**Dana Corporation *and* Clarice K. Atherholt, Petitioner and International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, AFL–CIO**

**Metaldyne Corporation (Metaldyne Sintered Products) *and* Alan P. Krug and Jeffrey A. Sample, Petitioners and International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, AFL–CIO.** Cases 6–RD–1518, 6–RD–1519, and 8–RD–1976

September 29, 2007

DECISION ON REVIEW AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, SCHAUMBER, KIRSANOW, AND WALSH

I. INTRODUCTION

Metaldyne Corporation and Dana Corporation (the Employers) independently entered into separate neutrality and card-check agreements with the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, AFL–CIO. Subsequently, the Employers recognized the Union upon a showing of majority support of the respective unit employees. Shortly after the Employers' recognition of the Union (22 days for the Metaldyne unit and 34 days for the Dana unit), employees in each unit filed a petition seeking a decertification election. The Metaldyne petitions were supported by over 50 percent of the unit employees, while the Dana petition was supported by over 35 percent of the unit employees. The Regional Director for Region 6 and the Regional Director for Region 8 dismissed the Metaldyne and Dana petitions, respectively, based on an application of the Board's recognition-bar doctrine. According to this doctrine, an employer's voluntary recognition of a union, in good faith and based on a demonstrated majority status, immediately bars an election petition filed by an employee or a rival union for a reasonable period of time. A collective-bargaining agreement executed during this insulated period generally bars Board elections for up to 3 years of the new contract's term.

The Petitioners filed timely requests for review of the Regional Directors' dismissals.[1] Through their petitions, the employees sought a change in Board law in order to permit them to express their views, either for or against unionization, in a decertification election. The Board granted review to re-examine its recognition-bar doctrine.[2]

Our inquiry here requires us to strike the proper balance between two important but often competing interests under the National Labor Relations Act: "protecting employee freedom of choice on the one hand, and promoting stability of bargaining relationships on the other."[3] It is a well-recognized judicial doctrine that "the Board should be left free to utilize its administrative expertise in striking the proper balance."[4] In striking that balance here, we find that the immediate postrecognition imposition of an election bar does not give sufficient weight to the protection of the statutory rights of affected employees to exercise their choice on collective-bargaining representation through the preferred method of a Board-conducted election.

In order to achieve a "finer balance"[5] of interests that better protects employees' free choice, we herein modify the Board's recognition-bar doctrine and hold that no election bar will be imposed after a card-based recognition unless (1) employees in the bargaining unit receive notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition or to support the filing of a petition by a rival union, and (2) 45 days pass from the date of notice without the filing of a valid petition.[6] If a valid petition supported by 30 percent or more of the unit employees is filed within 45 days of the notice, the petition will be processed. The requisite showing of interest in support of a petition may include employee signatures obtained before as well as after the recognition. These principles will govern regardless of whether a card-check and/or neutrality agreement preceded the union's recognition.[7]

[1] See Sec. 102.67 of the National Labor Relations Board's Rules and Regulations.

[2] *Dana Corp*., 341 NLRB 1283 (2004) (Members Liebman and Walsh dissenting). The Board also granted the Petitioners' motions to consolidate the cases and to solicit amicus briefs on the issues raised. In response, the Board received 24 amicus briefs, in addition to briefs on review and reply briefs from the Petitioners, the Employers, and the Union, which filed jointly with amicus AFL–CIO. In reaching our Decision, we have carefully reviewed the briefs on review, reply briefs, and amicus briefs.

[3] *MV Transportation*, 337 NLRB 770 (2002).

[4] *NLRB v. Montgomery Ward & Co*., 399 F.2d 409, 412 (7th Cir. 1968).

[5] *Deluxe Metal Furniture Co.,* 121 NLRB 995, 997 (1958).

[6] As set forth infra, the required notice will be an official NLRB notice that the employer shall post in conspicuous places at the workplace throughout the 45-day period. The 45-day period for filing a petition after a card-check recognition runs from the posting of the official NLRB notice.

[7] As used herein, the phrase "card-check and/or neutrality agreement" refers to an agreement whereby the employer recognizes the union upon the showing of a card majority and/or the employer remains neutral during the union's organizational campaign. The term "recognition" refers to the actual grant of recognition to the union by the employer.

Modifications of the recognition bar cannot be fully effective without also addressing the election-bar status of contracts executed within the 45-day notice period, or contracts executed without employees having been given the newly-required notice of voluntary recognition. Consequently, we make parallel modifications to current contract-bar rules as well, such that a collective-bargaining agreement executed on or after the date of voluntary recognition will not bar a decertification or rival union petition unless notice of recognition has been given and 45 days have passed without a valid petition being filed.

The Board's usual practice is to apply a change in law retroactively, including in the case in which the change is announced. However, we find that an exception is warranted here to avoid inequitable disruption of bargaining relationships established on the basis of the former voluntary recognition-bar doctrine. We therefore apply the recognition-bar modifications adopted herein prospectively only. Accordingly, we affirm the Regional Directors' administrative dismissals of the petitions before us under extant law.

## II. FACTS OF THE CASES

In September 2002, Metaldyne Corporation and the Union entered into a neutrality and card-check agreement. The Union then began an organizing drive and solicited authorization cards from employees in an agreed-upon bargaining unit. On November 26, 2003, the Union notified Metaldyne that it had the support of a majority of the unit employees. On December 1, 2003, after a card check by a neutral third party, Metaldyne voluntarily recognized the Union as the exclusive bargaining representative of the unit employees. Three weeks later, on December 23, 2003, Petitioners Alan P. Krug and Jeffrey A. Sample each filed a petition for a Board decertification election in the recognized unit. The petitions were supported by a showing of interest obtained after the grant of recognition. Metaldyne and the Union began contract negotiations in January 2004 and reached final agreement the following June.

On August 6, 2003, Dana Corporation and the Union entered into a neutrality and card-check agreement, and the Union began soliciting authorization cards. About November 26, 2003, the Union notified Dana that it had the support of a majority of employees in the agreed-upon unit. On December 4, 2003, after a card check by a neutral third party, Dana voluntarily recognized the Union as the exclusive bargaining representative of the unit employees. On January 7, 2004, Petitioner Clarice K. Atherholt filed a petition for a Board decertification election, supported by a showing of interest obtained after the grant of recognition. Contract negotiations had not begun when the petition was filed.

## III. POSITIONS OF PARTIES AND AMICI

In their requests for review, the Petitioners argue that the Board should abolish the voluntary recognition bar or, alternatively, modify it to allow decertification petitions to proceed if they are filed within 30 or 45 days following the grant of recognition to the Union. The Petitioners and those amici who support them[8] collectively make the following arguments. Questions concerning representation should be resolved through the "preferred method" of a Board election. The voluntary recognition bar is a discretionary Board policy that should be reevaluated when industrial conditions warrant. While the voluntary recognition process is founded on a majority card showing, it is a far less reliable indicator of actual employee preference than the results of a Board secret-ballot election. Given the recent growth of card-check/neutrality and voluntary recognition agreements, the Board should reassess and eliminate the voluntary recognition bar, as it places too much unchecked power in the hands of an interested employer and its chosen "partner" union, threatens employee free choice, and eliminates the Board from the process.

In the alternative, Petitioners and supporting amici argue that the Board should create a "window period" that would allow employees to file for decertification within a reasonable time (variously suggested as from 30 to 60 days) after the voluntary recognition is publicly announced. They maintain that this window period would not interfere with collective-bargaining negotiations because in most cases (including the cases at hand) negotiations have not even started at that point. Some amici further contend that the Board should also address the current "reasonable period" standard for determining the duration of a recognition bar. In their view, the Board should substitute a time-specific standard, perhaps of 6 months.

[8] Amici briefs or letters opposing the current voluntary recognition bar were submitted by the following: 21 Republican members of the U.S. House of Representatives; the Automotive Aftermarket Suppliers Assn., Heavy Duty Manufacturers Assn., Motor and Equipment Manufacturers Assn., Michigan Chamber of Commerce, and Original Equipment Suppliers Assn.; Allied Security; Center on National Labor Policy, Inc.; Tennessee Chamber of Commerce and Industry; John M. O'Donnell, labor and employment attorney; Associated Builders & Contractors, Inc., National Assn. of Manufacturers, National Restaurant Assn., Printing Industries of America, Society for Human Resource Management, Capital Associated Industries (NC), various employer and manufacturer associations of Florida, the Northeast, California, Ohio, Hawaii, the Mountain States, Nevada, Wisconsin, Michigan, Illinois, Pennsylvania, and Oregon; United States Chamber of Commerce and the Council on Labor Law Equality; HR Policy Assn.; Associated Industries of Kentucky; Thomas A. Lenz, labor attorney; and Wackenhut Corp.

The General Counsel, as amicus, also urges the Board to create a limited window-period exception to the voluntary recognition bar where a decertification petition is filed no later than 30 days after formal written notice to employees of the recognition. The General Counsel proposes that the decertification petition be supported by a document expressing opposition to union representation signed by at least 50 percent of the unit employees no later than 21 days after formal written notice of recognition. This would include petitions that began circulating before the date of recognition. This limited window-period exception should apply in any case of voluntary recognition based on a card check, regardless of whether or not the recognition was preceded by a neutrality and/or card-check agreement.

In support of this position, the General Counsel notes that although Board-conducted elections and voluntary recognition are both accepted methods of establishing valid collective-bargaining relationships, the Board and courts have recognized that elections provide the more reliable basis for determining whether employees desire representation. Card checks are less reliable because they lack the secrecy and procedural safeguards of an election, and employees may change their minds after signing the cards and further exploring the issue, but they may hesitate publicly to withdraw their signed cards. Although the Supreme Court has affirmed the need for an election bar to protect newly established bargaining relationships, *Brooks v. NLRB*, 348 U.S. 96 (1954), it did so in the context of a union's certification after an election conducted under "safeguards of voluntary choice," including the "privacy and independence of the voting booth." Card-check recognition fundamentally differs from elections in this regard, and these differences make it a far less reliable indicator of employee choice than an election. Therefore, according to the General Counsel, an exception to the recognition bar is warranted in certain circumstances.

The Employers, the Union, and those amici who support them[9] urge the Board to adhere to its current recognition-bar doctrine and to affirm the dismissals of the decertification petitions in these cases. Collectively, they make the following arguments. The recognition bar is a longstanding doctrine that serves the statutory policy of encouraging collective bargaining and labor relations stability and has been affirmed by several courts of appeals. The doctrine supports and encourages majority card-based voluntary recognition, which is an undisputedly lawful and important alternative to the selection of an exclusive bargaining representative through the Board election process. Without an immediate recognition bar, the initiation of contract negotiations will be delayed, employers will be reluctant to comply with information requests from the union, and the incentive to enter voluntary recognition agreements will be substantially reduced or eliminated. According to the Employers, the Union, and the supporting amici, the availability of 8(b)(1)(A) and 8(a)(2) charges provides adequate safeguards against union coercion in the solicitation of employee card support and the recognition of minority unions. They argue that elections are not necessarily superior to private voluntary recognition procedures. They point out that Board elections resolve questions concerning representation based only on a political majority of those unit employees who actually vote in an election process that they characterize as involving unequal party access, negative campaign tactics, frequent employer coercion, and substantial delay in the resolution of postelection objections or challenges. On the other hand, private voluntary recognition procedures resolve questions concerning representation based on a showing of support from no less than an absolute majority of unit employees, and, in frequent conjunction with neutrality agreements, they provide for a more expeditious employee choice on the issue of union representation with less coercion, misrepresentation, and negative rhetoric.

## IV. ANALYSIS

It may be worthwhile at the outset to identify those issues we will not address in these cases. We do not question the legality of voluntary recognition agreements based on a union's showing of majority support. Voluntary recognition itself predates the National Labor Relations Act and is undisputedly lawful under it.[10] We also do not address the legality of card-check and/or neutrality agreements preceding recognition. While some allegations have been made that the agreements and subsequent recognitions were not arms-length, there is no 8(a)(2) challenge to the negotiations of the agreements or to the agreements themselves. Nor is there an 8(a)(2) challenge to the grant of recognition. Although the Petitioners have asserted that the authorization cards were coercively obtained or otherwise tainted, such evidence has not been developed nor specific findings in that regard made. We also do not address circumstances in

[9] Amici briefs or letters supporting the current voluntary recognition bar were submitted by the following: a group of 48 Congressional Democrats (Sen. Kennedy, Rep. Miller, et al.); American Rights at Work; automotive manufacturers General Motors Corp., DaimlerChrysler Corp., Ford Motor Co., and automotive parts supplier Delphi Corp.; Collins & Aikman Corp.; Kaiser Foundation Health Plan, Inc.; Lear Corp.; Levi Strauss & Co.; Liz Claiborne, Inc.; Rutgers University Professors Adrienne E. Eaton and Jill Kriesky; and the United Transportation Union.

[10] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 595–600 (1969).

which *employers* may file postrecognition petitions or unilaterally withdraw recognition from a union. Finally, we will not decide in these cases whether the "reasonable period" standard for determining the length of a voluntary recognition bar period should be modified or replaced by a time-specific standard.[11]

In sum, the issue before us is limited to deciding whether an employer's voluntary recognition of a union based on a presumably valid majority showing—usually consisting of signed authorization cards—should bar a decertification or rival union election petition for some period of time thereafter. In granting the requests for review in these cases, the Board majority stated its belief "that the increased usage of recognition agreements, the varying contexts in which a recognition agreement can be reached, the superiority of Board-supervised secret-ballot elections, and the importance of Section 7 rights of employees, are all factors which warrant a critical look at the issues raised herein." *Dana Corp.*, 341 NLRB at 1283. Having now taken that critical look, with the benefit of extensive and helpful argument from the parties and amici, we conclude that the current recognition-bar doctrine should be modified to provide greater protection for employees' statutory right of free choice and to give proper effect to the court- and Board-recognized statutory preference for resolving questions concerning representation through a Board secret-ballot election.

### *A. The Current Recognition-Bar Doctrine*

The Board announced the recognition-bar doctrine in *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966). This was an unfair labor practice case in which the complaint alleged that the respondent employer unlawfully executed a collective-bargaining agreement with a minority union. It was stipulated that the employer had lawfully recognized the union based on its majority representative status, but the union no longer retained majority support when the parties executed their contract a month later. The Board, id. at 587, dismissed the complaint, reasoning 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.

Soon after *Keller Plastics*, the Board relied on the recognition-bar doctrine in holding that a respondent employer unlawfully withdrew its voluntary recognition of a union based on the filing of a decertification petition approximately 2-1/2 months after the recognition agreement. *Universal Gear Services Corp.*, 157 NLRB 1169 (1966), enfd. 394 F.2d 396 (6th Cir. 1968). Then, in *Sound Contractors*, 162 NLRB 364 (1966), the Board said that the recognition-bar doctrine would apply in representation cases to bar the filing of election petitions for a reasonable time after voluntary recognition. Although the Board permitted the processing of a petition in *Sound Contractors* because the rival union filing it was engaged in organizing the employer's employees at the time the incumbent was recognized, the Board has since broadly applied the recognition bar and dismissed petitions in circumstances that raise serious questions whether employee free choice was given adequate weight.[12] See, e.g., *Seattle Mariners*, 335 NLRB 563 (2001) (dismissing a decertification petition signed by over 40 percent of

[11] Under current Board law, a "'reasonable time' is not measured only by the number of days or months spent in bargaining, but by what transpired and what was accomplished in the bargaining sessions." *Royal Coach Lines,* 282 NLRB 1037, 1038 (1987). In the present cases, the Regional Directors determined that a reasonable time had not elapsed when the decertification petitions were filed, and the Petitioners did not seek review of this determination. We note that in *MGM Grand Hotel*, 329 NLRB 464 (1999), a Board majority found that the insulated "reasonable period" for bargaining was more than 356 days, thereby conferring on the recognized union the benefit of an insulated period substantially the same as a certified union would enjoy. Chairman Battista and Members Schaumber and Kirsanow did not participate in the *MGM* decision and question whether it was correctly decided. Even under a flexible, open-ended "reasonable period" standard, Members Schaumber and Kirsanow agree that appropriate weight should be given the importance of the Sec. 7 right to select and oust a representative, the significant distinctions between voluntary recognition and certification, the absence of unfair labor practices that might warrant a longer insulated period for remedial bargaining, and the likelihood that in many instances first contract negotiations for parties who voluntarily enter bargaining relationships will be less contentious and time-consuming. While there may be some benefit in having a maximum insulated period for the voluntary recognition bar, no party has asked the Board to impose such cutoff or overrule *MGM Grand Hotel.* Since this issue has not been briefed and brought sufficiently into focus for the Board to reliably address it, Members Schaumber and Kirsanow do not resolve these matters.

Chairman Battista believes that an open-ended period fosters unnecessary litigation, gives rise to results like that reached in *MGM*, and does not create the desirable sharp distinction between certification and card-based recognition. Accordingly, consistent with the views articulated in the briefs of two amici, and noting the factors set forth above by his colleagues, Chairman Battista would impose a maximum of 6 months for the insulated period. The 6 months would run from the end of the 45-day notice period.

[12] In *Smith's Food & Drug Centers,* 320 NLRB 844 (1996), the Board narrowed the *Sound Contractors* rival-union exception to the voluntary recognition bar, permitting the processing of rival union petitions filed within the otherwise insulated postrecognition period only if the petition is supported by a 30-percent showing of interest obtained prior to recognition.

unit employees *prior to* recognition but filed with the Board after recognition).[13]

### *B. The Rationale for Modification of the Recognition-Bar Doctrine*

While Section 9 of the Act permits the exercise of employee free choice concerning union representation through the voluntary recognition process, this does not require that Board policy in representation case proceedings must treat the majority card showings the same as the choice expressed in Board elections. On the contrary, both the Board and courts have long recognized that the freedom of choice guaranteed employees by Section 7 is better realized by a secret election than a card check.[14] "[S]ecret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support."[15]

As further discussed below, the 1947 Taft-Hartley amendments to Section 9 of the Act reflect the preference for Board elections by limiting Board certification of exclusive collective-bargaining representatives, and the benefits that inure from certification, to unions that prevail in a Board election. Those benefits include immunity from certain prohibitions in Section 8(b)(4) of the Act as well as a full 1-year period during which the certified union's majority status cannot be challenged. In recognition of the Congressionally-approved practice of according special value to certifications, the Board has long maintained an exception to both the recognition-bar and contract-bar doctrines that permits a recognized union to file a representation petition to secure the benefits of certification.[16]

Our administration of the Act should similarly reflect that preference by encouraging the initial resort to Board elections to resolve questions concerning representation. There is sound reason to believe that the current recognition-bar policy does not do so. The current policy fails to give adequate weight to the substantial differences between Board elections and union authorization card solicitations as reliable indicators of employee free choice on union representation and fails to distinguish between the circumstances of voluntary recognition and those present in the other election-bar situations cited in *Keller Plastics*. In light of these factors, discussed below, we conclude that some modifications in the voluntary recognition bar are required.[17]

The dissent repeatedly asserts that "voluntary recognition is a favored element of national labor policy" and suggests that we have lost sight of that proposition. We disagree. Our colleagues fail to recognize that there is no statutory mandate that there be any voluntary recognition bar at all. There was none prior to the 1966 *Keller Plastics* decision, even though, as our colleagues point out, voluntary recognition has been embedded in Section 9(a) from the Act's inception. Thus, for years, the policy basis of voluntary recognition apparently was not thought to be inconsistent with the lack of a recognition bar altogether. We are not returning the law to the pre-*Keller Plastics* era. We continue to support voluntary recognition, and thereby encourage the stability of collective-bargaining relationships established on that basis, by continuing to apply the recognition bar. We simply modify that bar to provide greater protection for employee free choice.

#### 1. The greater reliability of Board elections

The preference for the exercise of employee free choice in Board elections has solid foundation in distinctions between the statutory process for resolving questions concerning representation and the private voluntary recognition process. For a number of reasons, authorization cards are "admittedly inferior to the election process."[18] First, unlike votes cast in privacy by secret Board election ballots, card signings are public actions, susceptible to group pressure exerted at the moment of choice.[19]

[13] The Board held that the rival-union exception in *Smith's Food* was inapplicable to decertification petitions.

[14] See, e.g., *NLRB v. Gissel Packing Co.*, supra at 602; *Linden Lumber Division v. NLRB*, 419 U.S. 301, 304 (1974); *Transportation Maintenance Services v. NLRB*, 275 F.3d 112, 114 (D.C. Cir. 2002); *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 727 (2001); *Underground Service Alert*, 315 NLRB 958, 960 (1994).

[15] *Gissel*, supra at 602.

[16] *General Box Co.*, 82 NLRB 678 (1949). Our dissenting colleagues have previously emphasized that "Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions." *Levitz*, 333 NLRB at 723. Here, however, they argue that we err in stating there is a *statutory* preference for Board elections. Obviously, we disagree. The preference is not simply a matter of administrative convenience. While the text of the Act does not state an explicit preference for Board elections, we find 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.

[17] The Board's irrebuttable presumption of a union's continuing majority status following recognition is based on policy considerations, not on factual probability. Consequently, our modification of the recognition bar stems from our reassessment of those policy considerations.

[18] *Gissel*, supra at 603. The Supreme Court in *Gissel* held that the Board could impose a remedial bargaining order based on a union's prior card showing of employee support in extraordinary cases where a respondent employer's unfair labor practices foreclose the possibility of conducting a fair Board election.

[19] Inasmuch as such pressure may not rise to the level of coercion proscribed by Sec. 8(b)(1)(A) or may not be attributable to an agent of the soliciting union, the opportunity to file an unfair labor practice charge during the voluntary recognition process does not provide the same degree of protection against interference with employee free choice as does the Board electoral process, where conduct by unions,

The election is held under the watchful eye of a neutral Board agent and observers from the parties. A card signing has none of these protections. There is good reason to question whether card signings in such circumstances accurately reflect employees' true choice concerning union representation. "Workers sometimes sign union authorization cards not because they intend to vote for the union in the election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back, since signing commits the worker to nothing (except that if enough workers sign, the employer may decide to recognize the union without an election)."[20]

Second, union card-solicitation campaigns have been accompanied by misinformation or a lack of information about employees' representational options. As to the former, misrepresentations about the purpose for which the card will be used may go unchecked in the voluntary recognition process. Even if no misrepresentations are made, employees may not have the same degree of information about the pros and cons of unionization that they would in a contested Board election, particularly if an employer has pledged neutrality during the card-solicitation process.[21] Employees uninterested in, or opposed to, union representation may not even understand the consequences of voluntary recognition until after it has been extended. In circumstances where recognition is preceded by a card-check agreement that provides for union access to the employer's facility, employees may even reasonably conclude they have no real choice but to accede to representation by that union.[22]

Third, like a political election, a Board election presents a clear picture of employee voter preference at a single moment. On the other hand, card signings take place over a protracted period of time. In the present *Metaldyne* cases, for instance, the Union took over a year to collect the cards supporting its claim of majority support. During such an extended period, employees can and do change their minds about union representation.[23] On this point, several briefs filed in this proceeding refer to statistics from a 1962 presentation by former Board Chairman McCulloch as empirical evidence of the lesser reliability of cards to indicate actual employee preference for union representation. These statistics showed a significant disparity between union card showings of support and ensuing Board election results. In particular, unions with a 50- to 70-percent majority card showing won only 48 percent of elections. Even unions with more than a 70-percent card showing won only 74 percent of elections.[24]

Finally, although critics of the Board election process claim that an employer opposed to union representation has a one-sided advantage to exert pressure on its employees throughout each workday of an election campaign, the fact remains that the Board will invalidate elections affected by improper electioneering tactics, and an employee's expression of choice is exercised by casting a ballot in private. There are no guarantees of comparable safeguards in the voluntary recognition process. While the provision of an orderly process for determining whether a fair election has been conducted may result in substantial delay in a small minority of Board elections,[25] it remains preferable to determine employee free

employers, and third parties may be found to be objectionable interference even if it does not rise to the level of an unfair labor practice. Our dissenting colleagues know this distinction well, but they choose to ignore it in falsely alleging that we criticize Sec. 8(b)(1)(A) and maintain a double standard as to necessary protections for employee free choice against union and employer coercion.

The dissent faults our analysis here, observing that signing an "employee antiunion petition" is also a public action subject to group pressures. But there is an obvious difference. Such a petition, where it secures the necessary support, obtains a secret-ballot election. Union cards, on the other hand, obtain under *Keller Plastics* voluntary recognition shielded by an *immediate* election bar.

[20] *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1371 (7th Cir. 1983).

[21] "Among the factors that undoubtedly tend to impede [employee free choice] is a lack of information with respect to one of the choices available. In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice." *Excelsior Underwear*, 156 NLRB 1236, 1240 (1966).

[22] We do not attack pre-recognition union access provisions, as the dissent claims. We simply state that the impression employees may reasonably draw from a union's presence on their employer's premises is one factor among many we discuss for questioning the reliability of a card majority as a basis for immediately foreclosing any electoral referendum after an employer recognizes the union as the employees' bargaining representative.

[23] See, e.g., *Alliant Foodservice*, 335 NLRB 695 (2001), where 16 employees who signed cards for one union subsequently signed cards for another union.

[24] McCulloch, *A Tale of Two Cities: Or Law in Action*, Proceedings of ABA Section of Labor Relations Law 14, 17 (1962). Of course, cards submitted as a showing of interest in support of election petitions merely provide administrative grounds for conducting the election. In this respect, the dissent fails to recognize that all of the aforementioned reasons for questioning the reliability of the cards become moot once an election is held. Unlike card-based voluntary recognition, "it is the election, not the showing of interest, which decides the substantive issue [of representation]." *Northeastern University*, 218 NLRB 247, 248 (1975).

[25] A recent release of NLRB field and headquarters statistics for the Office of the General Counsel reveals that "[i]nitial elections in union representation cases were conducted in a median of 39 days from the filing of the petition, with 94.2% of all elections conducted within 56 days" during Fiscal Year 2006. General Counsel's Memorandum GC 07-03, *Summary of Operations FY 2006* (Jan. 3, 2007).

choice by a method that can assure greater regularity, fairness, and certainty in the final outcome.[26]

2. Differences between voluntary recognition and other election-bar situations

The Board's reliance in *Keller Plastics* on other election-bar doctrines for certification, Board orders, and settlement agreements to justify the immediate imposition of a voluntary recognition bar failed to account for the different contexts in which those doctrines arose. Most notably, the certification-year bar holds that a certified union's majority status is irrebuttably presumed to continue for 1 year from the date of certification *after a Board election*. The 1947 Taft-Hartley Act amendments to Section 9 of the Act effectively codified this limitation and also barred petitions filed within 1 year of a valid Board election, thus precluding repeated petition filings after a union loses an election.[27] In other words, the immediate imposition of a 1-year election bar after a union's certification or defeat results from the exercise of employee free choice by the preferred method of a Board election.

The Supreme Court affirmed the Board's certification-year rule and held that an employer violated Section 8(a)(5) by refusing to bargain with a certified union in *Brooks v. NLRB*, supra. It listed, with apparent approval, five reasons for imposing an immediate insulated bargaining period. 348 U.S. at 99–100. Proponents of the current recognition bar contend that some, although admittedly not all, of these reasons apply as well to collective-bargaining relationships newly established by voluntary recognition, particularly the observations that "a union should be given ample time for carrying out its mandate . . . and should not be under exigent pressure to produce hot-house results or be turned out," and that "it is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies, union strength may erode and thereby relieve him of his statutory duties at any time, while if he works conscientiously toward agreement, the rank and file may, at the last moment, repudiate their agent." Id. at 100. As an abstract matter, these considerations could support the current recognition-bar doctrine, but the Court did not speak in the abstract. It spoke in the specific context of why protections should be accorded a union whose majority status was certified *after a Board election*, "a solemn and costly occasion, conducted under safeguards to voluntary choice." Id. at 99. In this context, the consensus of the Board, the Congress, and the Court is that the greater assurance of an accurate expression of employees' free choice justifies the immediate imposition of an insulated period for bargaining free from the threat of challenge to the certified union's status.

In *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944), the Supreme Court affirmed a Board order that an employer bargain for a "reasonable period" after the employer's unfair labor practices had dissipated a union's card majority. The Court stated: "[A] Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship without regard to new situations that may develop. . . . But, as the remedy here in question recognizes, a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." Id. at 705. Consistent with *Franks*, the Board has affirmatively ordered employers to bargain with incumbent unions for a reasonable period of time, and barred the filing of election petitions during that period, when an employer has engaged in unfair labor practices that will taint any subsequent showing of employee disaffection.[28] Thus, the election bar accompanying Board orders in these cases serves a remedial purpose that is not implicated in the voluntary recognition-bar setting, and it is applied to situations where an employer's unlawful conduct raises doubt about whether a subsequent showing of employee interest in support of an election petition, as well as any ensuing election, would truly represent the exercise of free choice.

A settlement bar is also distinguishable from the circumstances of voluntary recognition. At least since *Poole Foundry & Machine Co.*,[29] the Board has held that an unfair labor practice settlement agreement in which the employer agrees to bargain bars the filing of a decertification petition within a reasonable period of time after the agreement. Although the employer is not an adjudicated violator of the Act in the situation described by *Poole*, the Board has sought to effectuate the settlement of unfair labor practice allegations before it by dismissing subsequently filed petitions that would interfere with the employer's settlement pledge to bargain. No such considerations exist in the case of voluntary recognition.[30]

[26] In Fiscal Year 2005, only 5 percent of all representation elections resulted in the filing of objections. See 70 NLRB Annual Report 130 (2005).

[27] See Sec. 9(c)(3).

[28] See, e.g., *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001).

[29] 95 NLRB 34, 36 (1951), enfd. 192 F.2d 740, 742 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952).

[30] For that matter, the D.C. Circuit has criticized the breadth of the Board's application of the settlement bar, *BPH & Co. v. NLRB*, 333 F.3d 213, 220–223 (D.C. Cir. 2003), and the Board recently held that a settlement agreement would not generally bar processing a decertifica-

In sum, there is a reasonable rationale for imposing an immediate bar in circumstances involving a certification, a Board bargaining order, and a settlement agreement containing a promise to bargain. However, the rationale is far less persuasive where there is only voluntary recognition. Accordingly, we find it appropriate to alter the bar in the latter situation.

Several courts of appeals have endorsed the current recognition-bar doctrine.[31] However, none of those judicial decisions state or suggest that the recognition bar is required as a policy or as a statutory matter, and neither the courts of appeals nor past Board decisions have expressly dealt with the alternative (jointly proposed by the General Counsel, Petitioners, and some amici here) of creating an initial postrecognition window period for filing election petitions before insulating the recognized union's majority status from challenge for a reasonable period of time. We conclude that a better balance between the protection of free choice and the encouragement of labor relations stability can be achieved by modifying the recognition bar in this way.

3. Current practices of card-check recognition

It is asserted that unions are increasingly and successfully turning to card checks as their preferred means of achieving recognition and that the Board should not interfere. Assuming arguendo that unions are increasingly turning to card checks in lieu of Board elections for recognition, and assuming further that employers are voluntarily acceding to card-check recognition, the Board's action today does not interfere with that voluntarism. Today's action improves upon it by better assuring that employee free choice has not been impaired by that recognition. That free choice is, after all, the fundamental value protected by the Act.

We acknowledge that the more rigid recognition-bar doctrine has been in effect since it was announced in *Keller Plastics*. Even in the context of administrative law, the principle of stare decisis is entitled to considerable weight. "The rules governing representation elections are not, however, 'fixed and immutable. They have been changed and refined, generally in the direction of higher standards.'"[32] To that end, we conclude a higher standard of notice to employees that recognition has been extended, and a postrecognition opportunity for employees to petition the Board for an election, must be met before an election bar is imposed.

*C. The Modified Recognition-Bar Doctrine*

For all these reasons, we herein modify two aspects of the current recognition-bar doctrine. There will be no bar to an election following a grant of voluntary recognition unless (a) affected unit employees receive adequate notice of the recognition and of their opportunity to file a Board election petition within 45 days, and (b) 45 days pass from the date of notice without the filing of a validly-supported petition. These rules apply notwithstanding the execution of a collective-bargaining agreement following voluntary recognition. In other words, if the notice and window-period requirements have not been met, any postrecognition contract will not bar an election.[33]

If both conditions are satisfied, the recognized union's majority status will be irrebuttably presumed for a reasonable period of time to enable the parties to engage in negotiations for a first collective-bargaining agreement. Under the contract-bar doctrine, any agreement reached during this 45-day window period will further bar an electoral challenge for up to 3 years of the contract term, once the window period elapses without the filing of a decertification or rival union petition.

We agree with the General Counsel that the notice and window-period requirements should apply irrespective of whether voluntary recognition is preceded by a card-check/neutrality agreement. The previously-discussed problems with the current recognition-bar doctrine may be increased in, but are not limited to, situations in which recognition follows such agreements. We find that the basic justifications for providing an insulated period to promote labor-relations stability during the infancy of a collective-bargaining relationship are well founded, except that they do not warrant *immediate* imposition of an election bar following voluntary recognition. The greater uncertainty surrounding the showing of majority support for a voluntarily recognized union, as opposed to a certi-

tion petition filed *prior to* the execution of the settlement agreement. *Truserv Corp.*, 349 NLRB 227 (2007) (Members Liebman and Walsh dissenting).

[31] See, e.g., *Exxel/Atmos, Inc. v. NLRB,* 28 F.3d 1243 (D.C. Cir. 1994)*; NLRB v. Cayuga Crushed Stone,* 474 F.2d 1380, 1383–1384 (2d Cir. 1973)*; NLRB v. Frick Co.,* 423 F.2d 1327, 1332 (3d Cir. 1970); *NLRB v. Universal Gear Service Corp.,* 394 F.2d 396, 397–398 (6th Cir. 1968); *NLRB v. Montgomery Ward & Co.,* 399 F.2d 409, 411–413 (7th Cir. 1968)*;* and *NLRB v. San Clemente Publishing Corp.,* 408 F.2d 367, 368 (9th Cir. 1969).

[32] *Excelsior Underwear*, supra at 1239 (quoting from *Sewell Mfg.*, 138 NLRB 66, 70 (1962)). We note that, while our dissenting colleagues criticize us for overturning 40-year-old precedent in this case, they joined in overruling 50-year-old precedent in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001). It would seem, then, that they agree that Board precedent is not immune from reconsideration simply because it is of a certain vintage.

[33] *Keller Plastics*, supra, *Smith's Food & Drug Centers*, supra, *Seattle Mariners*, supra, and their progeny are hereby overruled to the extent they are inconsistent with the modified recognition-bar doctrine that we announce in this decision.

fied union, justifies delaying the election bar for a brief period during which the unit employees, having been informed of the voluntary recognition agreement and the availability of a limited window period for filing a petition with the Board, can debate among themselves whether a Board-conducted election is preferred.

We also reject the dissent's contention that modification of the recognition-bar doctrine will disserve the policy of promoting labor relations stability and remove the incentive for parties to enter into voluntary recognition agreements. Employers and unions agree to voluntary recognition for any number of reasons, economic and otherwise, that will remain unaffected by our decision today.[34] Furthermore, the provision of a postrecognition window period for filing decertification or rival election petitions merely postpones the recognition bar; it does not abolish it or destroy its benefits. If no valid petition is filed within 45 days of notice of recognition, then a union's majority status will not be subject to challenge during the ensuing recognition-bar period.

It is true that, during the initial 45-day window period, the newly-established bargaining relationship will be subject to some degree of uncertainty about potential challenges to the union's representative status. However, the same uncertainty exists at other times during which an incumbent union's majority status is merely rebuttable and election petitions can be filed.[35] Moreover, although our modification of the recognition bar delays the onset of an insulated period in order to assure protection of employee free choice, it does not otherwise deny the advantages of incumbency to the recognized union and those employees who support it. The employer's obligation to bargain with the union attaches immediately. For instance, during this 45-day period, the union can begin its representation of employees, its processing of their grievances, and its bargaining with the employer for a first contract.

Our dissenting colleagues predict that an employer will have "little incentive to recognize a union voluntarily if it knows that its decision is subject to second guessing through a decertification petition." Unions, they predict, will be trapped in a "Catch 22": they will have no reason to bargain hard promptly for fear that they will be ousted in a decertification election, and yet failure to produce prompt results will induce employees to file a decertification petition.

It is not the Board's province to provide incentives for parties to enter into voluntary recognition agreements, particularly if their reasons for doing so give short shrift to affected employees' statutory rights of free choice. In any event, we seriously question whether our modification of the voluntary recognition bar will have the dire consequences predicted by the dissent. This modification merely permits the filing of an election petition during the 45-day window period. It does not encourage, much less guarantee, the filing of a petition. That is a matter left to employees, and an employer and union are both free during the window period to express their noncoercive views about the perceived benefits of a collective-bargaining relationship. If an employer, based on a cost-benefit analysis, believes voluntary recognition is on balance advantageous, it would not necessarily decline to recognize a union simply because there is some risk that a petition will be filed. Similarly, if a union has obtained a solid card majority and has been voluntarily recognized on that basis, it should not be deterred from promptly engaging in meaningful bargaining simply because of the risk of losing that majority in an election.

Finally, even if a decertification or rival union petition is filed during the window period, this will not require or permit the employer to withdraw from bargaining or from executing a contract with the incumbent union;[36] and during the preelection period, the recognized union will have the advantaged position of an incumbent. If the union prevails in the election, it will have the additional benefits available only to a certified bargaining representative.

1. The notice requirement

The Board requires employers to post official Board election notices, containing a summary of statutory rights and election details, for 3 working days prior to the election at conspicuous places in the workplace. A timely objection to a failure to comply with these requirements will result in the invalidation of the Board election results.[37] The election-notice requirement provides critical assurance that all employees in the voting bargaining unit will have adequate information about their electoral rights and an opportunity, prior to voting, to discuss and weigh the pros and cons of choosing collective-bargaining representation. Notice to employees of voluntary recognition and their right to file an election peti-

[34] See Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 Iowa L. Rev. 819, 832–841 (2005) (setting forth various reasons for neutrality and card-check agreements).

[35] For that matter, parties in the construction industry who have established nonmajority bargaining relationships under Sec. 8(f) have always conducted their labor relations without the benefit of an election bar.

[36] *RCA del Caribe, Inc.*, 262 NLRB 963, 965 (1982); *Dresser Industries*, 264 NLRB 1088, 1089 (1982).

[37] See Sec. 103.20 of the Board's Rules and Regulations, and *Club Demonstration Services*, 317 NLRB 349 (1995).

tion with the Board within 45 days will serve a similar purpose.

Thus, hereafter, the employer and/or the union must promptly notify the Regional Office of the Board, in writing, of the grant of voluntary recognition.[38] Upon being so apprised, the Regional Office of the Board will send an official NLRB notice to be posted in conspicuous places at the workplace throughout the 45-day period alerting employees to the recognition and using uniform language.

We request that the General Counsel prepare and distribute such notice for use by the Regional Offices. The notice should clearly state that (1) the employer (on date) has recognized the union as the employees' exclusive bargaining representative based on evidence indicating that a majority of employees in a described bargaining unit desire its representation; (2) all employees, including those who previously signed cards in support of the recognized union, have the Section 7 right to be represented by a union of their choice or by no union at all; (3) within 45 days from the date of this notice, a decertification petition supported by 30 percent or more of the unit employees may be filed with the National Labor Relations Board for a secret-ballot election to determine whether or not the unit employees wish to be represented by the union, or 30 percent or more of the unit employees can support another union's filing of a petition to represent them; (4) any properly supported petition filed within the 45-day period will be processed according to the Board's normal procedures; and (5) if no petition is filed within 45 days from the date of this notice, then the recognized union's status as the unit employees' exclusive majority bargaining representative will not be subject to challenge for a reasonable period of time following the expiration of the 45-day window period, to permit the union and the employer an opportunity to negotiate a collective-bargaining agreement.

2. The 45-day window period

Although the General Counsel and some others favor a 30-day postrecognition window period for filing election petitions, we believe that the slightly longer period of 45 days from the notice-posting date is more appropriate. The period must be of sufficient length to permit affected employees, after receiving notice, to fully discuss their views concerning collective-bargaining representation and, if they desire, to solicit support for decertification of the recognized union or support for another union to represent them. Of course, the recognized union and the employer may take part in this postrecognition dialogue, and they are free to devote the window period to persuading unit employees of the merits of such a collective-bargaining relationship. Particularly in a large bargaining unit, 30 days is not a very long time for such discourse and action. After all, in many instances, including the present cases, the recognized union has taken months or even in excess of a year to solicit the necessary majority showing of support.

We agree with the General Counsel that there is no need to distinguish between prerecognition and postrecognition support in determining the sufficiency of showings of interest for petitions filed during the 45-day window period. Petitions may be validly supported by employee signatures from both times. To be sure, the point of providing postrecognition notice and a 45-day window period is to permit the postrecognition solicitation of employee signatures, but there is no sound reason why the act of voluntary recognition should negate the validity of employee signatures antedating recognition.

Contrary to the General Counsel, however, we find no need to vary traditional showing-of-interest requirements. The 30-percent showing of interest is sufficient for our administrative purposes to raise a question concerning representation during other times when an incumbent union's majority status is rebuttable. Given our previous discussion about the lesser, and in some cases questionable, reliability of card-based voluntary recognition and the need to protect employee free choice through the preferred method of a Board election, it would not be appropriate to make the filing of postrecognition petitions more difficult by requiring a greater than usual showing of support. Further restrictions beyond the 45-day filing period requirement are unnecessary and unduly burdensome, in our view.

*D. Prospective Application*

The Board's general practice is to apply new policies and standards to "all pending cases in whatever stage."[39] However, the Board will make an exception in cases where retroactive application could, on balance, produce "'a result which is contrary to a statutory design or to legal and equitable principles.'"[40] We find an exception warranted here on equitable grounds. Our decision today marks a significant departure from preexisting law. In reliance on that law, the parties in the present cases en-

[38] For election-bar purposes, the recognition itself shall be in writing, shall describe the unit, and shall set forth the date of recognition. A copy of the written recognition must accompany the notice to the Regional Office. We reiterate that the 45-day window period will not begin to run until the requisite notice has been provided and the posting has occurred.

[39] *Deluxe Metal Furniture Co.*, 121 NLRB at 1006–1007.

[40] *John Deklewa & Sons*, 282 NLRB 1375, 1389 (1987) (quoting *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947)), enfd. 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

tered into voluntary recognition agreements with the understanding that the established recognition bar would immediately preclude the filing of Board petitions for a reasonable period of time. Other unions and employers have also entered into voluntary recognition agreements, and subsequently executed collective-bargaining agreements, that would not bar election petitions under our new policy because employees did not receive the notice of recognition that has not heretofore been required. Moreover, although retroactive application would further employee free choice, it would also destabilize established bargaining relationships. Thus, retroactivity would produce mixed results in accomplishing the purposes of the Act, while the reliance interests of the parties and those similarly situated would be unequivocally and substantially frustrated.

Under the above circumstances, we will apply the modified recognition-bar requirements prospectively only to voluntary recognition agreements that postdate our decision in this case.[41]

ORDER

It is ordered that the petitions in Cases 6–RD–1518, 6–RD–1519, and 8–RD–1976 are dismissed.

MEMBERS LIEBMAN AND WALSH, dissenting in part, but concurring in the result.

Sadly, today's decision will surely enhance already serious disenchantment with the Act's ability to protect the right of employees to engage in collective bargaining. As the majority recognizes, the Board's task in these cases is to balance the Act's twin interests in promoting stable bargaining relationships and employee free choice. But the appropriate balance was struck 40 years ago, in *Keller Plastics*,[1] and nothing in the majority's decision justifies its radical departure from that well-settled, judicially approved precedent. The voluntary recognition bar, as consistently applied for the past four decades, promotes both interests: it honors the free choice already exercised by a majority of unit employees, while promoting stable bargaining relationships. By contrast, the majority's decision subverts both interests: it subjects the will of the majority to that of a 30 percent minority, and destabilizes nascent bargaining relationships. In addition, the majority's view fails to give sufficient weight to the role of voluntary recognition in national labor policy and to the efficacy of existing unfair labor practice sanctions to remedy the problems the majority claims to see. Accordingly, we dissent.[2]

I.

The ultimate object of the National Labor Relations Act, as the Supreme Court has repeatedly stated, is "industrial peace . . . ." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996). Accord: *Fall River Dyeing & Finishing Corp. v. NLRB,* 482 U.S. 27, 38 (1987) ("The overriding policy of the NLRA is 'industrial peace'"); *Brooks v. NLRB,* 348 U.S. 96, 103 (1954) ("The underlying purpose of this statute is industrial peace."). To that end, the Board seeks to maximize and balance two sometimes competing goals: "preserving a free employee choice of bargaining representatives, and encouraging the collective-bargaining process." *NLRB v. Montgomery Ward & Co.*, 399 F.2d 409, 412 (7th Cir. 1968).[3]

For the reasons explained below, the Board's longstanding recognition bar achieves the appropriate balance between those goals after a voluntary recognition occurs. The majority's "modifications" upset that delicate balance.

Today's decision, as we will explain, undercuts the process of voluntary recognition as a legitimate mechanism for implementing employee free choice and promoting the practice of collective bargaining. It does so at a critical time in the history of our Act, when labor unions have increasingly turned away from the Board's

[41] Accord: *Dresser Industries*, supra at 1089 (applying new requirement that employers bargain with incumbent union pending outcome of decertification election prospectively only because employer in that case acted in reliance on extant law); *Excelsior Underwear*, supra at 1246 fn. 5 (applying new requirement that employers provide names and addresses of employees to petitioning union prospectively only because the employer in that case had no such obligation under extant law).

[1] *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966). Any student of labor law knows what a rarity a 40-year old Board doctrine is.

[2] We concur in the dismissal of the instant petitions.

Without passing on the issue, the members of the majority debate among themselves whether the Board should place a finite limit on the recognition bar's "reasonable time" for bargaining. No party has asked for such a limit, and therefore we need not respond to our colleagues' positions here.

[3] Sec. 1 of the Act states that the goal of industrial peace is to be achieved by "encouraging the practice and procedure of collective bargaining" as well as by "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." See also *Stanley Spencer v. NLRB*, 712 F.2d 539, 566 (D.C. Cir. 1983), cert. denied 466 U.S. 936 (1984) ("The Board's general obligation under the Act is to promote two goals: (1) employees' freedom of choice in deciding whether they want to engage in collective bargaining and whom they wish to represent them; and (2) the maintenance of established, stable bargaining relationships. When those goals conflict, the Board's job is to strike a sensible balance between them.") (internal citation omitted); *Ford Center for the Performing Arts*, 328 NLRB 1 (1999) (Board's task is "effectuating free choice while promoting voluntary recognition and protecting the stability of collective-bargaining relationships").

The majority, too, cites *Montgomery Ward*, supra, but for a nonissue: that "the Board should be left free to . . . strik[e] the proper balance." 399 F.2d at 412. The question presented here is, what balance is proper? *Montgomery Ward* offers no support for the majority's choice.

election process—frustrated with its delays and the opportunities it provides for employer coercion—and have instead sought alternative mechanisms for establishing the right to represent employees. See, e.g., Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 Iowa L. Rev. 819 (2005).[4] If disillusionment with the Board's election process continues, while new obstacles to voluntary recognition are created, the prospects for industrial peace seem cloudy, at best. Perhaps employers and unions committed to seeking a nonadversarial and quick process to determine union representation will turn to the Board's consent-election procedures as a substitute. See Board's Rules and Regulations Section 102.62. But today's decision will surely do nothing to dissuade those who are convinced that the Act's representation process is broken—just the opposite.

II.

Under the Act, an election is not the exclusive means of determining majority status. "Almost from the inception of the Act . . . it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation . . . ." *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 596–597 (1969). An employer's duty to bargain under Section 8(a)(5) of the Act is subject, not to Section 9(c), which deals with elections, but to Section 9(a), which states that a representative "designated or selected" by the majority of employees in a unit shall be the exclusive bargaining representative. Neither Section 9(a) nor any other provision of the Act specifies the manner in which the union must be chosen.[5] In enacting the Taft-Hartley amendments, Congress considered and rejected an amendment to Section 8(a)(5) that would have permitted the Board to find a refusal to bargain only if the union had been certified through an election. See *Gissel*, supra at 598 (citing H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 41 (1947)).

Thus, it is beyond dispute that an employer may voluntarily recognize a union that has demonstrated majority support by means other than an election, including—as in the present cases—authorization cards signed by a majority of the unit employees. See *Retail Clerks Local 455 v. NLRB,* 510 F.2d 802, 807 (D.C. Cir. 1975) (legislative history indicates that Congress intended to permit nonelection recognition procedures); *Rockwell International Corp.,* 220 NLRB 1262, 1263 (1975) (employer's "choice of a card check was not only reasonable but one long accepted and sanctioned by the Board"); *Montgomery Ward*, supra at 412–413 (rejecting argument that card checks are too "informal and uncertain" a method of selection to warrant a recognition bar); *Snow & Sons,* 134 NLRB 709, 710 (1961) (employer bound by its agreement to honor the results of a card check), enfd. 308 F.2d 687 (9th Cir. 1962). The Board and courts have uniformly endorsed voluntary recognition and have deemed it "a favored element of national labor policy."[6]

III.

To give substance to the policy favoring voluntary recognition, the Board held in *Keller Plastics* that, when an employer voluntarily recognizes a union in good faith based on a demonstrated showing of majority support, the parties are permitted a reasonable time to bargain without challenge to the union's majority status. *Keller Plastics*, 157 NLRB at 587. The Board stated:

> With respect to the present dispute which involves a bargaining status established as the result of voluntary recognition of a majority representative, we conclude that . . . 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.

*Keller Plastics* was an unfair labor practice case. On its facts, the Board held that a reasonable period of time had not elapsed between the time of recognition (when

[4] Professor Brudney observes that "[a]s a factual matter, Board elections have ceased to be the dominant mechanism for determining whether employees want union representation." Brudney, *Neutrality Agreements*, supra, 90 Iowa L. Rev. at 824. In his view:

> The development of substantial alternative approaches signals a recognition that assumptions about the basic fairness of Board elections have turned out not to be realistic. Participants on both sides understand that Board-supervised election campaigns regularly feature employers' exercise of their lawful yet disproportionate authority to help shape election results, as well as employers' use of their power to affect outcomes unlawfully but with relative impunity. These patterns of conduct have helped generate alternative contractually based approaches to organizing that appear to be used at least as widely as Board elections to determine whether employees wish to join unions.

Id.

[5] Accordingly, the majority flatly errs in stating that there is a "statutory preference" for elections.

[6] *NLRB v. Lyon & Ryan Ford, Inc.,* 647 F.2d 745, 750 (7th Cir. 1981), cert. denied 454 U.S. 894 (1981); *NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1978). See also *Terracon, Inc.*, 339 NLRB 221, 225 (2003), affd. 361 F.3d 395 (7th Cir. 2004) (noting the Board's "established objective of promoting voluntary recognition"); *MGM Grand Hotel,* 329 NLRB 464, 466 (1999) ("It is a long-established Board policy to promote voluntary recognition and bargaining between employers and labor organizations, as a means of promoting harmony and stability of labor-management relations.").

the union had majority support) and the execution of a collective-bargaining agreement the following month (by which time the union had lost majority support). Therefore, the employer did not violate Section 8(a)(2) by executing the agreement. Id.

Later that same year, the Board expressly extended the rule of *Keller Plastics* to representation cases. *Sound Contractors,* 162 NLRB 364 (1966). The Board determined that a recognition bar should apply in representation cases where the employer had voluntarily recognized a union based on a showing of majority support, so long as only that union had been organizing the employees. In such cases, then, a petition seeking to challenge the recognized union's status is barred for a reasonable period of time following lawful recognition.[7] Id. at 365.

By protecting the voluntary bargaining relationship from attack in its formative stages, the recognition bar effectuates the Act's interest in stability of labor-management relations. It also protects employee free choice: the bar extends for a reasonable period only. See *Keller Plastics*, supra at 587. If a reasonable time elapses and the parties have not reached agreement, the presumption of the union's majority status becomes rebuttable, and a decertification petition is no longer barred. Notably, voluntary recognition is lawful and the recognition bar applies only when the recognized union has the support of a majority of employees in the unit (as opposed to certification after an election, which requires only a majority of votes cast). An employer that recognizes a minority union, and a minority union that accepts recognition—even in good faith—will violate Section 8(a)(2) and Section 8(b)(1)(A), respectively.[8]

As explained in *Keller Plastics*, in other contexts—initial certification, remedial bargaining orders, and settlement agreements in which an employer agrees to bargain—the Board and courts have deemed it appropriate to similarly extend temporary protection to the bargaining relationship. That protection is particularly appropriate during negotiations for a first contract. Initial negotiations often involve unique issues that do not arise when the parties have an established bargaining history. See *N. J. MacDonald & Sons, Inc.,* 155 NLRB 67, 71–72 (1965) (initial contracts "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"). In *Brooks v. NLRB*, 348 U.S. 96 (1954), which upheld the Board's certification bar rule, the Supreme Court reasoned 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." Rather, "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." *Franks Bros. Co. v. NLRB,* 321 U.S. 702, 705 (1944) (discussing the justification for a remedial bargaining order).[9]

Since *Keller Plastics* and *Sound Contractors,* the Board has unreservedly reaffirmed the voluntary recognition bar in numerous cases,[10] and the appellate courts have repeatedly endorsed it.[11] Indeed, in the 40 years

[7] The Board developed other policies for cases involving active, simultaneous organizing campaigns by competing unions. See *Rollins Transportation System*, 296 NLRB 793 (1989); *Smith's Food & Drug Centers*, 320 NLRB 844 (1996). The current rule, set forth in *Smith's Food*, is that voluntary recognition of one union will not bar a petition by a competing union if the competing union was actively organizing the employees and had a 30-percent showing of interest *at the time of recognition*. See *Smith's Food,* supra at 844.

[8] *Ladies Garment Workers Union (Bernhard-Altmann Texas Corp.) v. NLRB*, 366 U.S. 731, 738 (1961). Contrary to the majority's suggestion, the recognition bar as it now stands does not fail to give weight to the differences between certification and voluntary recognition. Unlike certification, the recognition bar does not provide an automatic insulated 1-year period; it provides only for a "reasonable period." The recognition bar also is not absolute. See *Smith's Food*, supra at 844.

[9] The majority's lengthy discussion of the certification bar, settlement bar, and remedial bargaining order cases cited in *Keller Plastics*, and its attempts to distinguish them, create a red herring. We do not dispute that those cases arose in different contexts. But it does not follow that their animating principles—that a bargaining relationship should be given time to succeed before being subject to challenge—are inapplicable here, and that voluntary recognition is not also deserving of a bar against election petitions for a "reasonable period." Indeed, with full awareness of the differences between certification and voluntary recognition, appellate courts have relied on the Supreme Court's decisions in *Franks* and *Brooks*, both certification cases, in endorsing the recognition bar. See *NLRB v. Cayuga Crushed Stone*, 474 F.2d 1380, 1383 (2d Cir. 1973) ("The rationale of *Brooks*, as well as the holdings in other circuits, in fact compel the conclusion that the Unions' status must be recognized for a reasonable period despite the loss of majority employee support.") (citations omitted); *NLRB v. San Clemente Publishing Corp.*, 408 F.2d 367, 368 (9th Cir. 1969) ("The Company contends that the *Brooks* case should be limited to cases where the union has been chosen by a Board-conducted election. We disagree."); *NLRB v. Montgomery Ward*, supra at 411 ("[a]lthough neither *Franks* nor *Brooks* is binding precedent here, both are useful in resolving the issue before us"); *NLRB v. Universal Gear Service Corp.*, 394 F.2d 396, 398 (6th Cir. 1968) (two of the factors set forth in *Brooks* "have relevance to the problem presented in the instant case and support [the Board's] determination . . .").

[10] See, e.g., *Triangle Bldg. Products, Corp.*, 338 NLRB 257 (2002); *Seattle Mariners,* 335 NLRB 563, 564 (2001); *MGM Grand Hotel,* 329 NLRB 464 (1998); *Ford Center,* supra at 1; *Rockwell,* supra at 1263; *Blue Valley Machine & Mfg. Co.*, 180 NLRB 298, 304 (1969), enfd. in relevant part 436 F.2d 649 (8th Cir. 1971).

[11] See, e.g., *Exxel/Atmos, Inc. v. NLRB,* 28 F.3d 1243, 1246 (D.C. Cir. 1994); *Cayuga Crushed Stone,* supra at 1383–1384; *NLRB v. Broad Street Hospital & Medical Center*, 452 F.2d 302, 304–305 (3d. Cir. 1971); *NLRB v. Frick Co.,* 423 F.2d 1327, 1332 (3d Cir. 1970);

since *Keller Plastics*, although individual Board members have occasionally disagreed over the application of the recognition bar in particular cases, no Board Member—until now—and no court have challenged the bar itself or espoused the theory that it would be improved by the "fine tuning" perpetrated by the majority.[12]

IV.

The majority concedes that voluntary recognition is lawful, that the recognition bar is longstanding precedent, and that it has been endorsed by the courts. Nevertheless, the majority concludes that the recognition bar and corresponding aspects of the contract bar need "modification." The majority contends that it's newly created notice requirement and 45-day postrecognition "window period" for filing a decertification petition, together with the majority's corresponding changes to the contract bar, "improve upon" the recognition bar without "destroy[ing] its benefits." We disagree. The majority decision cuts voluntary recognition off at the knees.

An employer has the right to refuse to voluntarily recognize a union and demand an election. *Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974). One important reason employers choose voluntary recognition is to avoid the time, expense, and disruption of an election.[13] That rationale, however, is critically undermined by the majority's modifications. An employer has little incentive to recognize a union voluntarily if it knows that its decision is subject to second-guessing through a decertification petition.[14] Furthermore, even if an employer does choose to recognize a union voluntarily, the majority's new window period leaves the parties' bargaining relationship open to attack by a minority of employees at the very outset of the relationship, when it is at its most vulnerable. At the very least, the relationship will be in limbo for 45 days, even if a petition is not filed. If a petition is filed and the union ultimately prevails in the election, the election campaign and any postelection proceedings "nevertheless would have the deleterious consequence of 'disrupt[ing] the nascent relationship' between the employer and union pending the outcome of the election and any subsequent proceedings." *Seattle Mariners,* supra at 565 (citing *Smith's Food*, supra at 845–846). In that event, the disruption will not be limited to the 45-day window period, but will extend until the election is actually held, and even longer if objections are filed.[15]

The window period is also a "Catch 22" for the union. Although the parties will technically have an 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. Yet, if unit employees perceive that nothing is being accomplished in that initial bargaining, it stands to reason that they may be more likely to sign an election petition and even, ultimately, to vote against the union—even if they previously had supported it. That is precisely what the recognition bar is designed to avoid: putting the union in a position where it is "under exigent pressure to produce hot-house results or be turned out." *Brooks*, 348 U.S. at 100.[16]

Furthermore, as the Board has often recognized, support for a union is rarely unanimous. In any successful organizing campaign, there will likely be a minority of employees who opposed the union. See, e.g., *Seattle Mariners*, supra at 565. The majority's window period allows this minority to thwart, or at the very least work against, the majority, by creating a disincentive to meaningful collective bargaining at the same time it gives that minority the opportunity to marshal support for ousting the union.[17] That is contrary to the principle of majority rule on which the Act is premised. See *Emporium Capwell Co. v. Western Addition Community Organization*,

*San Clemente Publishing,* supra at 368; *Montgomery Ward,* supra at 411–413; *Universal Gear,* supra at 397–398.

[12] The majority notes that in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), we joined in overruling a 50-year-old decision in *Celanese Corp.*, 95 NLRB 664 (1951), thereby demonstrating that Board precedent is not "immune from reconsideration" based solely on its age. We have never suggested any such "immunity." In *Levitz,* we found that *Celanese* was "confusing," "contrary to the Act's fundamental principles of encouraging collective bargaining and effectuating employee free choice," and "clearly disruptive of industrial stability." 333 NLRB at 726. As discussed fully below, we find no such flaws in the voluntary recognition bar.

[13] See Brudney, *Neutrality Agreements*, supra, 90 Iowa L. Rev. at 835-840 (citing research of Professors Adrienne E. Eaton and Jill Kriesky).

[14] See *Broad Street Hospital,* supra at 305 ("Voluntary recognition . . . would be discouraged, and the objectives of our national labor policy thwarted if recognition were to be limited to Board-certified elections. . . .").

[15] According to statistics cited by the majority (see fn. 25 of majority decision), the median time for conducting an election during Fiscal Year 2006 was 39 days from the filing of the petition, with 94.2 percent of elections being conducted within 56 days. Assuming those time frames remain steady in the future, the union's status could remain unresolved for more than 3 months after recognition—or much longer, if objections are filed.

[16] The majority contends that its "modification" of the recognition bar will not be a disincentive to voluntary recognition, because the modification does not "encourage" or "guarantee" the filing of a petition—it simply "permits" it. As explained above, it is the uncertainty over whether a petition will be filed that itself interferes with initial bargaining.

[17] The majority's window period, at a minimum, seems designed to encourage employees who have supported the union to revisit their decision and to promote opposition to the union where none may have existed.

420 U.S. 50, 61 (1975); *Bernhard-Altmann*, 366 U.S. at 738. Indeed, "[b]y attempting to eliminate all ambiguity regarding employee desires as well as any possibility of collusive, 'sweetheart' deals between employers and unions," the majority decision "may defeat the very objective that it seeks to achieve—giving effect to the employees' freely expressed designation of a union as their representative." *Smith's Food*, supra at 846.

The majority's new approach also guts the Board's contract-bar rules and their purpose to promote industrial stability. A contract between an employer and a voluntarily-recognized union will not bar a decertification petition or a petition by a rival union, unless the newly-imposed procedural requirements—notice to the Board's Regional Office and posting of a notice to employees for 45 days—are satisfied. Should an employer and a voluntarily-recognized union fail to comply with these requirements, even through ignorance or inadvertence, any contract they reach will be subject to collateral attack at any time, for years.

The majority claims that this sea change in the law is necessary in order to give appropriate weight to employee free choice. In support, the majority cites the general proposition that an election is the "preferred" method for determining majority status. And that statement is true so far as it goes.[18] It does not follow from that statement, however, that the existing voluntary recognition bar, applied since *Keller Plastics*, does not embody the appropriate balance of the policies at stake.

First, the majority appears to give no weight to the principle that voluntary recognition is "a favored element of national labor policy." See discussion above, at fn. 6 and accompanying text.

Second, although the majority attacks card-check procedures as risking minority recognition and coercive union conduct, card checks are "long accepted and sanctioned by the Board." *Rockwell International Corp.,* 220 NLRB at 1263. See discussion above, Section II. The majority claims that its decision is based on policy considerations rather than factual probabilities, but the majority then speculates about factual scenarios and statistics that purportedly show the unreliability of cards. According to the majority, a "wait and see" period is needed because authorization cards are inherently unreliable. As the majority sees it, employees who sign authorization cards in support of a union are likely to do so because they (1) want to avoid "offending the person who asks them to sign"; (2) are "susceptible to group pressure exerted at the moment of choice"; (3) were given "misinformation or a lack of information about employees' representational options"; (4) "may not even understand the consequences of voluntary recognition until after it has been extended"; (5) are fooled by an employer's voluntary grant of union access and will "conclude they have no real choice but to accede to representation by that union"; and (6) "can and do change their minds about union representation" thereby calling into question any signature in support of the union. There is no genuine empirical support for these claims, and, indeed, the majority concedes that there is no evidence in the record that "the authorization cards were coercively obtained or otherwise tainted."[19]

[18] We note, however, that none of the decisions cited by the majority for the proposition that an election is preferable to a card check hold that authorization cards were an inappropriate or inherently unreliable basis for recognizing a union or imposing a recognition bar. *Transportation Maintenance Services v. NLRB*, 275 F.3d 112, 114 (D.C. Cir. 2002), *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 272 (2001), and *Underground Service Alert*, 315 NLRB 958, 960 (1994), did not address card checks at all. *Transportation Maintenance* addressed the question whether a decertification petition should be withdrawn at the petitioner's request after the election had already been held. *Levitz* established the standards for unilaterally withdrawing recognition and for filing an RM petition. *Underground Service Alert* involved a unilateral withdrawal of recognition while review of a decertification election was pending. *Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974), also cited by the majority, did not hold that cards are unreliable (see id. at 306), nor did it address the situation presented here, in which the employer and union have mutually agreed that cards are an acceptable method of determining majority status. *Linden* held only that an employer is not otherwise *required* to recognize a union based on cards, and that if the employer chooses not to do so, the burden is on the union to go forward with an election petition. 419 U.S. at 310. Finally, the Court in *Gissel*, 395 U.S. at 601, although recognizing that elections are "generally" preferred, rejected the employers' arguments that cards were too unreliable to reflect employee choice. The Court observed that, at the time of its 1969 decision, cards had already been in use under the Act for 30 years. Id. at 600 fn. 17.

[19] The majority cites as "empirical evidence of the lesser reliability of cards" a speech given by former Board Chairman McCulloch, illustrating a disparity between showings of union support based on cards and ensuing election results. McCulloch, *A Tale of Two Cities: Or Law in Action*, Proceedings of ABA Section of Labor Relations Law 14, 17 (1962). But the study proves nothing about the inherent reliability of cards as opposed to elections. The disparity could just as easily result from employer coercion during the election campaign as from union coercion during card solicitation. In that case, it would be the cards, not the election results, that truly reflected the employees' free choice. Indeed, the majority ignores the much more recent literature highlighting how employer antiunion conduct, and attendant delays, can undermine union support during lengthy election campaigns. See, e.g., Brudney, *Neutrality Agreements*, supra, 90 Iowa L. Rev. at 832–834 & fns. 58–63 (summarizing scholarly literature).

The majority also states that in Fiscal Year 2005, only 5 percent of elections resulted in the filing of objections. To the extent the majority is suggesting that employer coercion is rare in election campaigns, the majority's statistics do not account for situations in which employer conduct was not known to the union or in which the union, for whatever reason, chose not to file objections.

The majority also attacks neutrality agreements in which the union is allowed access to the employer's property. We fail to see, and the

Although the majority argues that card signings are "public actions" subject to "group pressures" at the time of signing, *the same is true* of employee antiunion petitions, on which the majority would rely to disrupt recognition and contract bar. In addition, as the Supreme Court stated in *Gissel*, "group pressures" may be "equally present in an election," and employees generally "should be bound by the clear language of what they sign . . . ." *Gissel*, supra at 604, 606.

Third, the Act already provides recourse for employees who believe that their employer recognized a minority union or that they were coerced into signing authorization cards. See *Montgomery Ward*, supra at 412 ("[b]oth employers and employees have adequate methods of challenging the existence of majority support for a union at the time it was recognized by an employer on the basis of a card check"). Union coercion in soliciting cards violates Section 8(b)(1)(A). See, e.g., *Gulf Caribe Maritime, Inc.*, 330 NLRB 766 fn. 2 (2000). An employer's recognition of a minority union, even if in good faith, violates Section 8(a)(2), and the union's acceptance of recognition violates Section 8(b)(1)(A). *Bernhard-Altmann*, 366 U.S. at 738. The standard remedy for those violations is to order the employer to cease and desist from recognizing and bargaining with the union, and the union to cease and desist from accepting recognition, until the union has been certified by the Board. See, e.g., *Crest Containers Corp.,* 223 NLRB 739, 742 (1976).[20]

The majority posits that unfair labor practice sanctions are inadequate to protect against union coercion.[21] In essence, the majority implies that Section 8(b)(1)(A) does not do what it is intended to do: shield employees from union coercion or restraint in their exercise of Section 7 rights. This rationale creates a double standard: in the voluntary recognition situation, the majority suggests that the Act's unfair labor practice procedures are insufficient to protect employees against union coercion. Yet, the majority has never suggested that the Act's parallel unfair labor practice protections against *employer* coercion are inadequate and require bolstering or a rethinking of representation procedures.

The majority's reasons for finding unfair labor practice sanctions inadequate simply do not withstand scrutiny. The majority argues that coercion to sign a card may not be actionable because it "may not be attributable to an agent of the soliciting union." As a general matter, absent extreme circumstances, the same would be true in an election campaign; campaign conduct that is not attributable to a party is only rarely grounds for setting aside an election. See *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984) (standard is "whether the misconduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a fair election impossible").

Finally, the majority insists that employees need the 45-day window period to "debate among themselves," to "fully discuss their views," and "to solicit support for decertification." The majority thus implies that employees need an antiunion campaign in order to exercise free choice. Employees, however, have already had the entire period during which the union solicited authorization cards—which the majority agrees may be a substantial period of time—to discuss their views and to marshal support for *or* against the union. There is no need for a "window period" that provides an antiunion minority of employees a second chance to drum up enough support to oust the union. To the extent the majority is concerned about the absence of an *employer*-driven antiunion campaign, nothing in the Act prohibits the employer from remaining silent or requires the employer to actively oppose unionization. See *International Union v. Dana Corp.*, 278 F.3d 548, 558–559 (6th Cir. 2002) (enforcing arbitration award finding that employer had violated neutrality agreement); *HERE Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1470 (9th Cir. 1992) (neutrality clause was enforceable in Sec. 301 action). Section 8(c) protects the employer's right to voice its opinion about unionization, but does not require the employer to do so. If the employer chooses to remain neutral during a card-solicitation campaign, employees themselves still have the right to campaign against the union. In short, "it is unclear how any limitation on [the employer's] behavior

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majority does not explain why an employer's agreement to allow access would lead employees to "reasonably conclude they have no real choice" but to support the union. In any event, the majority decision applies to *any* voluntary recognition based on a card check—not just recognition that follows a grant of access—and therefore sweeps far too broadly to be justified by purported concerns over union access

[20] No unfair labor practice charges were filed in either of the present cases alleging either that the recognition itself or the neutrality and card-check agreements violated Sec. 8(a)(2). The majority concedes that, although the Petitioners claim that the cards were tainted, there has been no evidence developed or findings made on that issue.

[21] The majority suggests that Sec. 8(b)(1)(A) does not provide the same protection against interference with employee free choice as does the election objections process. Insofar as they are concerned with coercion in the solicitation of cards, however, that conduct generally would occur outside of the critical period for the filing of objections (triggered by the filing of the election petition) and thus would not serve as grounds for overturning an election. In any event, many voluntary recognition agreements today provide codes of conduct for the union and the employer. See amicus brief of Professors Adrienne E. Eaton and Jill Kriesky, July 14, 2004 (three quarters of the agreements studied contained limitations on union organizing behaviors as well as on management). These often regulate conduct more rigorously than the Board's objectionable conduct rules (e.g., neutrality requirements).

during a [union] organizational campaign could affect . . . employees' Section 7 rights." *Dana*, supra at 559.[22]

V.

Voluntary recognition is "a favored element of national labor policy." *Lyon & Ryan Ford,* supra at 750. Yet, the majority decision relegates voluntary recognition to disfavored status by allowing a minority of employees to hijack the bargaining process just as it is getting started. Ultimately, the majority decision effectively discourages voluntary recognition altogether.

When an employer has voluntarily recognized a union based on a showing of majority support, the Board should honor the majority's choice and protect it for a reasonable period of time. In that manner, and with the accompanying safeguard of unfair labor practice sanctions, the Board has achieved the appropriate balance of effectuating employee free choice while reasonably protecting the stability of bargaining relationships. That balance was struck 40 years ago in *Keller Plastics* and has stood the test of time, both before the Board and in the courts of appeal. For all those reasons, we dissent from today's decision.

[22] The majority asserts, without any citation of authority, that "union card-solicitation campaigns have been accompanied by misinformation," and that misrepresentations "may go unchecked in the voluntary recognition process." But the same is true whether the campaign is pro- or anti-union, and whether it is a card solicitation or a prelude to an election. There is no perfect system. It is noteworthy that, in the election sphere, the Board has for the last 25 years chosen to leave misrepresentations largely unregulated. See *Midland National Life Insurance Co.*, 263 NLRB 127 (1982).