; consequently its assumption remains just that.

The Board fails to provide reasoning for preventing workers from seeking a secret ballot election to decertify a union for up to three years following an employer's voluntary recognition. To make a case for this change, the Board needed to show either that a given workforce never changes its mind about certification within three years or that it changes its mind in that time period so rarely that the costs of decertification decisions outweigh their benefits. But the Board does not make—

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[3] F. Vincent Vernuccio, "Card Check Coercion: Intimidation," in Protecting the Secret Ballot: The Dangers of Union Card Check (Midland, MI: Mackinac Center for Public Policy, 2019), https://www.mackinac.org/26958 (accessed January 3, 2023).

[4] Sean Higgins, "Fraud Alleged in Auto Plant 'Card Check' Union Organizing Bid," The Washington Examiner, September 26, 2013, https://www.washingtonexaminer.com/fraud-alleged-in-auto-plant-card-check-union-organizing-bid (accessed January 3, 2023).

[5] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 603 (1969)..

[6] Proposing Release at p. 66909.

indeed, it does not even try to make—either showing. For example, the Board could have cited instances in which workers sought to decertify a union within three years of voluntary recognition to demonstrate, if true, that such decertification elections were always unsuccessful. The Board did not provide such evidence. Moreover, the Board could have provided evidence of the tenure of workers to demonstrate that a given workforce is unlikely to change significantly within its' proposed period of up to three years. The Board does not provide any evidence that workers' free choices up to three years after voluntary recognition align with workers free choices at the time of a voluntary recognition.

If the Board had considered the potentially changing makeup of workers, it would have found very high rates of job turnover among younger generations and in recent years. Over the past two years, workers have been choosing to leave their jobs and take new ones at unprecedented rates, and these job moves have resulted in higher compensation. Over the last year alone, 50.8 million workers—nearly one-in-three—quit their jobs.[7] Turnover rates are exceptionally high in service industries that have been the subjects of increased unionization efforts. For example, Starbucks' reported turnover rate of 65 percent is significantly below other quick service restaurants' rates of 150 percent or more.[8] This means that a diminishing share of workers have the opportunity to exercise their right to choose their representation.

If the proposed rule's ban for up to three years had been in place three years ago, at the beginning of 2020 and a company had voluntarily accepted unionization based on the signed cards of 60 percent of its workforce, it is possible that only a small fraction of employees who work at the company today signed a card in support of the union that now represents them.

The Board failed to consider an analysis of workforce turnover and its impact on employees' free choice in light of its proposed extension in the period in which workers are prohibited from exercising their free choice to choose their representation.

The proposed rule's elimination of workers' fundamental right to petition for an undeniably more authentic secret ballot election, and suppressing workers' voices for up to three years is arbitrary and capricious and violates the purpose of the National Labor Relations Act.

- ***The Board should withdraw its proposed change to take away workers' rights to petition for a secret ballot election***.

The Proposed Rule Would Allow Employers To Usurp the Collective Bargaining Process To the Detriment of Workers

The National Labor Relations Act seeks "the equality of bargaining power between employees who do not possess the full freedom of association or actual liberty of contract, and

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[7] Bureau of Labor Statistics, "Job Openings and Labor Turnover Survey," https://www.bls.gov/jlt/ (accessed January 30, 2023).

[8] Jane Harkness, "Global Food and Beverage Companies That Have Cracked the Code on Employee Retention," Force Brands, October 3, 2018, https://forcebrands.com/blog/global-food-beverage-companies-employee-retention/ (accessed January 31, 2023).

employers…" by "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[9] In short, the NLRA seeks to promote workers' wills with respect to their choice of representation in negotiations with their employer.

Fundamental to that right is the secret ballot election, without which workers' true choices can be denied or compromised. By allowing a process for workers to become unionized through their employer's voluntary recognition and without workers' rights to obtain a secret ballot election, the choice to unionize becomes as much or more the choice of the employer as opposed to the employees. This proposed rule contravenes the intention of the NLRA to promote "the equality of bargaining power between employees…and employers" by enabling the creation of longer-lasting union relationships that could represent employers' interests and put employers at both sides of the bargaining table.

For example, employers can encourage the establishment of surreptitiously employer-friendly unions that solicit signature cards of its employees. Unlike employers, union organizers are free to make promises to workers to obtain their support. Assuming the organizers are able to convince 50 percent of workers to sign authorization cards, they can then present those to the employer who can then voluntarily recognize the union and begin bargaining for a contract without any opportunity, under the proposed rule, for workers to petition for a secret ballot election if they do not believe the union is in their best interests. With both the union and the employer representing the employer's interests, a contract could be obtained that—notwithstanding illusory benefits for workers—ultimately advantages the employer and which, under the proposed rule, could lock workers into a three-year contract without the ability to hold an election to decertify the union.

All of this could happen within the bounds of the law and with no recourse for up to three years for workers to challenge their forced representation by a union that could be not working for them or be actively working against them.

In addition, it is possible that the proposed rule would invite dishonest and unlawful activity that would go undetected and unchallenged, to the detriment of workers. For example, employers could create back room deals such as setting high union dues levels as kickbacks for employer-friendly union officials. Employer-friendly union organizers could make dubious promises to workers about the benefits they will obtain for them, mislead workers by telling them that signing an authorization card indicates that they want to have an election, or threaten and coerce workers into signing cards against their will.

The Board failed to consider the potential for its proposed rule to invite practices that are counter to the National Labor Relations Act's purpose of providing workers' with representation that prioritizes workers'—not employers'—interests. Consequently, the Board also failed to provide adequate reasoning for establishing a process that could restrict workers' bargaining power.

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[9] 29 U.S. Code § 151.

- ***The Board should withdraw the proposed rule on the basis that it could invite labor unions that work for employers instead of workers.***

Proposed Expansion of Unionization Without Evidence of Worker Support Could Deprive Workers of a Voice and Result in Wage Theft

The proposed rule creates a process to convert what was meant to be a unique and temporary, or contract-based unionization relationship within the construction industry to a more permanent union relationship without workers' having a right to vote and without the union even having to present positive evidence of majority support among workers for the union.

The consequence of this proposed rule is particularly harmful in light of the recent $550 billion federal infrastructure bill that includes prevailing wage provisions that will draw more non-unionized construction companies into temporary 8(f) unionization relationships as a condition of partaking in the federally-funded contracts. The proposed rule change will allow unions to include contract provisions that convert a temporary 8(f) union relationship into a permanent 9(a) relationship *beyond* the scope of the contract and *without* proof of majority support from workers. Even if the contract provisions are apparent, unions can leverage the enormity of federal spending to force employers to agree to a permanent union relationship as a cost of doing business with the federal government.

This will lead some employers to—both knowingly and unknowingly—agree to permanently unionize their workforce beyond the length of the contract without their employees having *any* say in their representation. Most importantly, if workers disagree with union representation on a permanent basis outside the government contract, the rule prevents them from calling for an election or decertification of the union within a six-month period following the employer's voluntary recognition.

The Board has not adequately considered the consequences of this change that strips workers of their rights to have a voice in their representation. One consequence that the board has not considered is the rule's potential to amount to wage theft for workers who are forced into union relationships and therefore forced to have a significant portion of their wages sacrificed to insolvent construction-industry union pension plans.

According to the most recent 2018 data from the Pension Benefit Guaranty Corporation, the construction industry accounts for 54.8 percent of all multiemployer, or union pension plans and 36.8 percent of all multiemployer pension participants.[10] Construction-sector union pension plans have amassed $368 billion dollars in unfunded pension promises and are on track to be able to pay on 43 cents of every dollar in benefits promised to-date.[11]

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[10] PBGC, "2019 Pension Data Tables," Table M-8: PBGC-Insured Plans and Participants by Industry (2018), https://www.pbgc.gov/sites/default/files/2019-pension-data-tables.pdf (accessed January 20, 2023).
[11] PBGC, "2019 Pension Data Tables," Table M-14: Funding of PBGC-Insured Plans by Industry (2018), https://www.pbgc.gov/sites/default/files/2019-pension-data-tables.pdf (accessed January 20, 2023).

Union construction pension plans' underfunding means that the pension contributions made on behalf of younger workers will be worth pennies-on-the-dollar in pension benefits because the plans will run out of money. Moreover, many construction workers—particularly those brought into union pension plans originally through 8(f) relationships—will not be employed long enough by a participating employer to become vested in and entitled to pension benefits and would thus receive none of the pension contributions made on their behalf. Those contributions directly reduce workers' wages as they make up a large part of unionized construction workers' wages.[12] For example, a sampling of construction sector union pension funds' filings with the PBGC show contribution rates of $5.10 per hour for the Cement Masons Local Union #681 Pension Plan[13] and $10.00 per hour for the Iron Workers' Local 17 Fringe Benefits Fund,[14] and an Empire Center study noted a $12.74 per hour pension contribution rate for the Laborers Union Local 1298 pension fund.[15] Those hourly pension contributions translate into $10,600 to $26,500 per year in pension benefits that would be worth little or nothing to many construction workers forced into union pension plans without the opportunity to vote—or even request a vote—on union membership.

The Board has also failed to consider the implication of its proposed rule on employers' liabilities for multiemployer pension plans. Employers who are forced into multiemployer construction pension plans become party to the plan, including incurring a portion of the plan's unfunded liabilities. If a new employer begins contributing a multiemployer pension plan, they become party to the plan and incur a portion of the plan's unfunded liabilities. The average construction-industry union pension plan has $489 million in unfunded pension liabilities. To get out from under those unfunded liabilities, participating employers must pay a "withdrawal liability" fee.

An analysis by Dr. John McGowan of government-mandated PLA projects examined the risk of exposure to multiemployer pension plan withdrawal liabilities and concluded:

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[12] A recent study by McGowan finds that workers who are forced to perform work under Project Labor Agreements suffer a 20 percent reduction in take-home pay. John McGowan, "Government-Mandated Project Labor Agreements Result in Lost and Stolen Wages for Employees and Excessive Costs and Liability Exposure for Employers," Build America Local, October 2021, https://buildamericalocal.com/wp-content/uploads/sites/18/2021/10/McGowan-Project-Labor-Agreement-and-Multiemployer-Pension-Study-October-2021.pdf (accessed January 31, 2023).

[13] Iron Workers Local 17 Fringe Benefit Funds, Inc., "Application for Special Financial Assistance," January 25, 2022, https://www.pbgc.gov/sites/default/files/documents/iron-workers-local-17-app-sfa.pdf (accessed January 21, 2023).

[14] Cement Masons Local Unit #681 Pension Plan, "Application for Special Financial Assistance," December 30, 2021, https://www.pbgc.gov/sites/default/files/documents/cement-masons-681-app-sfa.pdf (accessed January 21, 2023).

[15] E.J. McMahon, "The pension Piece of 'Prevailing Wage'," June 6, 2019, Empire Center, https://www.empirecenter.org/publications/the-pension-piece-of-prevailing-wage/ (accessed January 21, 2023).

> "Using Form 5500 data, we project that the withdrawal liability exposure for each firm could range between $1 million and $7 million when construction contractors trigger withdrawal liability."[16]

These added costs and liabilities could bankrupt small businesses who could incur the liabilities either unknowingly through obscure contract provisions, or begrudgingly through the powerful force of hundreds of billions of taxpayers dollars allocated to federal contracting. Yet, the Board assumes that the only direct cost for small entities will be to review the rule, at a price ranging from $171.04 to $177.44.[17]

The Board has failed to incorporate any costs estimates related to workers' lost compensation or employers' added multiemployer pension liabilities as a result of its proposed rule increasing unionization in the construction sector and therefore has failed to consider whether those losses are worth any benefits the rule would create.

The Board has failed to consider how the proposed rule will impact other laws, including the Special Financial Assistance provided to multiemployer pensions under the American Rescue Plan. The Board has failed to consider how the proposed rule will impact the finances of other government accounts, including the Treasury and Pension Benefit Guarantee Corporation, and how it could impact costs for taxpayers who have now been forced to pay for the unfunded obligations of select multiemployer pension plans. Although the Special Financial Assistance Plan specified one-time bailouts based on plans unfunded liabilities as of their applications (between 2021 and 2023), the Biden Administration's PBGC issued regulations in contrast to the statute passed by Congress so as to provide subsequent, additional bailouts based on a goal of keeping the plans solvent through 2051.[18] The addition of new multiemployer pension participants as a result of the proposed rule's provisions to permanently unionize construction workers without positive evidence of a majority support of those workers would mean new unfunded pension liabilities that could initiate yet another subsequent round of taxpayer bailouts.

Finalizing the proposal would therefore be arbitrary and capricious.

- ***The Board must put the proposed rule on hold until it can provide a reasonable economic impact and then resolicit comments based on an accurate accounting of its consequences***. Those estimates must include the potential for affected workers to lose tens of thousands of dollars in lost wages and benefits, for affected employers to incur millions of dollars in pension withdrawal liabilities, and for taxpayers to potentially incur additional costs for unfunded multiemployer pension plan liabilities.

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[16] John McGowan, "Government-Mandated Project Labor Agreements Result in Lost and Stolen Wages for Employees and Excessive Costs and Liability Exposure for Employers," Build America Local, October 2021, https://buildamericalocal.com/wp-content/uploads/sites/18/2021/10/McGowan-Project-Labor-Agreement-and-Multiemployer-Pension-Study-October-2021.pdf (accessed January 21, 2023).

[17] Proposing release at p. 66931.

[18] Rachel Greszler, "Biden's Abuse of Power Causes CBO to Raise Cost Estimate of Private Pension Bailouts by $4.5 Billion," The Daily Signal, October 12, 2022, https://www.dailysignal.com/2022/10/12/bidens-abuse-of-power-causes-cbo-to-raise-cost-estimate-of-private-pension-bailout-by-4-5-billion (accessed February 1, 2023).

- ***The Board should withdraw the proposed rules and maintain current law protections that guarantee workers the right to a secret ballot election or to at least petition for a secret ballot election when selecting their workplace representation, and which require positive evidence of a majority support of workers before a workplace is permanently unionized***. The purpose of the National Labor Relations Act is to protect the rights of workers and these proposed rules would take away workers' rights and take away workers' compensation.

Respectfully submitted,

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[19] This comment is submitted in my personal capacity, with my title provided for informational purposes only.