UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CONSTELLATION ENERGY GENERATION, L.L.C.,

Case No. 13-RC-372880

Employer,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Local 15,

Petitioner

MOTION TO FILE BRIEF OF *AMICI CURIAE* FOR THE MACKINAC CENTER FOR PUBLIC POLICY AND THE INSTITUTE FOR THE AMERICAN WORKER

1. The Mackinac Center for Public Policy and the Institute for the American Worker moves the Board for leave to file a Brief of Amici Curiae.
2. The Mackinac Center for Public Policy is a nonpartisan research and educational institute committed to improving the quality of life for all citizens by promoting sound solutions to state and local policy questions. One of its main areas of focus is labor law.
3. The Institute for the American Worker (I4AW) is a nonprofit organization that educates policymakers and stakeholders on labor policy issues and advocates for free market principles.
4. The Board should grant the employer's request for review since it offers a compelling reason to consider a fundamental Board policy and because it

implicates a question of law with substantial impacts on private-sector labor policy.

5. Amici jointly authored a June 10, 2025 study reviewing the history of the legal interpretations of Section 9(a) of the National Labor Relations Act, ultimately concluding that it had been misinterpreted by both the Board and the courts. Amici offer this brief to provide additional historical context to the Board in deciding whether to accept this case.

Dated: November 2, 2026

/s/ Stephen A. Delie
Stephen A. Delie (P80209)
Attorney for Amici Curiae
Mackinac Center Legal Foundation
140 W. Main Street
Midland, MI 48640
delie@mackinac.org
989-631-0900

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Submitted by:

Stephen Delie
Mackinac Center Legal Foundation
140 West Main Street
Midland, MI 48640

F. Vincent Vernuccio
Institute for the American Worker
P.O. Box 458
Hamilton, VA 20159

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INTERESTS OF THE AMICI

Amicus the Mackinac Center for Public Policy is a Michigan-based, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987. It has played a prominent role in studying and litigating issues related to mandatory collective bargaining laws.

Amicus the Institute for the American Worker (I4AW) is a nonprofit organization that educates policymakers and stakeholders on labor policy issues and advocates for free market principles.

Jointly, *amici* authored a June 10, 2025, study reviewing the plain language of Section 9(a) of the National Labor Relations Act (the "N.L.R.A.," or, the "Act"), 29 U.S.C. § 159(a), and how it has been misinterpreted by both the National Labor Relations Board (the "N.L.R.B.," or, the "Board") and the courts.[1] This study concluded that a correct interpretation of the N.L.R.A. requires a union to receive the support of a majority of the unit, rather than a majority of those employees voting, to prevail in a representation election.

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[1] Stephen Delie, *Misread: How Legal Authorities Allowed Tyranny of the Minority to Subvert Worker Enfranchisement*, MACKINAC CENTER FOR PUBLIC POLICY and INSTITUTE FOR THE AMERICAN WORKER (June, 2025), available at: https://www.mackinac.org/archives/2025/s2025-06.pdf.

INTRODUCTION

For 90 years, the Board has permitted unions to represent collective bargaining units without the support of a majority of employees within those units. In doing so, the Board has ignored the clear meaning of the relevant portion of the N.L.R.A., namely, 29 U.S.C. § 159(a) ("Section 9(a)"). Properly understood, this provision requires unions to obtain majority support from not only those voting in a representation election, but from all employees within a bargaining unit which the union seeks to represent. To ensure that employees' rights are protected, and that unions actually enjoy the support of those employees they claim to represent, the Board should restore a true-majority requirement for representation elections. Amici urge the Board to accept this case, which serves as an ideal vehicle to make such a ruling and to act without delay, as each additional election under the current standard risks further undermining employees' statutory rights.

ARGUMENT

I. The Board's Use of the Majority-of-Votes Standard is Contrary to the Text of the N.L.R.A. and Requires Correction.

The Employer's brief in this matter addresses the various reasons why a textualist interpretation of Section 9(a), read in context, requires a true-majority standard in representation elections. Amici agree with those arguments and will not reiterate them. Amici believe, however, that offering additional context highlighting the shaky historical underpinnings of the majority-of-votes standard may be helpful to the Board in understanding the extent to which the requirements of the Act have been thwarted by prior decisions by the Board and by various courts.

Any interpretation of Section 9(a) must begin with the text of that provision. *Groff v. DeJoy*, 600 U.S. 447, 468 (2023) ("[S]tatutory interpretation must begi[n] with, and ultimately heed, what a statute actually says.") (citation and internal quotation omitted). The text of Section 9(a) clearly contemplates the selection of a union only after that union receives the support of the majority of employees it intends to represent:

> Representatives designated or selected for the purposes of collective bargaining *by a majority of the employees in a unit* appropriate for such purposes, shall be the exclusive representative of all the employees in such a unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment….

29 U.S.C. § 159(a) (emphasis added).

That is not how the Board currently decides representation elections. Instead, the Board has adopted an approach where a union may be certified so long as the Board determines an election is actually representative of the opinions of employees within a bargaining unit.[2]

In doing so, the Board has adopted a test that is inconsistent with the best meaning of Section 9(a). This poses serious problems, as the Board is no longer afforded deference when determining the meaning of a statute. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400-01 (2024). Instead, the Board, like any

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[2] See, e.g., Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective Bargaining Relationships, 89 Fed. Reg. 69258 n. 15 (Aug. 1, 2024) (codified at 29 C.F.R. Part 103), available at: https://www.govinfo.gov/content/pkg/FR-2024-08-01/pdf/2024-16535.pdf; see also *N.L.R.B. v. Cent. Dispensary & Emergency Hosp.*, 145 F.2d 852, 854 (D.C. Cir. 1944).

other administrative agency, must now apply the single best meaning of the statute. *Id*. In light of this obligation, the Board should correct its erroneous interpretation of Section 9(a). That interpretation, while having deep historical origins, has been flawed from its beginnings and should be cast aside in favor of the true-majority standard required by the text.

II. The Historical Acceptance of the Majority-of-Votes Standard for Representation Elections in Case Law is Inconsistent with the N.L.R.A.'s Language and Relies on Outdated Notions of Statutory Interpretation.

Although the Board now uses a majority-of-votes standard in representation elections, this approach was not immediately obvious upon the initial application of the N.L.R.A., or its predecessor, the Railway Labor Act 45 U.S.C. § 151 *et. seq*. ("R.L.A."). Instead, cases with abnormal fact patterns led to increasingly problematic departures from the true-majority requirement for representation elections in Section 9(a). Over time, caselaw evolved from a position where a majority-of-votes standard was a special exception to a true majoritarian requirement to a position where the exception became the rule. This would eventually culminate in the essentially meaningless requirement that representation elections merely be "actually representative" of employees' wishes, with little concern for whether those elections represented the expressed desires of a majority of employees within the relevant bargaining unit. Amici believe that understanding how this metamorphosis occurred will be helpful to the Board in addressing the issues underpinning this case, and will help demonstrate that a proper interpretation of Section 9(a) requires unions

demonstrate the support of the majority of employees in a bargaining unit before being certified as their exclusive representative.

a. The Development of the Majority-of-Votes Standard Under the Railway Labor Act

Much of the justification used to depart from the true-majority standard originates from precedent involving the R.L.A. Understanding this precedent is key to understanding how the majority-of-votes standard came to be accepted as the rule in N.L.R.A. representation cases.

The R.L.A. predates the N.L.R.A. by nine years and it also contains language regarding the selection of exclusive bargaining representatives. Specifically, the R.L.A. states: "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. *The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for purposes of this chapter*." 45 U.S.C. § 152 (emphasis added). Although an apparent true-majority standard, the courts would interpret this language as permitting a majority-of-votes standard shortly before the adoption of the N.L.R.A.

In *System Federation No. 40, Railway Employees Department of American Federation of Labor v. Virginian Railway Co.*, 11 F.Supp. 621 (E.D. V.A. 1935), the Eastern District of Virginia was asked to review a challenge to a R.L.A. representation election in which a union was elected without the majority support of the "craft or class of employees" which it sought to represent. This challenge was quickly dismissed by the District Court, which appealed to a policy preference in lieu of textual analysis:

> It is also contended by the Railway that the election is void because one of the rules under which it was held was in violation of the act which provides (§2, par. 4), among other things, that the "majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class," etc. It seems to me that this defense also is without merit. A reasonable interpretation of the act is that the election must be open to each craft or class with full untrammeled opportunity to each eligible employee in such craft to vote, although he may not be compelled to exercise that right.

Id. at 627-28. The District Court made no effort to support this conclusion via a textual analysis, instead importing principles of corporate law requiring decisions to be reached by a quorum to bolster what it had decided constituted "[a] reasonable interpretation." *Id*.

The Fourth Circuit similarly engaged in only a cursory review of the statutory text. It ultimately permitted a majority of those voting to select a union, rather than a majority of those eligible. *Virginian Ry. Co. v. Sys. Fed. No. 40, Ry. Emp. Dep't of Am. Fed'n of Labor*, 84 F.2d 641, 652 (4th Cir. 1936) ("*Virginian Ry. 4th Circuit*"). In reaching this conclusion, the bulk of the Fourth Circuit's reasoning rested on the purposes of the N.L.R.A. and general election law principles. *Virginian Ry. (4th Circuit)*, 84 F.2d at 652-53. After noting that a true-majority requirement would enable those who didn't vote to be counted as votes against union representation, the Court found such a requirement to be contrary to the N.L.R.A.'s purported "reason and spirit":

> We do not think the act should be given an interpretation leading to such results, if any other interpretation is possible; and we think that such other interpretation is not only possible, but is required by the language of the statute and by its reason and spirit. The clause of the act which we have quoted does not in terms require a majority vote of the craft.

Virginian Ry. (4th Circuit), 84 F.2d at 653. In reaching this conclusion, the Fourth Circuit used its judgment about the N.L.R.A.'s purpose to trump the plain meaning of the Act's language.

This error would be compounded by the U.S. Supreme Court. In conducting its review, the Supreme Court largely acquiesced to the Fourth Circuit's reasoning without independently analyzing the Act's text. When addressing the question of the majority necessary to prevail in a representation election, the Supreme Court agreed that election law generally permitted a majority of those voting to determine the outcome and stated:

> We see no reason for supposing that [the R.L.A.] was intended to adopt a different rule. If, in addition to participation by a majority of a craft, a vote of the majority of those eligible is necessary for choice, an indifferent minority could prevent the resolution of a contest, and *thwart the purpose of the act*, which is dependent for its operation upon the selection of representatives. There is the added danger that the absence of eligible voters may be due less to their indifference than to coercion by the employer.

Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 561 (1937) ("*Virginian Ry. Supreme Court*) (emphasis added).

This reliance on the purported purpose of the R.L.A., instead of its text, would soon become the basis which would lead to that same mistake being incorporated into representation elections under the N.L.R.A.[3]

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[3] It should be noted, however, that while the *Virginian Railway* cases formed the basis from which future courts would eliminate a true-majority standard from N.L.R.A. representation elections, the National Mediation Board ("N.M.B.") treated that case as a unique circumstance and did not apply a majority-of-votes standard

(Note continued on next page.)

b. The Development of the Majority-of-Votes Standard Under the N.L.R.A.

The N.L.R.A., initially adopted in 1935, was modeled on the R.L.A.[4] Unsurprisingly, it contains similar language regarding the selection of unions by a majority of a bargaining unit:

> Representatives designated or selected for the purposes of collective bargaining *by a majority of the employees in a unit* appropriate for such purposes shall be the exclusive representatives of all the employees in such a unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

29 U.S.C. § 159(a) (emphasis added). This language, like the parallel language of the R.L.A. challenged in the *Virginian Railway* cases, was soon used to argue that the N.L.R.A. required the support of a true majority of employees in representation

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after those cases. Instead, the N.M.B. continued to require a true-majority in representation elections until 2010, when the majority-of-votes standard was adopted via an administrative rule. See Representation Election Procedure, 75 Fed. Reg. 26062 (May 11, 2010) (codified at 29 C.F.R. pts. 1202, 1206), available at: https://nmb.gov/NMB_Application/wp-content/uploads/2019/11/voting-rule-change_05-11-10.pdf. That rule was upheld when challenged before the D.C. Circuit, but the Court's opinion relied heavily on the Supreme Court's *Virginian Railway* decision and the now-defunct requirement for administrative deference found in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See, *Air Trans. Ass'n of Am., Inc. v. Nat. Mediation Bd.*, 663 F.3d 476, 480 (D.C. Cir. 2011). Regardless, the logic of the *Virginian Railway* cases would serve as the foundation for the subsequent weakening of the N.L.R.A's true-majority requirement.

[4] See *H.J. Heinz Co. v. N.L.R.B.*, 311 U.S. 514, 525 (1941) (noting that legislative history of the N.L.R.A. had described the N.L.R.A. as "an amplification and clarification of the principles enacted into law by the Railway Labor Act"); see also *N.L.R.B. v Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44 (1937) (recognizing parallels in language between the R.L.A. and N.L.R.A. and interpreting them analogously).

elections. In 1936, this Board followed the text when deciding *In the Matter of Chrysler Corporation and Society of Designing Engineers*, 1 N.L.R.B. 164, 172 (1936), where it refused to certify an election in which a union had won a majority of votes, but not the support of a majority of employees.[5] The Board would reverse itself that same year, however, by adopting a majority-of-votes standard based on the Fourth Circuit's reasoning in *Virginian Railway*. *In the Matter of the Assoc. Press and Am. Newspaper Guild*, 1 N.L.R.B. 686, 711 (1936).[6]

This shift would then be cemented by *In the Matter of R.C.A. Manufacturing Company, Inc. and United Electric and Radio Workers of America*, 2 N.L.R.B. 159 (1936).[7] There, the Board was asked to certify a union that had received a clear majority of ballots cast, but in which approximately one-third of eligible employees had voted. *Id*. at 169. The Board determined that Section 9(a) of the N.L.R.A. did not require a majority of employees to elect a union, nor did it require a majority of employees to vote on the question of representation. *Id*. at 173. Instead, the Board,

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[5] Available at: https://babel.hathitrust.org/cgi/pt?id=uc1.31175021034130. Specifically, the Board refused to certify an election where the union had won 121 out of the 125 ballots cast, but in a unit consisting of 700 employees. *Id*.

[6] "A majority of those eligible voted; a majority of those voting, though less than a majority of those eligible, voted for the American Newspaper Guild. In certifying the Guild we are following the rule established by the Circuit Court of Appeals for the Fourth Circuit in *Virginian Ry. Co. v. Sys. Fed'n No. 40*, decided June 18, 1936[,]" available at: https://babel.hathitrust.org/cgi/pt?id=uc1.31175021034130 (last accessed Oct. 26, 2026).

[7] Available at: https://babel.hathitrust.org/cgi/pt?id=mdp.39015073776281&seq=177 (last accessed Oct. 26, 2026).

relying on *Virginian Ry. (4th Circuit)*, concluded that the N.L.R.A., like the R.L.A., permitted a union to be certified based on a majority of votes cast. *Id*. at 179. The Board based its decision on the grounds that the N.L.R.A. was purportedly designed to encourage collective bargaining, and upon parallels to political elections.

> Following these cases, the phrase "majority of the employees," (sic) in the Act must be interpreted as meaning a majority of employees who participate in the election, so that the organization receiving a majority of votes cast is entitled to certification. *Such an interpretation is both consistent with the broad declarations of the Act in favor of the procedure of collective bargaining, since it facilitates the choice of representatives to carry on that bargaining, and in accord with the general concepts and court decisions concerning elections.*

Id. at 177-78 (emphasis added). Although the Board did mention statutory interpretation, it did so only in the context of the absurd results cannon, after which it concluded that the purposes of the N.L.R.A. made both a true-majority and a quorum requirement untenable. *Id*. at 177.

The courts would soon accede to the Board's chosen interpretation. In *New York Handkerchief Manufacturing Company v. N.L.R.B.*, the Seventh Circuit approved a representation election where the union won a majority of votes, but not the votes of a majority of employees in the bargaining unit. 114 F.2d 144 (7th Cir. 1940). The Court was reluctant to do so, however, and emphasized that its decision was influenced by the need to account for coercive actions the employer had taken in that particular case. *Id*. at 149. The Seventh Circuit expressly noted that it had concerns about whether the Act required representation elections to be decided by a true-majority standard, stating:

> The Board argues that its construction accords with the plain language of the Act and also with the decision in *Virginian Ry. v. System*

> *Federation No. 40*, 300 U.S. 515 [parallel citation omitted], construing a similar provision of the Railway Labor Act, 45 U.S.C.A. 151 et seq. *We are not as confident concerning the plain language of the Act as is the Board*, but we agree that the decision of the Supreme Court in the case just cited furnishes strong support to the Board's contention.

Id. at 148. (emphasis added). The Seventh Circuit was cautious, however, that not all elections should be decided by a majority-of-votes standard and specifically mentioned that the standard was appropriate in this case due to the unlawful conduct of the employer. *Id.* at 149.

That caution would soon be disregarded. In *N.L.R.B. v. Whittier Mills Company*, 111 F.2d 474, 477-78 (5th Cir. 1940), the Fifth Circuit concluded that Section 9(a) only required that a union be elected by a vote in which the majority of employees participated, even if those approving of a union did not represent a majority of employees. In turn, the Second Circuit went further, holding that the relevant standard was a simple majority-of-votes standard, with no reference to even a quorum requirement. *Marlin-Rockwell Corp. v. N.L.R.B.*, 116 F.2d 586, 588 (2d Cir. 1941). The Second Circuit noted, however, that its conclusion was contrary to the plain language of the Act:

> Finally, it is urged that to be validly elected the bargaining agent must receive the votes of a majority of all employees in the unit appropriate for collective bargaining. *Read literally, section 9(a) of the Act, 29 U.S.C.A. § 159(a), seems to require this*; but it is so generally the custom in elections to permit a majority of those voting to decide the result, that we think the argument cannot be accepted.

Id.

The most significant departure from the text of Section 9(a), however, would come from the D.C. Circuit. Building on these prior cases, the D.C. Circuit would fully

embrace a majority-of-votes standard, without any of the hesitation expressed by its predecessors. *Cent. Dispensary*, 145 F.2d at 853. Rather than adhering to the statutory text, the D.C. Circuit adopted a test that eschewed even the basest majority requirement by allowing unions to be certified based on nothing more than the Board's determination that an election was "actually representative." *Id.* at 854. Under *Central Dispensary*, any election could be approved by the Board as long as it determined that election was representative of the will of employees and that determination was not arbitrary. At this point, the majority requirement of Section 9(a) became, effectively, a dead letter.

In summary, both the Board and the courts gradually carved out exceptions to the requirement of a true majority in Section 9(a). Each of these cases built upon the interpretative errors of the last, with their origins traceable to the erroneous statutory interpretation of the R.L.A. in the *Virginian Railway* cases. The Board should correct these compounding errors by restoring the true-majority standard enacted by Congress, as that standard is what is most consistent with the text of the Act.

III. The Best Meaning of the N.L.R.A. Requires a Union to be Elected by a Majority of Represented Employees, Rather than a Majority of those Voting.

Section 9(a) is clear—to be certified as the bargaining representative for a unit, a union must enjoy the support of a majority of that unit. Even those courts that allowed the initial erosion of the true-majority standard in representation elections acknowledged that a plain reading of Section 9(a) requires those elections to be decided by a true majority of employees in the bargaining unit. The Second Circuit

noted that a literal reading of Section 9(a) required this interpretation, but allowed reliance on election law customs to overcome the text. *Marlin-Rockwell Corp*., 116 F.2d at 588. The Seventh Circuit similarly suggested that a majority-of-votes standard was inconsistent with the Act's text, but deferred to the Supreme Court's *Virginian Railway* decision. *New York Handkerchief*, 114 F.2d at 148. But this reliance was misplaced, as the U.S. Supreme Court had focused on general election law principles, rather than the R.L.A's text, in reaching that conclusion. See, e.g., *Virginian Ry. Co. v. Sys. Fed. No. 40,* 300 U.S. 515, 605-06 (1937). Due to their focus on policy, rather than text, none of these cases support the Board's continued departure from the true-majority standard outlined in Section 9(a). These cases' questionable conclusions are only thrown further into doubt when considered in a post-*Loper Bright* context, 603 U.S. 369 (2024).

A recent post-*Loper Bright* decision supports a return to a true-majority standard in representation elections and illustrates why these older decisions should be revisited. In July 2026, the D.C. Circuit addressed the Board's successor bar rule, which gave incumbent unions "an irrebuttable presumption that [they] retain[] majority support when a new owner assumes control of a business and retains a majority of the existing employees." *Hosp. Menonita De Guayama, Inc. v. N.L.R.B.* 183 F.4th 745, 751 (D.C. Cir. 2026). Consistent with the requirements of *Loper Bright*, the D.C. Circuit examined the best meaning of the Act, ultimately concluding that the successor bar rule was unlawful. Its rationale for doing so is equally applicable to Section 9(a).

The D.C. Circuit noted that the successor bar "contravenes the Act by suspending two statutory protections: employees' right to choose whether and how to collectively bargain and their right to be represented by a union that has majority support." *Id.* at 755. It found that the successor bar prevented employers from obeying their statutory duty to bargain with a union "only if the union represents a majority of employees." *Id.* at 757. The Court expressly rejected the idea that the Board's general policymaking authority permitted a rule which contravened the Act's requirement that unions enjoy the support of a majority of employees and expressly held that the Board's rules must be consistent with the N.L.R.A. *Id.* at 758. The Court also rejected the idea that the Act's goal of promoting labor stability could justify the rule, as it found that the Act's purposes also included protecting workers' freedom of association and ability to choose their own representatives. *Id.* In short, the D.C. Circuit rejected the Board's successor bar rule as being contrary to the plain language of the N.L.R.A. and it also rejected the idea that appeals to the Act's purported purpose allows the Board to depart from that language.

These same principles can, and should, be applied to reject the Board's majority-of-votes standard in representation elections.

IV. Restoring a Proper Interpretation of the N.L.R.A. is Essential to Protecting Employees' Rights

The decisions underpinning the current majority-of-votes standard rely primarily on appeals to policy considerations, the N.L.R.A.'s purported purpose, and election law generally. None of these justifications are compelling. The N.L.R.A. guarantees workers both the ability to collectively bargain and to refrain from

supporting a union, and there are substantial practical differences between political elections and representation elections that justify why that they should be treated differently. By relying on these policy considerations, early interpretations of the N.L.R.A. not only disregarded the text of the statute but also based their conclusions on flawed logic.

a. The Majority-of-Votes Standard Disenfranchises Employees and Represents an Ongoing Infringement of their Statutory Rights.

i. The Majority-of-Votes Standard Results in Elections that are Not Representative.

The current majority-of-votes standard disenfranchises an unacceptable number of employees, with the result being that unions are now often elected by only a minority of those in a bargaining unit. A poignant example can be seen in an SEIU election involving employees at Jetstream Ground Services in 2023. In that election, only 26% of eligible employees voted, with the union winning the support of only 17% of employees.[8] Nevertheless, that union now speaks as the exclusive bargaining representative for the 83% of employees that never supported it. *Id.* This result is disappointingly common, and each election won by a noticeable minority represents

[8] F. Vincent Vernuccio and Akash Chougule, *Unions Need Democracy*, I4AW.ORG (2024), p. 3, available at: https://i4aw.org/wp-content/uploads/2024/08/I4AW-Report_Unions-Need-Democracy_Final-1.pdf (last accessed Oct. 27, 2026).

a continual rejection of the language of Section 9(a), as well as a legal bar preventing the majority from representing its own interests.[9]

There also is evidence that unions have taken advantage of the majority-of-votes standard in organizing. The majority-of-votes standard allows unions to ignore workers who are either uninformed about, or ambivalent toward union representation, and to instead focus on a minority of highly-engaged, pro-union employees. Instead of having to earn the support of a majority of workers through education and outreach, unions can weaponize a small, but vocal minority. Michael Alcorn, a Trader Joe's employee, testified to the fact that unions have intentionally employed this tactic before the House Committee on Education and Workforce Subcommittee on Health, Employment, Labor, and Pensions, stating "After an organizer realized I wasn't on board, they told me that they couldn't answer any more questions and were going to devote their attention to those who would help them 'win.'"[10] The majority-of-votes standard encourages these tactics, and is contrary to both the language and purpose of Section 9(a), which is to ensure elections represent

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[9] See, e.g., Rep. Bob Onder and F. Vincent Vernuccio, *Protect Workers' Right to Vote*, NATIONAL REVIEW (2025), available at: https://www.nationalreview.com/2025/04/protect-workers-right-to-vote (last accessed Oct. 27, 2026) (noting as examples two other elections in which unions were elected by fewer than 13 percent of eligible employee voters).

[10] *Big Labor Lies: Exposing Union Tactics to Undermine Free and Fair Elections: Hearing Before the Workforce Subcomm. On Health, Employment, Labor, and Pensions*, 118th Cong. 57-136 (2024) (statement of Michael Alcorn, Trader Joe's Employee), available at: https://www.congress.gov/event/118th-congress/house-event/LC73300/text (last accessed Oct. 27, 2026).

the will of a majority of workers. If unions wish to act as the exclusive representative for all employees in a bargaining unit, they should be forced to win support from those employees, not merely target minimal turnout by their supporters.

ii. Political Elections are Different from Representation Elections, and the Assumptions Applying to the Former do not Translate Well to the Latter.

The courts' reliance on election law principles from political elections described above was misplaced and fails to account for the unique character of representation elections.[11] In a political election, if candidates were forced to obtain a majority vote of all eligible voters, it would be nigh-impossible for anyone to get elected. As an example, voter turnout for U.S. Presidential Elections has not exceeded 65% of the populace since 1908.[12] To satisfy a true majority requirement in such an election, a candidate would have to win 78.5% of all votes, a practical impossibility in political elections. Thus, political elections have to allow for a majority-of-those voting standard because an absolute majority standard would be unworkable and result in a complete lack of government. Political voters are voting on who should occupy an office. Representation elections are more akin to a question of whether an office should even exist. A political election cannot leave a Senate seat unoccupied, for example, while a representation election can lead to there not be a collective

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[11] See Section I(b), *supra*.

[12] The American Presidency Project, *Voter Turnout in Presidential Elections*, U.C. Santa Barbara (last updated May 24, 2025), available at: https://www.presidency.ucsb.edu/statistics/data/voter-turnout-in-presidential-elections.

bargaining agent. This does not change even if there are multiple unions seeking recognition. No union, aka, no office, is still a viable outcome, and one that the statute's text requires where a union fails to obtain a majority of the bargaining unit's support.

Political elections, unlike representation elections, are also predictably cyclical and regular. A voter in a political election who fails to vote, or who regrets their vote in favor of a particular candidate or party, can easily make a different decision in a subsequent election. That is not the case for representation elections, which often have generational impacts. A review of 2023 union members found that 95% of the nearly eight million workers represented by unions had not voted for the unions in their workplace.[13] And while it is theoretically possible to decertify a union after it is elected, practical and legal barriers often make such measures impossible.[14] The end result is that unions who have never enjoyed the support of a majority of employees in a bargaining unit will nevertheless be able to represent both those employees and their successors, often in practical perpetuity. The continuing nature of union

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[13] F. Vincent Vernuccio and Akash Chougule, *Unions Need Democracy*, I4AW.ORG (2024), p. 2, available at: https://i4aw.org/wp-content/uploads/2024/08/I4AW-Report_Unions-Need-Democracy_Final-1.pdf (last accessed Oct. 27, 2026).

[14] *Id.* at p. 3. See also, Stephen Delie, *Misread: How Legal Authorities Allowed Tyranny of the Minority to Subvert Worker Enfranchisement*, MACKINAC CENTER FOR PUBLIC POLICY and INSTITUTE FOR THE AMERICAN WORKER (June, 2025), pp. 14-15, available at: https://www.mackinac.org/archives/2025/s2025-06.pdf.

representation only serves to amplify the harms caused by an unrepresentative election, concerns which are not present in political elections.

Political elections also involve broader societal stakes, where the assent of the non-voter can be more reasonably interpreted as acquiescence to the will of the majority. Representation elections, meanwhile, impact hyper-localized issues which directly affect the bargaining unit's terms and conditions of employment. Salaries, working conditions, health care, retirement, and overtime pay are all likely to be negotiated, and will have a direct impact on even those employees who do not vote in a representation election. To presume that those employees non-vote should be interpreted in favor of unionization, instead of the status quo, artificially tilts the otherwise-neutral language of the N.L.R.A. into an inherently pro-union law.[15] That artificial favor is inappropriate and unnecessary.

b. A Return to a True-Majority Standard Would Restore Employees' Rights and Prevent Ongoing Harm, but Would not Upend Labor Policy

A restoration of the true-majority standard contained in Section 9(a) would ensure that the immense power afforded to a union when acting as the exclusive representative of a bargaining unit is concomitant with the support of the employees

[15] See, e.g., 29 U.S.C. § 157 (establishing that employees have the right "to form, join, or assist labor organizations," and to bargain collectively, or to "refrain from any or all of such activities."), 29 U.S.C. § 158(a)-(b) (outlining parallel unfair labor practices applicable to both employers and unions).

it represents.[16] It would protect against undemocratic elections in which unions speak for all employees based on the support of only a few. These protections are essential, and they should be restored. It should be noted, however, that a return to this standard would not upend labor policy—in a majority of cases, union election outcomes would be the same under both a true-majority standard and a majority-of-votes standard.

While essential to protecting workplace democracy, returning to a true-majority standard would not dramatically alter the number of unions certified via representation elections. After studying N.L.R.B. election reports for elections conducted in 2022, amicus Institute for the American Worker concluded that a majority of union elections were decided in elections where the true-majority standard had been met.[17] A 2014 thesis which reviewed the impacts of the National Mediation Board's 2010 decision to adopt a majority of votes reached similar conclusions.[18] After reviewing pre- and post-rule change R.L.A. elections, that study

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[16] See, e.g., *Janus v. Am. Fed'n of State, Cnty., and Mun. Emp., Council 31*, 585 U.S. 878, 898 (2018) (noting the benefits conferred on an exclusive representative, and that status "results in a tremendous increase in the power of the union.") (internal quotation and citation omitted).

[17] F. Vincent Vernuccio, *In Union Votes, 11% Can Make a Majority*, WALL STREET JOURNAL, June 23, 2023, available at: https://perma.cc/T95M-4TNX (last accessed Oct. 27, 2026).

[18] Michael Elsenrath, *Effects of Railway Labor Act Election Rule Changes on Voter Participation and Unionization Activity*, UNIVERSITY OF NORTH DAKOTA (May 1, 2014), available at: https://commons.und.edu/cgi/viewcontent.cgi?article=1389&context=theses (last accessed Oct. 27, 2026).

determined that unionization efforts "are just as likely to occur under the new rules as they were under the old rules." *Id.* at 26. Thus, a return to a true-majority standard would not prevent collective bargaining, and in a majority of cases, it would return the same results as the current majority-of-votes standard.

CONCLUSION

The majority-of-votes standard developed as the result of a series of Board and Court decisions which failed to meaningfully engage with the plain language of Section 9(a). Over several years, these decisions increasingly focused on the idea that the N.L.R.A. was designed to promote collective bargaining, without any acknowledgment of its other purposes, such as ensuring unions enjoyed the support of a majority of those employees they would represent. This approach has resulted in Section 9(a) being applied in a way that is contrary to statute, silences employees, and encourages unions to focus on obtaining only the bare minimum of support from bargaining units they wish to organize. The Board should accept Constellation Energy LLC's request for review and use this case to restore an interpretation of Section 9(a) that is constituent with the N.L.R.A.'s textual mandate for a true-majority requirement in representation elections. It should also do so without delay, as every future election will only serve to magnify the harms the American worker experiences as a result of union elections which are contrary to law, and which fail to accurately reflect the will of a majority of employees within bargaining units.

Respectfully Submitted,

/s/ Stephen A. Delie
Stephen A. Delie
Attorney for Amici Curiae

Mackinac Center for Public Policy
Institute for the American Worker

Dated: November 2, 2026

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing motion and brief were electronically filed with the National Labor Relations Board on November 2, 2026 using the Board's E-filing system and was served by e-mail to the following persons:

James D. Thomas
David A. Kelly
Elliot R. Slowiczek
Jackson Lewis, P.C.
150 N. Michigan Ave., Ste. 2500
Chicago, IL 60601
James.Thomas@jacksonlewis.com
David.Kelly@jacksonlewis.com
Elliot.Slowiczek@jacksonlewis.com

Kenneth A. Jenero
Holland & Knight LLP
150 N. Riverside Plaza, Ste. 2700
Chicago, IL 60606
Kenneth.jenero@hklaw.com

Todd D. Steenson
Assistant General Counsel
Constellation Energy Generation, LLC
4300 Winfield Road, 5th Floor
Warrenville, IL 60555
Todd.steenson@constellation.com

Counsel for Employer

Amanda K. Hansen
Schuchat, Cook & Werner
555 Washington Ave., Ste. 520
St. Louis, MO 63101
akh@scwattorney.com

Counsel for Petitioner

Angie Cowan Hamada, Regional Director
Marshan Donegan
Christina Mols, Field Examiner
National Labor Relations Board, Region 13
219 S. Dearborn St., Ste. 808
Chicago, IL 60604
Angie.Hamada@nlrb.gov
Marshan.Donegan@nlrb.gov
Christina.Mols@nlrb.gov

/s/ Stephen A. Delie
Stephen A. Delie
Attorney for Amici Curiae
Mackinac Center Legal Foundation
Institute for the American Worker

Dated: November 2, 2026