Johnson Controls, Inc. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL−CIO, and its affiliated Local Union No. 3066 *and* Brenda Lynch and Anna Marie Grant. Case 10−CA−151843

July 3, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

This case involves what happens when employees—with no improper influence or assistance from management—provide their employer with evidence that at least 50 percent of the bargaining unit no longer wishes to be represented by their union, the employer tells the union that it will withdraw recognition when the parties' labor contract expires, and the union subsequently claims that it has reacquired majority status before the employer actually withdraws recognition.[1] Under extant precedent, the Board determines the union's representative status and the legality of the employer's action by applying a "last in time" rule, under which the union's evidence controls the outcome because it postdates the employer's evidence. As we shall explain, this framework has proven unworkable and does not advance the purposes of the Act. Today, we adopt a new framework that is fairer, promotes greater labor relations stability, and better protects Section 7 rights by creating a new opportunity to determine employees' wishes concerning representation through the preferred means of a secret ballot, Board-conducted election.

Under well-established precedent, an employer that receives evidence, within a reasonable period of time before its existing collective-bargaining agreement (CBA or contract) expires, that the union representing its employees no longer enjoys majority support may give notice that it will withdraw recognition from the union when the CBA expires, and the employer may also suspend bargaining or refuse to bargain for a successor contract.[2] This is called an "anticipatory" withdrawal of recognition.

When the contract expires, however, an employer that has made a lawful anticipatory withdrawal of recognition still withdraws recognition at its peril. If the union challenges the withdrawal of recognition in an unfair labor practice case, the employer will have violated Section 8(a)(5) if it fails to establish that the union lacked majority status at the time recognition was actually withdrawn.[3] In making this determination, the Board will rely on evidence that the union reacquired majority status in the interim between anticipatory and actual withdrawal, regardless of whether the employer *knew* that the union had reacquired majority status.[4] As a result, an employer that properly withdraws recognition anticipatorily, based on evidence in its possession showing that the union has lost majority status, can unexpectedly find itself on the losing end of an 8(a)(5) charge when it withdraws recognition at contract expiration. Moreover, the remedy for that violation will typically include an affirmative bargaining order, which precludes any challenge to the union's majority status for a reasonable period of time—at

[1] On February 16, 2016, Administrative Law Judge Keltner W. Locke issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent and Intervenors Brenda Lynch and Anna Marie Grant filed answering briefs. The Respondent filed cross-exceptions and a supporting brief, and the General Counsel, Charging Party, and Intervenors filed answering briefs. The General Counsel, Charging Party, and Respondent filed reply briefs to the answering briefs. The Intervenors also filed a notice of supplemental authority to direct the Board's attention to Judge Millett's concurring opinion in *Veritas Health Services, Inc. v. NLRB*, 895 F.3d 69 (D.C. Cir. 2018), the General Counsel filed a response, and the Intervenors filed a response to the General Counsel's response. The Intervenors also filed a notice of supplemental authority to direct the Board's attention to General Counsel Memorandum 18-06, "Responding to Motions to Intervene by Decertification Petitioners and Employees."

The National Labor Relations Board has considered the decision and the record in light of the exceptions, briefs, and other filings and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and to adopt the recommended Order dismissing the complaint.

The General Counsel and Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. As explained below, however, we find it unnecessary to rely on the judge's credibility determinations as to the testimony of dual signers regarding their representational preferences on the date the Respondent withdrew recognition from the Union.

The General Counsel also argues that the judge erred in granting the motion to intervene filed by Lynch and Grant, thereby giving them the right to fully participate in the unfair labor practice proceeding. In light of our dismissal of the complaint, we find it unnecessary to pass on this exception.

[2] The employer, however, must comply with the existing contract in the interim.

[3] *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 725 (2001).

[4] See, e.g., *Parkwood Developmental Center*, 347 NLRB 974 (2006), enfd. 521 F.3d 404 (D.C. Cir. 2008); *HQM of Bayside, LLC*, 348 NLRB 758 (2006), enfd. 518 F.3d 256 (4th Cir. 2008); *Scoma's of Sausalito, LLC*, 362 NLRB 1462 (2015), enf. denied 849 F.3d 1147 (D.C. Cir. 2017).

least 6 months, as long as 1 year.[5] And if, within this insulated period, the parties reach agreement on a successor contract, the union's majority status will again be irrebuttably presumed for the duration of that contract, up to another 3 years.[6]

The facts of this case and others like it highlight the crux of the problem. Where the union possesses evidence that it has reacquired majority status notwithstanding prior disaffection evidence showing that it had lost that status, some unit employees necessarily must be "dual signers." That is, some employees must have signed both the anti-union petition and, subsequently, a union authorization card or pro-union counter-petition. And where this happens, unions and employers are generally unwilling to disclose the identities of signers on their respective sides, for fear that the other party may retaliate against them. Although one may wish it were otherwise, we cannot say this mutual concern of retaliation is wholly groundless.

Further, we believe there are better ways to settle disputes over a union's postcontract majority status than by relying on the "last in time" rule. In what often may be a contentious and confusing time for employees who are being repeatedly asked to express their representational preference, the "last in time" rule strikes us as ill-suited for making such an important determination. Moreover, we are concerned that the union's ability to gather its counter-evidence secretly, together with the "peril" rule of *Levitz*, creates an opportunity, if not an actual incentive, for incumbent unions to take advantage of the "last in time" rule to extend the bar against challenges to its representative status for years to come, to the detriment of employees' Section 7 right to choose a different bargaining representative or to refrain from union representation altogether.

The framework we announce today addresses all these concerns and creates a mechanism that settles questions concerning employees' representational preference in the anticipatory withdrawal context through a Board-conducted, secret-ballot election, the preferred means of resolving such questions.[7] In doing so, we overrule *Levitz*, supra, and its progeny insofar as they permit an incumbent union to defeat an employer's withdrawal of recognition in an unfair labor practice proceeding with evidence that it reacquired majority status in the interim between anticipatory and actual withdrawal.[8] Instead, we hold that proof of an incumbent union's actual loss of majority support, if received by an employer within 90 days prior to contract expiration, conclusively rebuts the union's presumptive continuing majority status when the contract expires. However, the union may attempt to reestablish that status by filing a petition for a Board election within 45 days from the date the employer gives notice of an anticipatory withdrawal of recognition. Consistent with the Board's usual practice, we shall apply our new holding retroactively in this case and in other pending cases. Accordingly, we will adopt the judge's recommended Order and dismiss the complaint.

FACTS

The Respondent manufactures, distributes, and sells interior automobile components from its facility in Florence, South Carolina. Since August 18, 2010, the Union has represented a unit of production and maintenance employees employed at the Florence facility. The parties' most recent collective-bargaining agreement was effective from May 7, 2012, through May 7, 2015.[9] Negotiations for a successor agreement began on April 20. However, on April 21, the Respondent was presented with a union-disaffection petition circulated by employees Brenda Lynch and Anna Marie Grant. The petition, titled "Union Decertification Petition," was signed by 83 of the 160 bargaining-unit employees and stated, in pertinent part:

> WE, THE UNDERSIGNED, EMPLOYEES OF Johnson Controls, Florence facility, DO NOT WISH TO CONTINUE TO BE REPRESENTED BY THE United Auto Workers, LOCAL UNION NO. ~~509~~ 3066 (Local ~~509~~ 3066) FOR PURPOSES OF COLLECTIVE BARGAINING OR ANY OTHER PURPOSE ALLOWED BY LAW. WE

[5] See *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), enfd. 310 F.3d 209 (D.C. Cir. 2002).

[6] See *General Cable Corp.*, 139 NLRB 1123 (1962).

[7] See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969); *Levitz*, 333 NLRB at 723. The question concerning representation that will be settled by the election is the union's representative status *after* the contract expires. While the contract remains in effect, the incumbent union's majority status is irrebuttably presumed under the "contract bar" doctrine (assuming a contract of no more than 3 years' duration). Generally, following contract expiration, the union's majority status is rebuttably presumed. However, where, as here, at least fifty percent of the unit employees have already rejected the union within a reasonable period of time before the contract expires, its post-contract presumptive majority status has been anticipatorily rebutted.

[8] Thus, to the extent necessary, we overrule *Scoma's of Sausalito, LLC*, supra, 362 NLRB 1462; *HQM of Bayside, LLC*, supra, 348 NLRB at 758; *Highlands Regional Medical Center*, 347 NLRB 1404 (2006), enfd. 508 F.3d 28 (D.C. Cir. 2007); and *Parkwood Developmental Center*, supra, 347 NLRB at 974. *Fremont Medical Center & Rideout Memorial Hospital*, 354 NLRB 453 (2009), incorporated by reference in 359 NLRB 542 (2012), also stands for the overruled proposition, but the Board's decisions in that case were invalidated by the Supreme Court in *New Process Steel* and *Noel Canning*, respectively. See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010); *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

[9] All dates hereafter are in 2015 unless otherwise noted.

> UNDERSTAND THIS PETITION MAY BE USED TO OBTAIN AN ELECTION SUPERVISED BY THE NATIONAL LABOR RELATIONS BOARD OR TO SUPPORT WITHDRAWAL OF RECOGNITION OF THE UNION.[10]

There is no allegation that any of the disaffection signatures were tainted by supervisory involvement.

Later that same day (April 21), the Respondent notified the Union that it had received the petition and would no longer recognize the Union as the employees' bargaining representative when the parties' collective-bargaining agreement expired on May 7. The Respondent also stated that it was cancelling the previously scheduled bargaining sessions for a successor agreement. In its April 22 response, the Union stated that it had not received a petition or any verifiable evidence that it no longer enjoyed majority support, and it demanded that the Respondent return to the bargaining table. On April 24, the Respondent refused to provide the petition or to continue bargaining.

The Union thereafter began soliciting authorization cards from bargaining-unit employees. The authorization cards stated:

UAW AUTHORIZATION CARD

Date:

It's Time!

I, _____ authorize the United Auto Workers to represent me in collective-bargaining.

The cards included signature lines for the employee and a witness. Between April 27 and May 7, the Union collected 69 signed authorization cards, six of which were signed by employees who had also signed the disaffection petition. We will refer to these six employees as the "dual signers."

On May 5, the Respondent informed the Union that it had not received any evidence from the Union that the Union continued to enjoy majority support among the bargaining-unit employees and that, in the absence of such evidence, it would withdraw recognition upon expiration of the parties' current contract. Although not mentioned by the judge, the Union responded by letter the following day, advising the Respondent that it "ha[d] credible evidence" that it retained majority support and was "happy to meet" to compare evidence. By letter dated May 7, the Respondent acknowledged the Union's request to meet but stated that it was "not willing … to share the names of the employees who signed the [disaffection] petition." The Respondent further stated:

> You indicate that despite the evidence the [Respondent] has received from our employees, the [U]nion has evidence it has not lost majority support. However, while the employees provided the [Respondent] with their evidence, to date the [U]nion has not provided any substantiated evidence supporting its position. Absent contrary evidence, we must rely upon the evidence in our possession and proceed as previously indicated.

The Respondent withdrew recognition from the Union on May 8. Immediately thereafter, the Respondent announced improvements to the employees' terms and conditions of employment, including a 3-percent wage increase and a match to employees' 401(k) retirement contributions.[11]

On August 28, Lynch filed a petition for a decertification election in Case 10−RD−158949. Processing of that petition has been blocked, however, by the unfair labor practice charge the Union filed in this case.

At the unfair labor practice hearing, four of the six dual signers testified that on May 8—the day the Respondent withdrew recognition from the Union—they did not want the Union to represent them, and the judge credited their testimony. Based on the disaffection petition and the credited testimony of the four dual signers, the judge concluded that at the time the Respondent withdrew recognition, the Union had actually lost majority support. That is, adding these four dual signers to the 77 bargaining-unit employees who signed only the disaffection petition, 81 employees out of the 160-employee unit no longer wished to be represented by the Union. On this basis, the judge found the withdrawal of recognition lawful and dismissed the complaint.

DISCUSSION

The issue presented here is whether the Respondent demonstrated that the Union had lost its majority status as of May 8, the date the Respondent withdrew recognition. Under current law, and declining to rely on dual-signer testimony (unlike the judge), all six dual signers would be counted as supporting the Union because they signed union authorization cards after having signed the disaffection petition. In other words, their prior signa-

[10] Although the judge found that the disaffection petition included 84 valid signatures, the parties agree that there were only 83 valid signatures, since one employee signed the petition twice. The Respondent subsequently received one additional signature, but that signature was offset by the resignation of another signatory employee prior to the date recognition was withdrawn. Accordingly, we correct the judge's decision to clarify that there were 83 valid signatures on the petition. The judge's inadvertent error does not affect the outcome of the case.

[11] The complaint does not allege that the unilateral changes violated the Act.

tures on the disaffection petition would be disregarded. We believe there is a better way to resolve anticipatory withdrawal cases such as this one. Before we explain our new framework, however, we will first review the legal context within which this case and others like it arise.

I. THE LEGAL CONTEXT

Under Section 9(a) of the Act, the bargaining representative of an appropriate unit of employees is the representative "designated or selected for the purposes of collective bargaining by the majority of the employees in [such] unit," and Section 8(a)(5) of the Act requires the employer of the unit employees to recognize and bargain with their 9(a) representative.[12] Under longstanding precedent, once a union has been designated or selected as the Section 9(a) representative of a bargaining unit, it enjoys a presumption of continuing majority status,[13] which under certain conditions is irrebuttable. Specifically, a union "usually is entitled to a conclusive presumption of majority status for one year following Board certification as [the exclusive bargaining] representative" of a bargaining unit.[14] In addition, under the "contract bar" doctrine, a union is entitled to a conclusive presumption of majority status during the term of a collective-bargaining agreement, up to 3 years.[15] As the Supreme Court has observed, "[t]hese presumptions are based not so much on an absolute certainty that the union's majority status will not erode as on the need to achieve stability in collective-bargaining relationships."[16] At the end of the certification year or upon expiration of the collective-bargaining agreement, the policy-based presumption of majority status becomes factually rebuttable. Id.

Prior to *Levitz*, an employer could rebut the incumbent union's presumption of majority status by establishing either that the union did not enjoy majority status at the time the employer refused to bargain, or the refusal to bargain was based on a good-faith reasonable doubt, supported by objective considerations, of the union's majority status.[17] In addition, under the "anticipatory withdrawal of recognition" doctrine, while an existing contract would bar a *present* withdrawal of recognition, an employer that established good-faith doubt of the union's majority status within a reasonable time prior to the expiration of a CBA could announce that it did not intend to negotiate a successor agreement,[18] and it could then lawfully withdraw recognition and implement unilateral changes when the existing contract expired.[19]

The "good-faith reasonable doubt" standard came under scrutiny in the Supreme Court's decision in *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359 (1998). In its underlying decision in that case, the Board had found that the employer failed to demonstrate that it harbored a reasonable doubt of the union's majority status.[20] Before the Supreme Court, Allentown Mack contended that the Board had effectively abandoned the "reasonable doubt" standard and would recognize an employer's reasonable doubt "only if a majority of the unit employees renounce[d] the union."[21] At oral argument, the Board maintained that "the word 'doubt' may mean either 'uncertainty' or 'disbelief'" and that its reasonable-doubt standard "use[d] the word only in the lat-

[12] Sec. 8(a)(5) makes it an unfair labor practice for an employer to fail or refuse to bargain, on request, with the unit employees' majority representative. Conversely, an employer has no duty to recognize or bargain with a union that represents less than a majority of the employer's unit employees. Indeed, an employer violates Sec. 8(a)(2) by recognizing or continuing to recognize a union that lacks majority support. See *International Ladies' Garment Workers' Union v. NLRB (Bernhard-Altmann) v. NLRB*, 366 U.S. 731, 738-739 (1961). In *Levitz*, however, the Board created a safe harbor from 8(a)(2) liability for employers with evidence of actual loss of majority status that elect to file an RM petition for an election rather than withdraw recognition. 333 NLRB at 726 & fn. 52.

Under Sec. 8(f) of the Act, an employer primarily engaged in the building and construction industry may lawfully recognize and bargain with a union regardless of whether the union has majority status. See generally *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert denied 488 U.S. 889 (1988). Sec. 8(f) bargaining relationships are not at issue here.

[13] See, e.g., *Station KKHI*, 284 NLRB 1339, 1340 (1987), enfd. 891 F.2d 230 (9th Cir. 1989), cert. denied 496 U.S. 925 (1990).

[14] *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996) (internal quotations and citation omitted). Certain "unusual circumstances" are recognized as exceptions to the otherwise irrebuttable presumption of majority status during the certification year: defunctness of the union, schism within the certified representative, and radical fluctuation of the size of the bargaining unit. *United Supermarkets, Inc.*, 287 NLRB 119, 120 (1987), enfd. 862 F.2d 549 (5th Cir. 1989).

[15] *Auciello Iron Works*, supra; *General Cable Corp.*, supra. Additionally, an affirmative bargaining order precludes any challenge to a union's majority status for a reasonable period of time. See *Lee Lumber & Building Material Corp.*, supra, 334 NLRB at 399. And under the "successor bar" and "recognition bar" doctrines, majority status is similarly irrebuttable for a reasonable period of time. See *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011) (successor bar); *Lamons Gasket Co.*, 357 NLRB 739 (2011) (recognition bar). We express no view as to whether *UGL-UNICCO* and *Lamons Gasket* were correctly decided.

[16] *Auciello Iron Works*, supra (internal quotations and citation omitted).

[17] See *Celanese Corp. of America*, 95 NLRB 664, 671−675 (1951).

[18] See *Levitz*, 333 NLRB at 730 fn. 70; *Abbey Medical / Abbey Rents, Inc.*, 264 NLRB 969 (1982), enfd. mem. 709 F.2d 1514 (9th Cir, 1983); *Burger Pits, Inc.*, 273 NLRB 1001 (1984), enfd. sub nom. *HERE v. NLRB*, 785 F.2d 796 (9th Cir. 1986).

[19] See, e.g., *Burger Pits*, supra, 273 NLRB at 1001.

[20] *Allentown Mack Sales*, 316 NLRB 1199 (1995).

[21] *Allentown Mack Sales and Service*, 522 U.S. at 364.

ter sense."[22] The Court rejected the Board's position and held that *doubt* means "uncertainty."[23] Accordingly, it held that under the Board's reasonable-doubt standard, properly construed, the question was whether Allentown Mack had "a genuine, reasonable uncertainty" about the union's continued majority status.[24] The Court also held that the Board could permissibly maintain a unitary standard for withdrawal of recognition, filing an RM petition, and polling, but it could also rationally adopt different standards, including more stringent requirements for withdrawal of recognition.[25]

Thereafter, in *Levitz*, the Board abandoned the "good-faith doubt" standard for withdrawal of recognition and held that, at times when an incumbent union's majority support is rebuttably presumed, an employer may withdraw recognition only "where the union has actually lost the support of the majority of the bargaining unit employees." 333 NLRB at 717; see id. at 725 ("[A]n employer may rebut the continuing presumption of an incumbent union's majority status, and unilaterally withdraw recognition, only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit.").[26] At the same time, the Board stressed "that an employer with objective evidence that the union has lost majority support . . . withdraws recognition at its peril." Id. at 725. This means that if the union challenges the withdrawal of recognition in an unfair labor practice proceeding, the employer will have violated Section 8(a)(5) if it fails to establish actual loss of majority status at the time recognition was withdrawn. Id.

Although *Levitz* adopted an "actual loss" standard for withdrawal of recognition, it appeared to reaffirm the "good-faith doubt" standard for *anticipatory* withdrawal of recognition. Id. at 730 fn. 70.[27] Subsequent to *Levitz*, however, the Board incorporated the "actual loss of majority status" standard into its statement of the anticipatory withdrawal doctrine.[28] Thus, an employer that receives evidence, within a reasonable period of time before its existing collective-bargaining agreement expires, that the union representing its employees no longer enjoys majority support may lawfully refuse to negotiate a successor agreement and announce that it will not recognize the union after the contract expires. It must, of course, continue to recognize the union and adhere to the terms of the existing contract in the interim, since until the contract expires the union enjoys an irrebuttable presumption of majority status under the "contract bar" doctrine. *Levitz*, 333 NLRB at 730 fn. 70. But, under *Levitz*, when an employer follows its anticipatory withdrawal of recognition with actual withdrawal when the contract expires, it does so at its peril: if the union challenges the employer's claim of loss of majority status in an unfair labor practice case, the employer will be found to have violated Section 8(a)(5) if it fails to establish loss of majority status at the time it withdrew recognition. Id. at 725.

In combination, the change from the *Celanese* "good-faith doubt" standard to the "actual loss of majority status" requirement, plus the *Levitz* "peril" rule, created an opportunity that unions reasonably seized. An employer's anticipatory withdrawal of recognition became a

[22] Id. at 367.

[23] Id. ("We cannot accept [the Board's] linguistic revisionism. 'Doubt' is precisely that sort of 'disbelief' (failure to believe) which consists of an uncertainty rather than a belief in the opposite. If the subject at issue were the existence of God, for example, 'doubt' would be the disbelief of the agnostic, not of the atheist.")

[24] Id.

[25] Id. at 365–366, 373–374.

[26] In addition, accepting the Court's implicit invitation to adopt different standards for withdrawal of recognition and filing an RM election petition, the *Levitz* Board held that an employer could file an RM petition based on good-faith reasonable uncertainty of the union's continuing majority status. 333 NLRB at 717, 727–728. An employer also has the option of filing an RM petition based on evidence that the union has lost majority status. Id. at 726. The dissent faults us for not addressing that option. The short answer to the dissent is that the Respondent chose a different option—anticipatory withdrawal of recognition—and we address the issue the case presents, not an issue it does not present. Of course, the dissent's agenda is far more ambitious. She proposes making an RM petition the employer's *only* recourse. As explained below, we reject that proposal, as did the Board in *Levitz*, unanimously. Id. at 725-726.

Notably, for almost 20 years prior to *Levitz*, the Board applied parallel standards to Sec. 8(a)(5) allegations in the extension-of-recognition and withdrawal-of-recognition contexts. Under the "*Joy Silk*" rule, an employer could lawfully withhold voluntary recognition from a union with majority support if it possessed a good-faith doubt of the union's majority status. *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949), enfd. as modified 185 F.2d 732 (D.C. Cir. 1950), cert. denied 341 U.S. 914 (1951). So also, under *Celanese*, an employer likewise could lawfully withdraw recognition based on good-faith doubt of the union's majority status, even if the union actually may have enjoyed majority support. In other words, an employer with good-faith doubt could require both a union seeking initial recognition and an incumbent union to prove its majority status through a Board-conducted election. *Levitz*, 333 NLRB at 721-722. Although we do not return to the *Celanese* "good-faith reasonable doubt" standard, today's decision restores a measure of symmetry to the Board's union-recognition jurisprudence.

[27] This seeming anomaly is readily explained: *Levitz* held that the "actual loss of majority status" standard would apply prospectively only, id. at 729, and footnote 70 reaffirming the anticipatory withdrawal doctrine appears in the part of the *Levitz* decision where the Board is applying the "good-faith reasonable doubt" standard (as construed by the Court in *Allentown Mack*) to the facts of that case.

[28] See, e.g., *Parkwood Developmental Center*, 347 NLRB at 975 fn. 10. To the extent that any uncertainty remains, we clarify that to be lawful, an anticipatory withdrawal of recognition—like a present withdrawal of recognition—must be based on evidence that the union has actually lost majority status.

signal to the union to mount a counter-offensive. If, in the interim between anticipatory and actual withdrawal, a union were able to reacquire majority status, the employer's withdrawal of recognition would violate Section 8(a)(5). The remedy for that violation would most likely include an affirmative bargaining order, which would insulate the union's majority status from challenge for up to one year. And if a successor contract could be concluded within that insulated period, a new contract bar would take effect, giving the union up to 3 more years during which its majority status would be irrebuttably presumed. Moreover, an incumbent union need not show the employer its evidence of reacquired majority status prior to contract expiration.[29] From one perspective, this rule is justified by concern that an employer might retaliate against employees should their identities and preferences be revealed. But it is also true that the union's ability to *covertly* reacquire majority status increases the odds that the employer's withdrawal of recognition will unwittingly violate Section 8(a)(5), potentially resulting in an affirmative bargaining order, concomitant decertification bar, successor contract, and another contract bar.

II. NEED FOR A NEW FRAMEWORK

The issue presented in this case and in prior similar cases is how best to determine the wishes of employees concerning representation where the employer has evidence that at least fifty percent of unit employees no longer desire to be represented by the union, and the union possesses evidence that it has reacquired majority status. In these situations, as in this case, some unit employees are necessarily "dual signers." In resolving this issue, the Board is required to "balance the statutory goal of promoting labor relations stability against its statutory responsibility to give effect to employees' wishes concerning representation." *Silvan Industries,* 367 NLRB No. 28, slip op. at 3 (2018). After careful consideration, we do not believe the existing framework effectively serves either goal.

First, existing precedent does not properly safeguard employee free choice. In determining the dual signers' wishes, extant precedent follows a "last in time" principle, giving controlling effect to the later signature.[30] Thus, an employee's disaffection signature is automatically invalidated by his or her subsequent reauthorization signature. Such a rule ignores the fact that dual signers have expressed both support for *and* opposition to union representation within a brief period of time. Moreover, it is quite possible that some dual signers may fail to understand that when they sign a union card or counter-petition after having signed a union-disaffection petition, they are effectively revoking their prior signature on the disaffection petition.[31]

Parties have sometimes sought to ascertain dual signers' representational wishes by asking them, at unfair labor practice hearings, what their sentiments were on the date recognition was withdrawn. Here, for example, the judge allowed such questions and relied on the testimony of four dual signers to find actual loss of majority status notwithstanding the Union's documentary evidence to the contrary. We cannot endorse this practice. Employees' testimony about their representational wishes, given in the presence of the parties' representatives and bound to displease one of them, is an unreliable substitute for a secret ballot, cast within the safeguards of a Board-conducted election.[32]

Second, existing precedent does not effectively promote labor relations stability, either. A union is under no obligation to disclose to an employer that it has reacquired majority status prior to the employer's actual

[29] See id.

[30] See, e.g., *Scoma's of Sausalito*, 362 NLRB 1462, 1465−1467; *Highlands Regional Medical Center*, 347 NLRB at 1407.

[31] For example, in the instant case, employee Jefferson testified that he "didn't really know what [the union authorization card] meant." (Tr. 75.) And employee McFadden testified that "they had already told us that the Union was out, so I felt like signing [the union authorization card], you know, wouldn't make a difference. So I just signed it anyway." (Tr. 130.) In noting this evidence, we do not rely on after-the-fact testimony to ascertain these employees' representational sentiments. We merely observe that this testimony illustrates the fallibility of the "last in time" rule.

[32] The question of how to resolve dual-signer situations has plagued the Board. Two past Board members proposed addressing this issue by requiring the union to present its evidence of reacquired majority status. See *Parkwood Developmental Center*, 347 NLRB at 975 fn. 8 (then-Chairman Battista); *Scoma's of Sausalito*, 362 NLRB 1462, 1462 fn. 2 (then-Member Johnson). In addition to removing the risk of unfair surprise, such a requirement would also (as former Member Johnson noted) discourage gamesmanship and eliminate unwitting violations of Section 8(a)(5), which disrupt bargaining relationships and typically result in the decertification-barring issuance of an affirmative bargaining order.

Although this proposal has merit, we believe a Board-conducted, secret-ballot election provided under our new framework is the better solution. First, as this case illustrates, both employers and unions may be reluctant to disclose their evidence to each other, or they may dispute which side should "go first." In this regard, we note that the Union's offer to compare its evidence with the Respondent's evidence contemplated an exchange of evidence, as the dissent acknowledges. Unlike the dissent, we read the Union's offer to disclose its evidence as conditioned on reciprocity. Had the Union intended an unconditional offer, it would have provided its evidence even though the Respondent did not do likewise. Second, the mandated disclosure proposal of past Board members accepts the "last in time" rule, provided the union timely discloses its evidence to the employer. We would not apply the "last in time" rule. When, as here, a majority of employees have validly withdrawn support from the union, evidence that some of them may have subsequently recanted gives rise to a situation that is best resolved through an election.

withdrawal of recognition.[33] Thus, an employer possessed of numerically sufficient disaffection signatures, and unaware of the union's counter signatures, will likely withdraw recognition at contract expiration and make unilateral changes, only to discover that it has violated Section 8(a)(5). This results in an unwarranted disruption of the bargaining relationship, which could have been avoided had the employer known that its disaffection evidence had been superseded.[34] The union may obtain a decertification-barring affirmative bargaining order as a result, but the bargaining relationship has still been unlawfully and unnecessarily disrupted. In contrast, if the union were permitted to re-establish its majority status through an election, there would be no unlawful disruption of the bargaining relationship, and the union would receive a new certification year if it won the election.

Third, the treatment of dual signers under current precedent is analytically unsound. As astutely noted by the judge in this case, *Levitz* establishes an unjustified asymmetry: the Board only allows an employer to prove the dispositive fact—a union's loss of majority support—with evidence the employer actually possessed and relied on, but it permits the union, through the General Counsel, to challenge that evidence with after-acquired evidence the employer did not possess. There is the following asymmetry as well. An employee's union authorization card "cannot be effectively revoked in the absence of notification to the Union prior to the demand of recognition."[35] But an employee's signature on a disaffection petition *is* effectively revoked by a pro-union countersignature in the absence of notification to the employer prior to its withdrawal of recognition. Nowhere in *Levitz* or its progeny is there any explanation why an employee's signature on a disaffection petition, presented to an employer for the purpose of securing an end to union representation, should be treated differently than his or her signature on a union authorization card.

Finally, the Board's current treatment of dual signers under current precedent was questioned in *Scomas of Sausalito, LLC v. NLRB*, 849 F.3d 1147 (D.C. Cir. 2017). There, unbeknownst to the employer, the union reacquired majority status by obtaining signed union authorization cards from dual signers 3 days before recognition was withdrawn. Although the majority affirmed the Board's finding that the employer unlawfully withdrew recognition, Judge Henderson questioned whether an employer violates the Act at all "when, in good faith, it withdraws recognition from a union as a result of the union's intentional nondisclosure of its restored majority status." Id. at 1160. Moreover, the court unanimously refused to enforce the Board's affirmative bargaining order, citing the unintentional nature of the employer's violation and the union's having withheld the evidence of its restored majority status. Instead, the court indicated that in these circumstances, the question concerning representation should be resolved through an election.[36]

We agree. The determination of union majority status through unfair labor practice litigation in cases like these has proven to be unsatisfactory. A Board-conducted secret ballot election, in contrast, is the preferred means of resolving questions concerning representation.[37] Under current representation law, both employers and employees can obtain a Board-conducted secret ballot election when, as here, a sufficient number of unit employees have indicated that they no longer wish to be represented by an incumbent union.[38] We conclude that unions, too, should have an electoral mechanism to determine the will of the majority following an anticipatory withdrawal of recognition, and we believe that such a mechanism is preferable to the current *Levitz* regime.

III. THE NEW STANDARD

a. Anticipatory Withdrawal and the 45-Day Window Period

We reaffirm the settled doctrine that if, within a reasonable time before an existing collective-bargaining agreement expires, an employer receives evidence that the union has lost majority status, the employer may inform the union that it will withdraw recognition when the contract expires, and it may refuse to bargain or suspend bargaining for a successor contract. A union that receives such notice of anticipatory withdrawal has a variety of options. Assuming it has grounds to do so, it may file an unfair labor practice charge alleging that the employer initiated the union-disaffection petition or unlawfully assisted it,[39] that the petition fails to make the em-

[33] See fn. 4, supra.

[34] Writing separately in *Levitz*, Member Hurtgen chastised the Board for "subject[ing] employers to a guessing game." 333 NLRB at 732. Of course, an employer also is not required to disclose its evidence of loss of majority status to the union. Under current law, the guessing game goes both ways.

[35] *Struthurs-Dunn, Inc.*, 228 NLRB 49, 49 (1977), enf. denied 574 F.2d 796 (3d Cir. 1978).

[36] The concerns expressed by the court with respect to the Board's existing approach in this area support our decision today even though a panel majority upheld the Board's violation finding.

[37] See *Gissel*, 395 U.S. at 602.

[38] Sec. 9(c)(1)(A) provides for elections petitioned for by employees seeking to decertify an incumbent union ("RD" elections). Sec. 9(c)(1)(B) provides for employer-petitioned elections to determine majority support ("RM" elections).

[39] See, e.g., *Sociedad Española de Auxilio Mutuo y Beneficencia de P.R.*, 342 NLRB 458, 459 (2004), enfd. 414 F.3d 158 (1st Cir. 2005).

ployees' representational wishes sufficiently clear,[40] that the petition is tainted by serious unremedied unfair labor practices,[41] or that the number of valid signatures on the disaffection petition fails to establish loss of majority status.[42] However, the Board will no longer consider, in an unfair labor practice case, whether a union has reacquired majority status as of the time recognition was actually withdrawn. Instead, if the union wishes to reestablish its majority status, it must file an election petition. The Board will process the petition without regard to whether the parties' contract is still in force at the time the petition is filed.[43]

We recognize that so long as the contract remains in effect, the union's majority status is irrebuttably presumed. The election, however, is to determine whether a majority of unit employees wish the union to continue to represent them *after* the contract expires. Although a union typically enjoys a rebuttable presumption of majority support post-contract, the fact that at least fifty percent of the unit has signaled its nonsupport of the union rebuts the presumption.

Accordingly, we modify the "anticipatory withdrawal of recognition" doctrine in two respects. First, the "reasonable time" before contract expiration within which anticipatory withdrawal may be effected is defined as no more than 90 days before the contract expires. This change removes any uncertainty as to what constitutes a "reasonable time" before contract expiration, and it aligns the start of the "anticipatory withdrawal" period with the usual start of the 30-day open period during which decertification and rival union petitions may be filed. Second, if an incumbent union wishes to attempt to re-establish its majority status following an anticipatory withdrawal of recognition, it must file an election petition within 45 days from the date the employer announces its anticipatory withdrawal. The union has 45 days to file this petition regardless of whether the employer gives notice of anticipatory withdrawal more than or fewer than 45 days before the contract expires.[44] Any rival union may intervene in the incumbent's representation case on a sufficient showing of interest. Consistent with existing representation law, a rival union may also file its own petition during the long-established 30-day open period regardless of any incumbent-union petition.[45]

If *no* post–anticipatory withdrawal election petition is timely filed, the employer, at contract expiration, may rely on the disaffection evidence upon which it relied to effect anticipatory withdrawal; that evidence—assuming it does, in fact, establish loss of majority status at the time of anticipatory withdrawal—will be dispositive of the union's loss of majority status at the time of actual withdrawal at contract expiration; and the withdrawal of recognition will be lawful if no other grounds exist to render it unlawful.[46] If a post–anticipatory withdrawal

[40] Compare *Highlands Regional Medical Center*, 347 NLRB at 1406 (finding that petition denominated "a showing of interest for decertification" did not establish that employees no longer wanted union representation), with *Wurtland Nursing & Rehabilitation Center*, 351 NLRB 817, 817−818 (2007) (finding that petition evidenced loss of majority status given that it expressly referenced removal of union).

In overruling *Highlands Regional Medical Center*, above, to the extent it is inconsistent with today's decision, we do not reach the question of whether a petition that describes itself as a showing of interest for decertification may be relied upon to evidence nonsupport of the union as well as support for a decertification election. 347 NLRB at 1406 fn. 15. Such a question may be considered in the context of a future representation proceeding.

[41] See, e.g., *Mesker Door, Inc.*, 357 NLRB 591, 596−598 (2011) (concluding that unlawful threats by employer's attorney and plant manager were causally related to employees' disaffection petition and thus the employer's withdrawal of recognition based on the petition was unlawful) (citing cases).

[42] Under current law, an employer is not obligated to provide the union with a copy of its disaffection evidence at the time it withdraws recognition anticipatorily. We do not change that precedent. We believe that a union on the receiving end of an anticipatory withdrawal may readily acquire sufficient relevant information from its stewards and/or other pro-union employees to determine whether an unfair labor practice charge would be warranted. The sufficiency of the employer's disaffection evidence will, of course, be evaluated by the Board's regional office in its investigation of any unfair labor practice charge that may be filed regarding the employer's anticipatory withdrawal and refusal to bargain for a successor contract.

[43] Consistent with existing law, a union satisfies the requirement for a showing of interest to support its petition if it is the certified or currently recognized bargaining agent of the employees involved or a party to a current or recently expired collective-bargaining agreement covering the employees in whole or in part. See Casehandling Manual (Part II) Representation Cases §11022.1.

[44] For petitions filed for a "post–anticipatory withdrawal" election, the usual election bar to petitions filed within the 60-day "insulated period" prior to contract expiration will not apply.

[45] Specifically, a rival union may file its own petition during the open period prior to the contract's expiration date or after the contract expires. See *Trinity Lutheran Hospital,* 218 NLRB 199 (1975) (open period for health care institutions begins 120 days and ends 90 days before contract terminates); *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000 (1962) (open period for other employers begins 90 days and ends 60 days before contract terminates). If the incumbent union files a petition, rival unions may intervene if they make a required showing of interest for intervention. See Casehandling Manual (Part Two) Representation Proceedings Sec. 11023.2 (Cross-Petitioner Interest); 11023.3 (Full Intervenor Interest); 11023.4 (Participating Intervenor Interest).

[46] Following anticipatory withdrawal, the union will now have an electoral means to re-establish its majority status. If it chooses not to employ that means, the employer's disaffection evidence will be dispositive because it will be the *only* cognizable evidence of the unit employees' representational desires.

Of course, if the union believes the employer is bluffing and does not, in fact, have evidence that the union has lost majority status, it can call the employer's bluff by filing a charge alleging that the employer's refusal to bargain for a successor contract violated Sec. 8(a)(5). It can also file a petition for an election *and* an 8(a)(5) charge, and the block-

election petition *is* timely filed, the employer may still withdraw recognition at contract expiration since the union's post-contract presumption of continuing majority status has been rebutted by the employer's disaffection evidence, and the employer may withhold recognition unless and until the union's majority status is re-established electorally. Under certain circumstances, however, such an employer may permissibly continue to recognize the union, as explained below.

Thus, an employer's numerically sufficient and untainted evidence that an incumbent 9(a) representative has lost its majority status, upon which the employer relies to withdraw recognition anticipatorily, will be dispositive of the union's loss of majority status at contract expiration. Accordingly, an employer possessing such evidence *may* withdraw recognition when the contract expires: the union's irrebuttable presumption of majority status disappears when the contract expires; its post-contract presumptive majority status has been rebutted by evidence that at least fifty percent of the unit employees no longer support the union; and its majority status may only be re-established through an election that has yet to be held. In recognizing the right of an employer, thus situated, to withdraw recognition at contract expiration, we protect the Section 7 right of employees to refrain from union representation and collective bargaining.[47] In the interest of promoting labor relations stability,[48] however, we do not *require* such an employer to withdraw recognition at contract expiration if the 45-day window period remains open or a union election petition has been timely filed and the election remains pending.

We recognize, of course, that where an incumbent union has lost majority status, permitting an employer to refrain from withdrawing recognition as described above implicates Section 8(a)(2). Therefore, just as the Board in *Levitz* created a safe harbor from 8(a)(2) liability for employers with evidence of actual loss of majority status that choose to file an RM petition rather than withdraw recognition, 333 NLRB at 726, so also we create a safe harbor from 8(a)(2) (and 8(b)(1)(A)) liability to the extent necessary to accommodate the legal structure we adopt today. No employer that permissibly refrains from withdrawing recognition from a minority union in conformity with this decision will violate Section 8(a)(2) of the Act, and no union that accepts such recognition will violate Section 8(b)(1)(A).[49]

There is, however, one exception to the foregoing "safe harbor" rule. That exception is when a rival union has filed an election petition or intervenes in the incumbent union's representation case. In that situation, the employer must withdraw recognition from the incumbent, since continued recognition of the incumbent union would give it an unfair advantage over its rival. The employer may lawfully express its *preference* for one of the competing unions, but it may not continue to recognize the incumbent union to the disadvantage of its rival.[50]

ing-charge policy would be applicable in this and other contexts. For example, if a union receives notice of anticipatory withdrawal and has sufficient information to believe that the employer solicited disaffection evidence, it may file an election petition *and* an 8(a)(5) charge with a simultaneous offer of proof, thereby blocking the election. See Sec. 103.20 of the Board's Rules & Regulations. We clarify, however, that if a union opts to file an unfair labor practice charge rather than an election petition first, or at all, we will not toll the 45-day period. Thus, a union must file an election petition within 45 days of receiving notice of anticipatory withdrawal. If the union chooses to first pursue an unfair labor practice charge, it will have no election recourse if it does not file an election petition within the 45-day window period.

Under the blocking-charge policy, the pendency of an unfair labor practice charge—regardless of whether it is meritorious—may prevent an election from occurring for an extended period of time. For this reason, among others, the Board plans to revisit the blocking charge policy in a future rulemaking proceeding. As of the issuance of this decision, however, the Board has not yet revisited the policy. Thus, for institutional reasons, we continue to maintain extant law pertaining to blocking charges.

Additionally, we adhere to extant precedent that an alleged post-election loss of majority support is not relevant to the question of whether a union should be certified as the result of a properly conducted Board election. See *Macy's Inc.*, 361 NLRB 1490, 1490 (2015) (citing cases), enfd. 824 F.3d 557 (5th Cir.), rehearing denied 844 F.3d 188 (5th Cir. 2016), cert. denied 137 S. Ct. 2265 (2017).

[47] Typically, a withdrawal of recognition is conduct that reasonably tends to cause employee disaffection from the union, tainting a subsequent showing of nonsupport. See *Lee Lumber & Building Material Corp.,* 322 NLRB 175, 178 (1996), affd. in part 117 F.3d 1454 (D.C. Cir. 1997). Here, however, the union will have lost majority support first, and the withdrawal of recognition would follow thereafter and merely reflect the facts on the ground. Thus, a withdrawal of recognition would not constitute objectionable conduct affecting the results of a subsequent post–anticipatory withdrawal election. We reiterate, however, that withdrawal of recognition in this context is permissive, not mandatory.

[48] Again, our duty is to balance our "statutory responsibility to give effect to employees' wishes concerning representation" against "the statutory goal of promoting labor relations stability." *Silvan Industries,* 367 NLRB No. 28, slip op. at 3.

[49] Thus, we reaffirm the overruling of *Maramont Corp.*, 317 NLRB 1035 (2001), and *Hart Motor Express*, 164 NLRB 382 (1967). See *Levitz*, 333 NLRB at 726 fn. 52.

[50] The situation here is distinguishable from that in *RCA del Caribe, Inc.*, 262 NLRB 963 (1982), where the Board held that an employer must continue to bargain with the incumbent union for a successor contract notwithstanding the filing of a representation petition by a rival union. In that case, the incumbent union continued to enjoy presumptive majority status during the pendency of the rival's petition. See id. at 965 ("While the filing of a valid petition may raise a doubt as to majority status, the filing, in and of itself, should not overcome the strong presumption in favor of the continuing majority status of the incumbent . . . ."). Here, in contrast, we are dealing with an incumbent whose presumption of continuing post-contract majority status has been overcome by the unit employees' showing of nonsupport.

b. Impact of the New Standard on Unilateral Changes

Whether an employer may or should take unilateral action following a lawful withdrawal of recognition depends on the situation. As noted, except in limited circumstances, unilateral action by the employer would entail substantial risk.

1. Gap period between contract termination and union election

If there is a gap between the date the contract terminates and the date of the election, an employer that makes unilateral changes in unit employees' terms and conditions of employment during that intervening period would not violate Section 8(a)(5), since the unit employees' showing of disaffection will have rebutted the union's post-contract presumption of continuing majority status. However, unilateral changes made after the election petition has been filed—during the pre-election "critical period"—could constitute objectionable conduct where the changes would reasonably interfere with employee free choice (for example, a wage increase or grant of benefits), warranting a second election if the union were to lose the first one.

2. Unchallenged election loss by the Union

If the union loses a post–anticipatory withdrawal election, has not challenged a potentially outcome-determinative number of ballots, and does not file election objections, the employer must withdraw recognition (if it has not done so already), and it may proceed to act unilaterally.

3. Challenged election loss by the union

Assuming the employer refrains from making changes pre-election, if the union *loses* the election and either had challenged a potentially determinative number of ballots or files election objections, or both, the employer would make unilateral changes after the election at its peril. If the disposition of the union's ballot challenges were to change the outcome of the election and result in a union victory, the union's representative status would be established as of the date of the election, and the employer's unilateral changes made after that date would violate Section 8(a)(5).[51] Assuming no outcome-changing ballot challenges, if the union were to prevail on its objections, a second election would be directed, and the employer's unilateral changes prior to that election could furnish grounds for the union—if it loses the second election—to file objections yet again and obtain a third election. Of course, if the union's outcome-determinative ballot challenges and/or objections are overruled, the employer must withdraw recognition (if it has not done so already), and it may proceed to act unilaterally.

4. Employer challenges union election win

Similar considerations are brought to bear if the union *wins* the post–anticipatory withdrawal election, and the employer either challenged a potentially determinative number of ballots or files election objections, or both. Again, the employer would make unilateral changes at its peril. If the disposition of the determinative challenged ballots results in the union preserving its election win, the union's representative status would be established as of the date of the election, and the employer's unilateral changes made after that date would violate Section 8(a)(5). Id. If the employer's objections are sustained and a second election directed, its unilateral changes in unit employees' terms and conditions of employment would furnish the union grounds to file objections to the second election and obtain a third election in the event it loses the second election. In other words, if an employer wants to avoid interfering with its own efforts to secure an efficacious rerun election, it should refrain from making unilateral changes until post-election proceedings have run their course.

Accordingly, as a practical matter, whereas withdrawing recognition after the contract expires following a lawful anticipatory withdrawal will generally be a risk-free act,[52] making unilateral changes poses considerable risks. An employer should take these risks into consideration in its decision making, although we are well aware that the exigencies of running a business may exert other pressures.

c. Appropriateness of the New Standard

We believe that our new standard represents an improvement over current law in several respects. It ends the unsatisfactory process of attempting to resolve conflicting evidence of employees' sentiments concerning representation in unfair labor practice cases. Instead, such issues will be resolved as they should be: through an election, the preferred method for determining employees' representational preferences. Rather than divining the wishes of dual signers based on an unreliable "last in time" presumption, we will ascertain those wishes based on ballots cast in the privacy of the polls, free from the risk of coercion by any party. That process is not only preferred as a matter of policy, but it is often

[51] *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975).

[52] Unless, of course, a post–anticipatory withdrawal election takes place *before* the contract expires, the union prevails, and there are neither potentially determinative challenged ballots nor election objections. In that scenario, the union's post-contract majority status would be re-established *before* the contract expires, and the employer could not lawfully withdraw recognition at contract expiration.

speedier than the unfair labor practice path as well, at least where no blocking charges are filed. Stability in labor relations is also better protected by the new approach: employers will not stumble blindly into unlawful withdrawals of recognition, as they may and sometimes do under current law; they will not have to withdraw recognition at all following anticipatory withdrawal if the 45-day window period remains open or during the pendency of the election; and legal and practical considerations will exert substantial pressure on employers to maintain the status quo until the representation process is concluded, as described above.

An incumbent union normally enjoys a rebuttable presumption of continued majority status after a collective-bargaining agreement expires. We recognize that, under our new standard, the union is required to petition for and win an election in order to re-establish its status as the unit employees' bargaining representative. However, we believe this requirement is fair, inasmuch as it is only imposed in circumstances where at least 50 percent of unit employees have validly expressed that they no longer support the incumbent union. The union's post-contract presumption of continued majority status will have been rebutted by this showing of disaffection, and, as a practical matter, the union must do something to restore, if it can, its majority status. Currently, the union must obtain evidence that it has regained majority support, and it must do so before the employer withdraws recognition. We do not believe that it is more burdensome to require the union to file an election petition in this situation instead. There is no valid basis for supposing that a union could solicit a sufficient number of cards to reacquire majority status in the interim between anticipatory and actual withdrawal, but that those same employees would reject the union in a secret-ballot election held shortly thereafter.[53]

IV. RETROACTIVE APPLICATION

We must now decide whether to apply our new rule retroactively, i.e., in all pending cases (including this one), or prospectively only. "The Board's usual practice is to apply new policies and standards retroactively to all pending cases in whatever stage," unless retroactive application would work a "manifest injustice." *SNE Enterprises*, 344 NLRB 673, 673 (2005) (internal quotations omitted). "[T]he propriety of retroactive application is determined by balancing any ill effects of retroactivity against 'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" Id. (quoting *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947)). Thus, in determining whether retroactive application would result in "manifest injustice," the Board considers "the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application." Id. Having considered these principles, we conclude that applying the rules adopted here retroactively and dismissing the complaint would not work a manifest injustice.

Preliminarily, the Union obtained authorization cards from employees, but it declined to present them to the Respondent unless the Respondent presented its disaffection evidence to the Union. It was lawful for the Union to withhold its evidence before today's decision, and it will remain lawful after today's decision. The Union's refusal to show the cards to the Respondent had no effect on its legal rights under preexisting law, and it has no effect on its rights under our new standard, either.

We recognize that, under preexisting precedent, the Board would have given effect to the dual signers' authorization cards under the "last in time" rule for the purpose of determining whether the Respondent proved actual loss of majority status on the date recognition was withdrawn. Under the standard announced today, the Union cannot rely on that evidence. But the Union's ability to rely on its dual-signer evidence is the source of the very problems our new standard is meant to cure, so its loss is simply the inevitable consequence of curing the "mischief" that preexisting law created. Moreover, preexisting precedent had been vigorously criticized on precisely the grounds discussed herein, and, in light of the D.C. Circuit's opinion in *Scomas,* the enforceability of an affirmative bargaining order issued under preexisting law would be in serious doubt.[54] Consistent with our decision today, that court would likely call for the representation issue to be resolved by an election.

We also cannot ignore the interests of the unit employees, a majority of whom signed a valid, uncoerced petition indicating that they did not want the Union to represent them. That petition, in turn, was the basis for a de-

[53] The union, after all, has been the designated representative of the unit employees and has access to them. If, notwithstanding the disaffection petition, a majority of the unit employees do actually desire the incumbent union to continue to represent them, it should not be difficult for the union to rally that support in time for the election our new standard contemplates. In this case, for example, the union obtained 69 authorization cards over a 10-day period, all gathered in the face of the Respondent's notice of anticipatory withdrawal of recognition. We note, moreover, that the incumbent union need not make the usual administrative showing of 30 percent support in order to file an election petition. See fn. 43, supra.

[54] As discussed above, former Members Battista and Johnson had both criticized preexisting precedent. See *Parkwood Developmental Center*, 347 NLRB at 975 fn. 8 (2006), and *Scoma's of Sausalito, LLC*, 362 NLRB 1462, 1462 fn. 2.

certification petition filed with the Board in 2015 that remains pending to this day but would be dismissed if this case were decided under preexisting precedent. While a few of those employees signed authorization cards for the Union after they signed the disaffection petition, the vast majority did not. And the credited testimony of some of the dual signers suggests that the disaffection petition may represent their true wishes concerning representation.

To be sure, the Union would not have been aware, before our decision today, that it had to file an election petition in order to re-establish its status as the unit employees' representative in the circumstances of this case. But under preexisting law, it had the right to do so in response to the Respondent's withdrawal of recognition. Filing an 8(a)(5) charge was thus not the *only* option available: the Union could have filed an 8(a)(5) charge, an election petition, or both. Moreover, the Union had an incentive to file a petition instead of, or in addition to, an 8(a)(5) charge: an election win would mean a full year of bargaining insulated from challenge to its majority status, whereas a win on the 8(a)(5) charge might or might not result in an enforceable bargaining order and a consequent "reasonable" insulated period. Moreover, the Union can still file a petition now.[55]

V. RULING ON THE MERITS

We now turn to the merits of this case. On April 21, the Respondent was presented with a disaffection petition signed by 83 of the 160 bargaining-unit employees, over 50 percent of the unit. Later on April 21, the Respondent notified the Union that it had received the petition and would no longer recognize the Union as the employees' bargaining representative when the parties' collective-bargaining agreement expired on May 7. Consistent with this announcement, the Respondent withdrew recognition on May 8, and the Union did not file an election petition. Because a majority of unit employees no longer wished to be represented by the Union at the time the Respondent withdrew recognition, the Respondent acted lawfully. Although the Union had solicited authorization cards from 69 bargaining-unit employees, six of whom were "dual signers," we do not consider this evidence for the purpose of determining whether the Respondent's withdrawal of recognition was lawful for the reasons fully explained in this decision. We also do not consider the dual signers' testimony about their true sentiments concerning representation on the date recognition was withdrawn,[56] or testimony concerning the sentiments of other employees who did not sign the disaffection petition.

VI. RESPONSE TO DISSENT

Our dissenting colleague contends that our decision is contrary to the foundational principle that an incumbent union is entitled to a continuing presumption of majority support, which must be measured solely as of the time the employer withdraws recognition. Our colleague also contends that the Board should consider prohibiting employers from ever withdrawing recognition unilaterally and should instead require them to seek a Board election. We respectfully disagree.[57]

Our colleague's single-minded focus on the irrebuttable presumption of majority status during the first 3 years of a contract term turns a blind eye to a salient aspect of

[55] Despite our dissenting colleague's concerns over retroactive application, we adhere to our position for the reasons articulated above. We additionally note that the Board has previously applied a decision retroactively that worked a more extensive change than today's decision. See *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988). Among other things, *Deklewa* made Sec. 8(f) collective-bargaining agreements binding and enforceable for the duration of their term, whereas under pre-*Deklewa* precedent, an 8(f) agreement "[could] be repudiated by either party, at any time, for any reason, and it [could] not be enforced through Sec[.] 8(a)(5) or Sec[.] 8(b)(3)." Id. at 1378. This was a substantive change. Here, in contrast, the "ill effect" of retroactivity—creating a right, unknown to the Union at the time, to file an election petition following anticipatory withdrawal before a contract expires and recognition is actually withdrawn—is limited to a matter of timing, i.e., *when* a petition may be filed, not *whether* a petition may be filed. As stated, under existing law the Union could have filed an election petition when the Respondent withdrew recognition, either instead of or in addition to filing an 8(a)(5) charge. The dissent finds retroactive application in *Deklewa* more appropriate than in this case because pre-*Deklewa* law was "unsettled and confusing," *Deklewa*, above at 1389, but today's decision importantly provides a clear process for resolving the uncertainty surrounding dual-signers' intent.

Our colleague's position on retroactive application here is also difficult to reconcile with her position in *BFI Newby Island Recyclery*, 362 NLRB 1599 (2015), where she was part of a Board majority that radically transformed the joint-employer landscape—contrary to the dissent, a well-settled landscape long relied upon by American businesses in structuring their contractual relationships—and applied its new standards retroactively, with little comment other than that retroactive application is "[t]he Board's established presumption in representation cases." Id. at 1600. The changes we make here are far less sweeping than the changes effected in *Browning-Ferris*.

[56] Such testimony was similarly irrelevant under the former *Levitz* standard. See *Gissel*, 395 U.S. at 608 ("[E]mployees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activity in violation of [S]ec[.] 8(a)(1)."); *DTR Industries*, 311 NLRB 833, 840 (1993) ("[T]he Board may not, in the absence of misrepresentations [or coercion,] inquire into the subjective motives or understanding of the card signer to determine what the signer intended to do by signing the card."), enf. denied on other grounds 39 F.3d 106 (6th Cir. 1994).

[57] As a preliminary matter, we reject our colleague's oft-repeated charge that we wrongfully overrule precedent here without public notice and an invitation to file briefs, as the Board has frequently overruled or modified precedent without supplemental briefing. See, e.g., *Boeing Co.*, 365 NLRB No. 154, slip op. at 21 (2017) (citing cases).

anticipatory-withdrawal precedent. Under well-settled law, both before and after *Levitz*, an employer that receives evidence, within a reasonable period of time (now defined as 90 days) before a collective-bargaining agreement expires, may lawfully do two things. First, it may lawfully announce that it will withdraw recognition when the contract expires (and with it, the union's conclusive presumption of majority status under the contract-bar doctrine). Second—and this is the salient point—it may *immediately* refuse to bargain or suspend bargaining for a successor collective-bargaining agreement, at a time when the union's majority status is otherwise irrebuttable. That such a refusal is lawful can only mean one thing: the Board recognizes, and has long recognized, that the irrebuttable presumption of majority status is a policy-based presumption of law, not a presumption of fact, and that there are policy-based circumstances warranting an exception to this presumption when an incumbent union has actually lost majority status within a reasonable period of time before the contract expires.[58] The presumption—the legal fiction—of the union's continuing post-contract majority status has been rebutted in fact, and it's pointless to pretend otherwise. Our framework accepts this reality and furnishes an electoral mechanism for the union to seek to regain majority status even before the contract expires, or shortly thereafter, with a consequent renewal of the certification-year bar. The dissent disregards this reality and prefers legal fictions instead.[59]

The dissent compounds her error by faulting the Respondent for following through on its anticipatory withdrawal of recognition announcement without post-expiration affirmation of the union's continued loss of majority status. In this respect, she relies on unsupported presumptions of fact to buttress her unsupported presumption of law. For our colleague, the only thing that matters is whether the Respondent could prove loss of majority status on the date it withdrew recognition, shackled by restrictive evidentiary rules that (1) conclusively presume dual signers were union supporters; (2) count pro-union evidence in the union's possession whether or not the employer knew of it; and (3) exclude all evidence detracting from the union's support not in the employer's possession. Section 7 of the Act creates a right for employees to be represented by a union of their own choosing, and it also creates a right for employees to refrain from such representation. The dissent's restrictive evidentiary rules effectively privilege the former right over the latter. In addition, as the Supreme Court has stated, the validity of any factual presumption depends on "the rationality between what is proved and what is inferred." *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 805 (1945). By giving dispositive weight to the dual signers' cards in the circumstances presented here, the framework applied by the dissent fails this test for all the reasons stated above.

We also reject the dissent's advocacy for a rule under which all withdrawals of recognition would be unlawful absent an election. The dissent presents this election-only concept as if raised for the first time by former General Counsel Richard F. Griffin, Jr. in 2016 (although not by counsel for the General Counsel in this case), and goes so far as to demand that we justify our refusal to adopt it. Of course, that position was fully considered and rejected in *Levitz* by a unanimous Board. 333 NLRB at 725. We adhere to the views there expressed. In addition, it would be anomalous to hold that an election is the only means by which a union's representative status under Section 9(a) may be ended when unions may achieve 9(a) status through voluntary recognition as well as by an election. Moreover, unilateral withdrawal of recognition has been a lawful means of terminating a union's 9(a) status for many decades—and although, since *Levitz*, such withdrawal requires a showing that the incumbent union has lost its majority status, for most of the Board's history recognition could be lawfully withdrawn based on a lesser showing of good-faith doubt of the union's continuing majority status. See *Celanese Corp.*, 95 NLRB 664 (1951). Although we do not here propose returning to the good-faith doubt standard, the dissent establishes no valid basis for running to the opposite extreme and abolishing withdrawal of recognition altogether.[60]

[58] See *Allentown Mack Sales and Service*, 522 U.S. at 378 ("The Board can, of course, forthrightly and explicitly adopt counterfactual evidentiary presumptions (which are in effect substantive rules of law) as a way of furthering particular legal or policy goals."). See also *NLRB v. Curtin-Matheson Scientific, Inc.*, 494 U.S.775, 814−816 (1990) (Scalia, J., dissenting).

[59] The dissent also ignores language from the D.C. Circuit's decision in *Scomas of Sausalito* that she herself quotes, stating that "[t]he court described the case as 'an unusual one in which the [u]nion withheld evidence about its restored majority status . . .'" (citing 849 F.3d at 1156). Obviously, majority status can only be restored if it has been lost.

[60] The dissent says that we violate the foundational principle that a Board-conducted election is the preferred way to determine whether an incumbent union continues to enjoy majority status. To the contrary, nothing in our decision today detracts from existing procedures for determining continued majority status through an election. Employees can still test a union's majority status by filing an RD petition, and employers may still choose to file RM petitions rather than unilaterally withdrawing recognition. We simply add another path to a Board-conducted election.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. July 3, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

In the name of promoting employee free choice and preserving stability in collective bargaining, the majority does the opposite: It permits an employer unilaterally to withdraw recognition from an incumbent labor union, in the face of objective evidence that the union has *not* lost majority support among the employees it represents. It then requires the union to petition for and win an election to regain its representative status, which should never have been stripped from it. This result—reached by reversing precedent unasked and without briefing—violates two foundational principles under the National Labor Relations Act: first, that a recognized union is entitled to a continuing presumption of majority support,[1] and, second, that a Board-conducted election—not empowering unilateral employer action—is the preferred way to determine whether an incumbent union continues to enjoy majority support.[2] Indeed, the majority has invented an entirely new scheme that flips these longstanding principles on their head.

As I will explain, there is no rational connection between the reasons offered by the majority for rejecting established law and the new approach it adopts here. To the contrary, the statutory policies that the majority relies on actually preclude the choice the majority makes, while the factual circumstances it invokes are not presented in this case, where the union offered to show the employer its rebuttal evidence but was rebuffed without justification.[3] Today's decision, then, reflects a failure to engage in the reasoned decision making required of the Board.[4] And as if this failure were not enough, the majority applies its new scheme retroactively, despite the manifest injustice that results. The union here was entitled to prevail under existing law, it could not reasonably have anticipated the requirement now imposed on it and other unions, and it is too late for the union to comply with the majority's new scheme. Thus, the union finds itself lawfully ousted—more than 4 years after the employer violated then-governing law in withdrawing recognition unilaterally.

I.

Under existing law, this is a simple case for finding a violation of Section 8(a)(5) of the National Labor Relations Act. Before turning to the facts here, I briefly review the legal background.

A.

Section 8(a)(5) makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees, subject to the provisions of [S]ection 9(a)," which provides the mechanisms by which a majority of employees may choose a bargaining representative, including an election conducted by the National Labor Relations Board.[5] During the term of a collective-bargaining agreement, an employer must recognize and bargain with the union: the union has a *conclusive* presumption of majority support.[6] Once the agreement expires (but not before) the presumption becomes rebuttable.[7]

Under the framework established in *Levitz*, supra, an "employer may rebut the continuing presumption of an

[1] E.g., *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785-787 (1996). See also *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 720 & fn. 16 (2001) (discussing origins and purposes of continuing presumption of majority support).

[2] "The Board … has recognized … that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969).

[3] Because today's decision is predicated on a factual scenario not presented here, the decision is not supported by substantial evidence in the record and is subject to reversal on that ground alone. See, e.g., *United Food & Commercial Workers, Local 400 v. NLRB*, 222 F.3d 1030, 1033 (D.C. Cir. 2000).

[4] See, e.g., *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998); *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 638 (D.C. Cir. 2017).

[5] 29 U.S.C. 158(a)(5). Sec. 9(a) of the Act provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit…." 29 U.S.C. §159(a).

[6] "A union is . . . is entitled under Board precedent to a conclusive presumption of majority status during the term of any collective-bargaining agreement up to three years." *Auciello Iron Works*, supra, 517 U.S. at 786 (footnote omitted).

[7] Id. at 786−787 ("[U]pon expiration of the collective-bargaining agreement, the presumption of majority status becomes a rebuttable one.").

incumbent union's majority status and unilaterally withdraw recognition only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit."[8] The union's asserted loss of support is measured "at the time the employer withdrew recognition."[9] An employer "withdraws recognition at its peril": if the employer fails to prove loss of support, at the crucial time, by a preponderance of the evidence, the Board will find the withdrawal unlawful.[10]

After *Levitz*, the Board reaffirmed the doctrine of "anticipatory withdrawal," which applies when a collective-bargaining agreement is in effect and an employer thus is not permitted to withdraw recognition from the union.[11] In that situation, if an employer obtains evidence that the union has, in fact, lost majority support, the employer may announce that it will not negotiate with the union for a new agreement, but instead will withdraw recognition when the current agreement expires. The Board's "anticipatory withdrawal" cases establish that the union's asserted loss of majority support is determined *as of the time the employer withdrew recognition*—and not as of the time the employer announced that it *would* withdraw recognition at the earliest permitted opportunity, i.e., when the collective-bargaining agreement expired.[12] In this respect, the Board decisions have been consistent—and uniformly enforced by the federal courts of appeals, where challenged. [13]

[8] *Levitz*, supra, 333 NLRB at 725.

[9] Id.

[10] Id. See, e.g., *Leggett & Platt*, *Inc.*, 367 NLRB No. 51, slip op. at 12 (2018).

[11] See *Parkwood Developmental Center, Inc.*, 347 NLRB 974, 975 (2006), enfd. 521 F.3d 104 (D.C. Cir. 2008). The doctrine originated with *Abbey Medical*, 264 NLRB 969 (1982), enfd. mem. 709 F.2d 1514 (9th Cir. 1983).

[12] See, e.g., *Leggett & Platt*, supra, 367 NLRB No. 51, slip op. at 13 ("Under Board law, the operative date for determining whether there is objective evidence of a lack of majority support is not the date the employer announces its intent to withdraw recognition based on such evidence, but rather the date the employer's withdrawal becomes effective.").

[13] Id. See also *Scoma's of Sausalito, LLC*, 362 NLRB 1462 (2015), enf. denied in part 849 F.3d 1147 (D.C. Cir. 2017); *HQM of Bayside, LLC*, 348 NLRB 758 (2006), enfd. 518 F.3d 256 (4th Cir. 2008); *Highlands Hospital Corp., Inc.*, 347 NLRB 1404 (2006), enfd. 508 F.3d 28 (D.C. Cir. 2007); *Parkwood Developmental Center, Inc.*, 347 NLRB 974 (2006), enfd. 521 F.3d 404 (D.C. Cir. 2008).

To be sure, under the particular factual circumstances of that case, the District of Columbia Circuit declined to enforce the Board's bargaining order in *Scoma's*, supra, while affirming the Board's violation finding and enforcing other remedies. *Scomas of Sausalito, LLC v. NLRB*, 849 F.3d 1147 (D.C. Cir. 2017). I discuss *Scomas* below. There, the union never informed the employer, before the employer withdrew recognition, that the union possessed evidence rebutting the evidence which the employer relied on in withdrawing recognition. See id. at 1155-1158. That is not the case here.

Importantly, in addition to establishing the "actual loss" standard for withdrawing recognition, *Levitz* also lets employers obtain a Board election to test the union's status, if they can establish simply a good-faith reasonable uncertainty of the union's continuing majority support—a lesser showing than required to withdraw recognition unilaterally.[14] *Levitz* in turn creates a safe harbor from Section 8(a)(2) liability for employers with evidence of actual loss of majority status that elect to continue recognizing the union and pursue a Board election rather than withdraw recognition.[15] Thus, the *Levitz* framework is clearly designed to encourage employers to pursue the preferred route of a Board election rather than the riskier—and more destabilizing path of withdrawing recognition unilaterally. Application of this framework in this case is straightforward, and the outcome should be clear.

B.

The facts are straightforward and not in dispute: In 2010, the Union was certified by the Board as bargaining representative, following a secret-ballot election.[16] It ultimately reached a collective-bargaining agreement with the Respondent, which was set to expire on May 7, 2015. A few weeks before the expiration date, the Respondent received a petition—signed by a bare majority of bargaining-unit employees (83 of 160)—stating that employees no longer wished to be represented by the Union. That same day (April 21, 2015), the Respondent notified the Union that it would withdraw recognition unilaterally as soon as the contract expired.

This step was permissible under the Board's "anticipatory withdrawal" doctrine. The Respondent could not withdraw recognition from the Union while the collective-bargaining agreement remained in effect, because during that time, the Union enjoyed a conclusive presumption of majority support.[17] But (as it did in its April 21 letter) the Respondent was free to announce that it *would* withdraw recognition when the contract expired and was free to refuse to negotiate a successor agreement, while honoring the existing one. And the Respondent was free to actually withdraw recognition, if it

[14] 333 NLRB at 727−728.

[15] 333 NLRB at 726 & fn. 52. For a discussion of this principle, see *Pacific Coast Supply, LLC v. NLRB*, 801 F.3d 321, 326 (D.C. Cir. 2015), enfd. 360 NLRB 58 (2014).

[16] The majority fails to mention this fact, despite the incongruity here of permitting an employer to unilaterally withdraw recognition from a union whose representative status was determined by the Board as the result of a secret-ballot election.

[17] See, e.g., *Parkwood Developmental Center*, supra, 347 NLRB at 975 & fn. 9, citing *Auciello Iron Works*, supra, 517 U.S. at 786.

could prove that the Union had lost majority support as of the time recognition was withdrawn.[18]

The Union's April 22 reply to the Respondent pointed out that the Union had not received evidence that it had lost majority support, as the Respondent asserted, and asked the Respondent to return to the bargaining table. On April 24, the Respondent refused to resume bargaining and refused to provide its evidence, asserting that "the employer needs the evidence, not the union" and that "[t]he Company will not provide it." The Respondent gave no further explanation for its refusal.

The Union then began soliciting authorization cards from employees, collecting 69 signed cards between April 27 and May 7. Notably, six employees who signed cards "authoriz[ing] the United Auto Workers to represent" employees had also signed the earlier petition relied on by the Respondent. Under well-established Board law, these six "dual" signatures could not be relied on by the Respondent to carry its burden to prove that the Union had lost majority support—and thus the Respondent's evidence was no longer enough to support a withdrawal of recognition: only 77 of 160 employees (83 minus 6), less than half of the bargaining unit, could be counted as opposed to union representation.[19]

On May 5, the Respondent wrote to the Union, reiterating that it had evidence that the Union lost majority support, but also pointing out that it "had not received any evidence from the union or otherwise that the union continue[d] to have majority support" and stating that "[i]n the absence of such evidence," it would withdraw recognition when the contract expired. Rising to the challenge, the Union responded the next day, May 6. It stated that it did "not believe that the Union ha[d] lost" majority support and asserted that the Union had "credible evidence to support its position." This statement, of course, was true. The Union offered to meet with the Respondent and "compare [its] evidence with [the Respondent's] evidence."

The Respondent's May 7 response rebuffed the Union completely. The Respondent "acknowledge[d] the union's request to meet," but reiterated its unwillingness to "share the names of the employees who signed the petition." As for the Union's "evidence [that] it ha[d] not lost majority support," the Respondent stated that "to date the Union has not provided any substantiated evidence supporting its position" and asserted that "[a]bsent contrary evidence," the Respondent was required to "rely upon the evidence in [its possession and proceed as previously indicated." That statement was inaccurate as a legal matter and disingenuous as a factual matter. Under *Levitz*, as explained, the Respondent was not required to withdraw recognition unilaterally, but rather was free to take advantage of the safe harbor that the Board has created, by filing an election petition with the Board.[20] Meanwhile, the Respondent's reference to the Union's supposed failure to provide its evidence glossed over the actual circumstances: the Union *had* offered to show the Respondent its evidence and to compare it with the Respondent's evidence. It was the Respondent that had rejected the Union's proffer. (Notably, while the Union's May 6 letter clearly contemplated an exchange of evidence, it did not condition the Union's offer on reciprocity by the Respondent.)

On May 8, the day after the contract expired, the Respondent unilaterally withdrew recognition from the Union, based on the original employee petition. At no point did the Respondent accept the Union's proffer of its rebuttal evidence, and at no point did the Respondent seek a Board election.[21]

The record establishes that the Respondent failed to carry its *Levitz* burden to prove that, at the time it withdrew recognition, the Union had lost majority support. At all relevant times, the Union was protected by the continuing presumption of majority support. Given that presumption, it was never the Union's burden to demonstrate through affirmative evidence (e.g., an employee-signed petition or authorization cards) that it retained majority support. Rather, the issue here is simply whether the Respondent's evidence of actual loss of majority

[18] *Parkwood Developmental Center*, supra, 347 NLRB at 975 & fn. 10. As the District of Columbia Circuit has explained:

[A]nticipatory withdrawal must be distinguished from withdrawal of recognition. Anticipatory withdrawal occurs prior to expiration of a [collective-bargaining agreement] and does not obviate the employer's obligations under the existing agreement. Withdrawal of recognition occurs after expiration of [an agreement], at which time the employer is free of contractual obligation.

Parkwood Developmental Center, Inc. v. NLRB, 521 F.3d 404, 409 (D.C. Cir. 2008).

[19] See *Scoma's*, supra, 362 NLRB at 1467; *HQM of Bayside*, supra, 348 NLRB at 759; *Highlands Regional Medical Center*, supra, 347 NLRB at 1407; *Parkwood Developmental Center*, supra, 347 NLRB at 975. An analogous situation occurs when an employee signs authorization cards supporting two different unions seeking to represent employees, and the question is whether the employer has unlawfully recognized a union without majority support. Under Board precedent, a "dual" card generally may not be counted toward establishing majority support for the recognized union. See, e.g., *Le Marquis Hotel, Inc.*, 340 NLRB 485, 488 (2003).

[20] See, e.g., *HQM of Bayside*, supra, 348 NLRB at 760 (noting that *Levitz* "imposes no such Hobson's choice" but rather "created a safe harbor for employers" by permitting them to petition for an election under the "good-faith reasonable uncertainty" standard).

[21] The irony is that the Union's status as bargaining representative was itself the product of Board certification, following a secret-ballot election. The Respondent, in other words, was compelled to recognize and bargain with the Union by the Board but purported to deprive the Union of its representative status by unilateral action.

support sufficed. Because the Union had obtained authorization cards from (among other employees) six employees who had earlier signed the petition relied upon by the Respondent, and because the signatures of the six dual-signing employees could not be counted to show *loss* of support, the Respondent's evidence fell short.[22] The burden of proof was on the Respondent. Under *Levitz* and the Board's "anticipatory withdrawal" decisions, as approved by the courts,[23] it follows that the Respondent violated Section 8(a)(5) of the Act. The administrative law judge's finding that the union had lost majority support—which was based on testimony, at the unfair labor practice hearing, from four of the six dual-signer employees about their subjective motivations in signing—was simply incorrect, as the majority acknowledges.[24]

II.

No party to this case has asked the Board to reverse well-established, consistently-applied, and judicially-approved precedent. But the majority does so anyway, without providing public notice or inviting briefs, in a move that by now has become its unfortunate signature.[25]

Here, as in other cases, a poor process leads predictably to a poor result. The majority's opinion demonstrates that it has failed to engage in reasoned administrative decision making, both by ignoring the legal options open to the Board and by basing its chosen option on reasons that have no support in law, policy, or fact.

The way the majority describes existing law reveals the fatal flaw in the majority's position. The majority announces that it

> overrule[s] *Levitz* and its progeny insofar as they permit an incumbent union to defeat an employer's withdrawal of recognition in an unfair labor practice proceeding with evidence that it reacquired majority status in the interim between anticipatory and actual withdrawal.

This tendentious framing obscures the long-established principle that an incumbent union always is entitled to a continuing presumption of majority support—conclusive during the term of a collective-bargaining agreement and rebuttable after the agreement expires—which the employer must overcome with objective evidence to justify its withdrawal of recognition from the union.[26] The Board's "anticipatory withdrawal" cases do not involve a union's supposed "reacquisition" of majority support, but rather the employer's inability to meet its burden to demonstrate that the union has actually *lost* majority support at the crucial time: when the employer withdrew recognition after the collective-bargaining agreement expired (and not earlier, when the agreement remained in effect and the employer was not allowed to withdraw recognition).[27]

[22] As described, the record also establishes that before the Respondent withdrew recognition, it rejected the Union's proffer of evidence rebutting the asserted loss of majority support. That fact is immaterial with respect to finding a violation of the Act, both under Board law and under the District of Columbia Circuit's decision in *Scomas*, supra, but it strongly suggests that the Circuit would treat a bargaining order as an appropriate remedy here, in contrast to *Scomas*.

[23] See fn. 18, supra.

[24] The evidence relied upon by the judge was not before the Respondent when it withdrew recognition (or, for that matter, when it announced that it would withdraw) and thus cannot be relied upon now. *Levitz*, supra, 333 NLRB at 725−726. See, e.g., *Highlands Regional Medical Center*, supra, 347 NLRB at 1407 fn. 17. See also *Highlands Hospital Corp., Inc. v. NLRB*, 508 F.3d 28, 32 (D.C. Cir. 2007) (affirming Board's refusal to consider employees' hearing testimony because employer "had no knowledge of that corroborating evidence on the day it withdrew recognition"). This principle also applies in cases that do not involve anticipatory withdrawal. See, e.g., *Anderson Lumber Co.*, 360 NLRB 538, 544 (2014). See also *Pacific Coast Supply*, supra, 801 F.3d at 333−334 (affirming Board's decision).

Moreover, as the majority acknowledges, and as the Supreme Court has made clear, the law treats such after-the-fact employee testimony as inherently unreliable and irrelevant to the issue of majority support. See *Gissel Packing*, supra, 395 U.S. at 608 (rejecting "any rule that requires a probe of an employee's subjective motivations [in signing a union authorization card] as involving an endless and unreliable inquiry"). See, e.g., *Leggett & Platt*, supra, 367 NLRB No. 51, slip op. at 14.

[25] As I explained in my December 2017 dissent in *The Boeing Company*, the majority's approach is an "unwarranted break with the Board's practice." *The Boeing Company*, 365 NLRB No. 154, slip op. at 31 (2017) (dissent). Since *Boeing*, the majority has continued its rush to overrule precedent, without public participation. See, e.g., *Ridgewood Health Care Center, Inc.,* 367 NLRB No. 110, slip op. at 15 (2019) (Member McFerran, dissenting in part).

[26] Just as inapposite is the majority's claim that the "*Levitz* 'peril' rule created an opportunity that unions reasonably seized" to "mount a counter-offensive" in order to "reacquire majority status," to win an unfair labor practice case and a bargaining-order remedy insulating the union from challenge, and ultimately secure a new collective-bargaining agreement that would prolong the union's protected status. Under the majority's scenario, in other words, unions scheme to lull employers into ousting them from the workplace so that they can ultimately return with new advantages—perhaps years later, and only if the Board orders and the employer cooperates. This fanciful scenario illustrates the majority's failure here to engage in reasoned decision-making.

[27] The majority mistakenly argues that because Board law permits anticipatory withdrawal of recognition—an employer may stop bargaining with the union for a new contract, if presented with evidence that the union has lost majority support during the term of the existing contract the Board must treat the union as having *conclusively* lost its majority status when the contract expires, even if the union has rebutted the employer's relevant evidence in the interim. Thus, the majority asserts that the "Board recognizes . . . that when an incumbent union has actually lost majority status . . . before the contract expires, the presumption … of its continuing *post-contract* majority status has been rebutted in fact." (emphasis added).

This assertion is incorrect. It confuses anticipatory withdrawal with actual withdrawal. The Board's anticipatory-withdrawal cases (overruled today by the majority, of course) make clear that the union retains majority status at the relevant time: when the contract ends. Thus, until

The majority, in turn, misconceives the issue now before the Board. According to the majority, the "issue presented in this case . . . is how best to determine the wishes of employees concerning representation where the employer has evidence that at least fifty percent of unit employees no longer desire to be represented by the union, and the union possesses evidence that it has reacquired majority status [sic]." There is an obvious answer to that question under existing law: The employer should file an election petition with the Board, just as *Levitz* expressly permits. If, rejecting this option, the employer chooses to withdraw recognition from the incumbent union unilaterally, then it properly does so at its peril—for the reasons explained in *Levitz*, namely that the presumption of continued union majority support serves to stabilize collective bargaining and that elections are the preferred method of resolving representation questions. To be sure, under the election procedure permitted by *Levitz*, the incumbent union (because it *is* the incumbent) remains in place unless and until employees reject the union in a secret-ballot vote. *That* fact seems to be the unspoken reason for the majority's creation of a "new framework" for cases like this one.

Incredibly, the majority states that its new framework is a "better option" than the *employer*-initiated election option under *Levitz*, without explaining why the latter option does not adequately serve the policies of the National Labor Relations Act. Because it has "failed to consider an important aspect of the problem" ostensibly before the Board, the majority has not engaged in reasoned decision-making.[28] The existing *Levitz* election option plainly does further the Act's aims of preserving both employee free choice *and* stable collective-bargaining relationships.

Indeed, the majority properly should consider making the *Levitz* option mandatory. There are powerful arguments—made by the Board's immediately prior General Counsel—for why the Board should flatly *prohibit* employers from unilaterally withdrawing recognition and should instead require them to seek Board elections whenever they are otherwise free to challenge the union's majority status.[29] Such a rule seems especially appropriate where, as here, the union's representative status was certified by the Board as the result of an election—again, a fact that the majority never mentions, but which surely is relevant. Why should an employer ever be free to unilaterally deprive a union of a status conferred by a secret-ballot Board election, when it is well established, as reflected in the Supreme Court's *Gissel* decision,[30] that Board elections are the best method of determining a union's majority support? The majority does not adequately answer that question here.

III.

Instead of adhering to existing law or addressing the perceived problem here by eliminating employer unilateral withdrawal altogether, the majority adopts an entirely new (and perplexingly complicated) scheme with obvious flaws, already described. None of the reasons offered by the majority for its new scheme withstands scrutiny.

A.

First, the majority claims that "existing precedent does not properly safeguard employee free choice." According to the majority, current law errs in its treatment of the signatures of "dual signers"—i.e., the employees who first signed a petition opposing the union and then signed cards supporting the union—by "giving controlling effect to the later signature." This "last in time" rule, the majority says, "ignores the fact that dual signers have expressed both support for *and* opposition to union representation within a brief period of time." (emphasis in original). The majority's characterization does not accurately explain the operation of existing law.

today, the employer could not lawfully withdraw recognition, if objective evidence, obtained by the union before the contract expired, demonstrated that the union has not lost majority support. In other words, Board precedent establishes that in the circumstances presented here, the union's "continuing post-contract majority status" has *not* been rebutted—either "in fact" or in law.

[28] *Motor Vehicle Manufacturers' Ass'n of the U.S., Inc. v. State Farm Mutual Auto. Insurance Co.*, 463 U.S. 29, 43 (1983). As the District of Columbia Circuit has recently explained, in a case involving the Board:

> An agency decision is arbitrary when it "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency."
>
> . . .
>
> The Board's decision, therefore, must "enable [the court] to conclude that [its action] was the product of reasoned decision [] making," . . . in part because the Board "engage[d] the arguments raised before it," . . . including those of a dissenting member.
>
> *Hawaiian Dredging Construction Co., Inc. v. NLRB*, 857 F.3d 877, 881 (D.C. Cir. 2017) (citations omitted; brackets in original).

[29] See NLRB General Counsel Memorandum GC 16-03, *Seeking Board Reconsideration of the* Levitz *Framework*, 2016 WL 2772273 (N.L.R.B.G.C.) (May 9, 2016). Then-General Counsel Richard F. Griffin, Jr. argued that the *Levitz* framework "has created perils for employers in determining whether there has been an actual loss of majority support for the incumbent union, has resulted in years of litigation over difficult evidentiary issues, and in a number of cases has delayed employees' ability to effectuate their choice as to representation." Id. at *1.

[30] *Gissel Packing Co.*, supra, 395 U.S. at 602.

Under existing law, with its rebuttable presumption of continuing majority support for the incumbent union, it is the employer's burden to prove that the union has actually lost majority support. That burden of proof cannot be carried with dual-signed cards.[31] And the failure of the employer to carry its burden of proof simply means that the incumbent union remains in place, for the time being. The union does not *become* the bargaining representative because the dual-signing employees' original signatures are not counted; the union already *is* the representative. The key point here, rather, is that an employer cannot demonstrate that the union has actually lost majority support if what the evidence shows is that for a crucial number of employees, their "representational sentiments" are in question.

The existing *Levitz* option, of course, provides a way to resolve this uncertainty about "representational sentiments." Confronted with conflicting evidence in the form of an employee-disaffection petition and union-authorization cards, the employer may seek a Board election. The secret ballots cast by employees in that election—not their petition or card signatures—will be given "controlling effect." The majority completely fails to explain here why the *Levitz* option is insufficient to "safeguard employee free choice" in the face of "unsettled" "representational sentiments."[32] Relatedly, the majority gives cursory treatment to an issue presented in some "anticipatory withdrawal" cases, but not this one: what to do in situations where the union fails to disclose the existence of its rebuttal evidence before the employer actually withdraws recognition.[33]

B.

The majority's second reason for adopting a new scheme—that "existing precedent does not effectively promote labor relations stability"—is unavailing. According to the majority, permitting the union to rebut the employer's claimed showing of loss of majority support in an unfair labor practice proceeding "results in an unwarranted disruption of the bargaining relationship, which could have been avoided had the employer known that its disaffection evidence had been superseded." The flaws in this assertion are obvious.

First, the "disruption of the bargaining relationship" is caused by the employer's unilateral withdrawal of recognition from the union—which is entirely a matter of choice. Under the *Levitz* option, an employer presented with evidence of the union's loss of majority support always has the safe harbor of seeking a Board election.

Second, insofar as the concern is that the employer might withdraw recognition in ignorance, unaware of the union's rebuttal evidence, then that concern could be

[31] The same is true, as noted earlier, when an employer recognizes a union whose majority status is contested by a rival union, each with cards supporting a claim of majority support. See *Le Marquis Hotel,* supra, 340 NLRB at 488.

[32] In justifying its new scheme, the majority claims that "[i]t ends the unsatisfactory process of attempting to resolve conflicting evidence of employees' sentiments concerning representation in unfair labor practice cases" and that "[in]stead, such issues will be resolved as they should be: through an election, the preferred method for determining employees' representational preferences." But the "unsatisfactory process" cited by the majority is entirely a function of the employer's decision to withdraw recognition unilaterally from the union, instead of seeking a Board election—its option under *Levitz*. And if the majority wanted to ensure that the "unsatisfactory process" never was triggered, then the obvious solution would be to prohibit employers from withdrawing recognition unilaterally and instead provide that a union's status could be lost only through a Board election.

[33] This was the situation in *Scoma's of Sausalito, LLC*, 362 NLRB 1462 (2015), enf. denied in part 849 F.3d 1147 (D.C. Cir. 2017), which led the District of Columbia Circuit to find the employer's withdrawal of recognition unlawful, but to reject the Board's remedy of a bargaining order (which would have insulated the union from a challenge to its status). In past cases, as the majority explains, dissenting Board members have argued that existing law should be changed to require a union to disclose its rebuttal evidence to the employer, as a prerequisite for finding a subsequent withdrawal of recognition unlawful. See, e.g., *Scoma's*, supra, 362 NLRB 1462, 1462 fn. 2 (dissenting view of then-Member Johnson). This would be a departure from the *Levitz* rule, under which employers who forego the option of a Board election withdraw recognition at their peril.

The majority says the disclosure requirement "has merit," but that "a Board-conducted secret-ballot election provided under [it]s new framework is the better solution." The majority's explanation for its choice is inadequate. And the "secret-ballot election" that the majority touts is, as explained, a false fix. The majority's framework permits the employer to oust an incumbent union *without* a Board election, based on evidence that does not prove actual loss of majority support, and then requires the *union* to seek and win a Board election to restore the status taken away by the employer.

The disclosure-requirement issue is not presented here, where the union offered to show its rebuttal evidence to the employer before the employer withdrew recognition but was rebuffed without explanation. Imposing such a requirement would, in any case, be of dubious value.

First, as *Levitz* made clear, employers presented with evidence showing that the union has lost majority support always have the safe harbor of seeking a Board election, instead of withdrawing recognition. Second, requiring unions to provide their rebuttal evidence—which will reveal the identity of employees who support the union, in a setting where the employer may well wish to oust it—exposes employees to employer retaliation. As the Supreme Court in *Gissel* explained, employees are vulnerable because they are economically dependent on the employer and it is the employer that controls the employment relationship. 395 U.S. at 617. Employees who support the union, but who fear retaliation, may not wish to demonstrate their support if they know that their identities will be disclosed to the employer. Third, even without a Board-imposed requirement, unions have a strong, practical incentive to disclose their rebuttal evidence: persuading the employer not to withdraw recognition and thus avoiding what might be years of unfair labor practice litigation to restore the union's status. Where employees do not fear employer retaliation, or where they are willing to risk retaliation to preserve the union's status, the union may well decide to present the employer with its rebuttal evidence, even if not legally required to do so.

addressed by imposing a disclosure requirement on the union—an option that the majority inexplicably rejects. That option is flawed, as explained,[34] but it remains less damaging to the Act's policies than the majority's new scheme.

Third, if existing law is being reconsidered, then the majority must explain why the Board should not decide to prohibit employers from unilaterally withdrawing recognition altogether and instead always require a secret-ballot Board election before an incumbent union may lose its status. Such an approach avoids disrupting an existing bargaining relationship unless and until employees' views on union representation have been determined by the best method.

It is no answer to say, as the majority does, that its scheme avoids an "unlawful disruption of the bargaining relationship." What the majority does is to permit a *lawful* disruption of the bargaining relationship, in circumstances where the employer is unable to prove that the incumbent union has actually lost majority support. As explained, this approach cannot be reconciled with long-established policies: it serves neither employee free choice, nor collective-bargaining stability.[35]

C.

The majority next insists that the "treatment of dual signers under current precedent is analytically unsound" because it is "asymmetrical" in two respects: (1) the union may rebut the employer's showing of loss of majority support "with after-acquired evidence the employer did not possess," and (2) the employee's signature on the original disaffection petition is treated as having been "revoked" by the later-signed union-authorization card, regardless of whether the employer is aware of the "revocation," while in entirely different circumstances the Board will not recognize an employee's revocation of an authorization card without prior notice to the union. These arguments are baseless.

The supposed improper "asymmetry" of permitting the union to rely on "after-acquired" evidence does not exist. By definition, the union's rebuttal evidence will be "after-acquired" because it is the employer's announcement of anticipatory withdrawal that notifies the union that its majority status is under challenge. The union, of course, is the incumbent bargaining representative. At the time of the employer's announcement, it enjoys a conclusive presumption of majority support, and at the time of actual withdrawal (after the collective-bargaining requirement expires), the incumbent union is still protected by a rebuttable presumption of majority support, which the employer must overcome. The "asymmetry" here, then, is simply a function of the continuing presumption of majority support, applicable at all relevant times.

As for the supposed "asymmetry" as to card revocation, it, too, is nonexistent. The principle cited by the majority applies in cases where the union's attempt to win representation has been frustrated by the employer's unfair labor practices and the Board, instead of directing an election, issues a *Gissel* bargaining order requiring the employer to recognize and bargain with the union.[36] Such an order requires that the union have demonstrated majority support at the time it demanded recognition from the employer; in that context, the Board refuses to invalidate authorization cards, where employees belatedly assert that they wish to revoke them. The difference with this case is obvious. Where withdrawal of recognition from an incumbent union is the issue, the operative time for determining actual loss of majority support is necessarily the time at which recognition was withdrawn – not before (or, for that matter, after). There is no "asymmetry," then, only different types of cases.

D.

The majority's final justification for its new scheme provides no support at all—to the contrary, it only highlights the majority's failure to engage in reasoned decision-making here. Citing the District of Columbia Circuit's decision in *Scomas*, supra (and the concurring opinion of Circuit Judge Henderson, which does not represent the view of the court), the majority insists that the case supports permitting an employer to withdraw recognition unilaterally—despite the absence of evidence proving that the incumbent union has lost majority support – and then requiring the union to seek and win a Board election in order to restore the representative status that the employer took away. This argument is mistaken from premise to conclusion.

First, in *Scomas*, the court affirmed the Board's finding that the employer had, indeed, unlawfully withdrawn recognition from the incumbent union. The court, how-

[34] See fn. 32, supra.

[35] My colleagues reject the "election-only" approach even though they repeatedly concede that the best way to determine employees' wishes concerning representation is through a secret-ballot Board-conducted election. The majority points out that the *Levitz* Board rejected the "election-only" approach, but the Board also observed that "[i]f future experience prove[d] [the Board] wrong" in its belief that employers would be less likely to withdraw recognition unilaterally under the *Levitz* rule, the "Board can revisit this issue." 333 NLRB at 725–726. The Board's experience since *Levitz*—as reflected, for example, in the anticipatory-withdrawal cases—suggests that revisiting the issue may, indeed, be appropriate. Today's decision will predictably lead to more unilateral withdrawals of recognition by employers.

[36] See *Struthers-Dunn, Inc.* 228 NLRB 49, 49 & 69−70 (1977), enf. denied 574 F.2d 796 (3d Cir. 1978).

ever, rejected a bargaining-order remedy because the union had failed to disclose its rebuttal evidence to the employer before the employer actually withdrew recognition. The court described the case as "an unusual one in which the [u]nion withheld evidence about its restored majority status"[37] and observed that "[f]ar from being deliberate or calculated, [the employer's] violation was unintentional."[38] This case, as explained, is factually distinguishable: the Union offered to show its rebuttal evidence to the Employer before the effective date of withdrawal but was rebuffed without explanation. Nothing in the court's decision supports either finding *no* violation in this case (as the majority does) or denying a bargaining-order remedy. Insofar as *Scomas* might support the imposition of a disclosure requirement on unions in cases like this one, the majority has expressly rejected that (debatable) option, without a real explanation.

Second, in purporting to "agree" with the District of Columbia Circuit that a Board election is the best way to decide representation questions, the majority ignores two obvious options: (1) adhering to existing law, which permits *employers* to seek an election when confronted with evidence that creates a good-faith reasonable uncertainty about the union's majority support (here, the original employee-disaffection petition would have sufficed, even without the union's proffered rebuttal evidence); and (2) adopting a new prohibition against employer unilateral withdrawal of recognition and instead always requiring a Board election. In observing that the "determination of union majority status through unfair labor practice litigation in cases like these has proven to be unsatisfactory" and that a "Board-conducted secret ballot election, in contrast, is the preferred means of resolving questions concerning representation," the majority echoes the arguments of former General Counsel Griffin cited earlier—and begs the question of why unilateral withdrawal should ever be permitted to employers.

It is no answer for the majority to say that "unions, too, should have an electoral mechanism to determinate the will of the majority following an anticipatory withdrawal of recognition." This merely adds insult to injury. The majority generously grants its new electoral mechanism to unions by first permitting employers to withdraw recognition from an incumbent union without having to prove that the union has actually lost majority support. And, of course, under existing law, a union is *already* free to seek a Board election when recognition has been withdrawn by the employer, whether lawfully or unlawfully. The majority's gift, then, is worth less than nothing. Incredibly, the majority nevertheless describes its new scheme as "fair."[39]

Moreover, the majority engages in circular reasoning, insisting that because its presumption of majority status has been rebutted, the incumbent union "must do something to restore, if it can, its majority status." But *whether* the union's continuing presumption of majority status has been rebutted by the employer is precisely the issue. Only by allowing employers to rely on evidence of loss of majority support at the time anticipatory withdrawal is announced, and by precluding unions from rebutting the employer's evidence with their own evidence before withdrawal is actually effectuated, can the majority claim that the union must "restore . . . its majority status." Absent evidence of the actual loss of majority support at the time recognition is withdrawn, it should be obvious that there is no need for an incumbent union to "restore" anything. It was, and it should remain, the bargaining representative of employees.

IV.

As explained, the majority's new scheme is contrary to basic labor law principles—that a union is entitled to a continuing presumption of majority support and that elections are the best way to resolve questions of representation—and its adoption reflects the failure of the majority to engage in reasoned decision making. But even if adoption of the new scheme could somehow be justified as a general matter, the majority's decision to apply the scheme retroactively in this case is untenable, because it works a manifest injustice on the Union here. The majority acknowledges the "manifest injustice" standard but fails completely in its attempt to explain why retroactivity is appropriate. "In determining whether the retroactive application of a Board rule will cause

[37] *Scomas of Sausalito*, supra, 849 F.3d at 1156.
[38] Id. at 1157.

[39] Even considered on its own terms, the majority's new scheme is riddled with unexplained and unworkable features, including the 45-day window period, following the employer's announcement of anticipatory withdrawal, during which the union must file a petition in order to restore the majority status that it never actually lost. The majority's explanation of why a union's rebuttal evidence—even if gathered and proffered before the contract expires—may be disregarded entirely is double-talk.

Meanwhile, the majority's complicated treatment of the employer's ability to make unilateral changes in employees' terms and conditions of employment, while the union's status is being determined, makes it highly likely that elections conducted under its scheme will be challenged based on objectionable employer conduct. The majority describes withdrawing recognition as "generally . . . a risk-free act," but points out that "making unilateral changes poses considerable risks." Thus, the majority simply substitutes a new risk for the *Levitz* "withdraw-at-peril" rule, to no clear end. Under the majority's scheme, an employer may well be lured to withdraw recognition *and* to make unilateral changes (precisely the appeal of ousting a union) only to find themselves in protracted litigation, with continued instability in the workplace.

manifest injustice, the Board will consider the reliance of the parties on existing law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application."[40] Each of these three factors weighs against retroactivity.

To begin, it is clear that the Union relied on existing law, which had been consistently applied by the Board and approved by the courts. As *Levitz* illustrates, when the Board has altered the law governing employer withdrawals of recognition to limit employer action, it has done so prospectively, so as not to place an unfair burden on employers who relied on existing law in withdrawing recognition and so unexpectedly faced unfair labor practice liability.[41] Here, in giving employers greater freedom, the majority gives no weight to unions' reliance interests, allowing the Respondent to oust the Union unilaterally—despite the fact that the Respondent's withdrawal of recognition clearly violated the Act under existing law—while faulting *the Union* for not filing an election petition with the Board.[42] The majority admits that the "Union would not have been aware, before [its] decision today, that it had to file an election petition in order to re-establish its status." Contrary to the majority, there was also no independent reason for the Union, a Board-certified incumbent representative that had not lost majority support, to file a petition (in contrast to the Respondent).[43] Indeed, had the Union filed a petition it effectively would have conceded that the Respondent's withdrawal of recognition was lawful, i.e., that it had lost its representative status and could restore it only through a Board election. No fair and free election, meanwhile, could have been held while the Respondent's unfair labor practices remained unremedied and employees reasonably viewed the Union as impotent.

Retroactivity, in turn, would do very little to accomplish the purposes of the Act. The majority does not seem to claim that its new scheme is required by the Act, i.e., that the Board was not free to adopt its prior approach in "anticipatory withdrawal" cases like this one. Such a claim would be contrary to the decisions of the District of Columbia Circuit affirming the Board in prior cases. And if the new scheme is not required by the Act, then declining to apply it retroactively is no great harm.

Finally, here there is a "particular injustice" in retroactive application. Now that the Respondent's withdrawal of recognition has been held lawful, the Union is free to file a petition to restore its status, but it is much too late to meet the time-requirements of the majority's new scheme (requiring a union to file a petition within 45 days after recognition is withdrawn), which at least might have preserved the status quo with respect to employees' terms and conditions of employment, while the Union's petition was processed by the Board. The employees in this case have been without union representation for more than 4 years.[44] It is no answer for the majority to cite the interests of the employees who signed the original disaffection petition. Given the number of employees who signed that petition and then quickly signed union-authorization cards as well, it is indisputable that the Union never lost majority support. It was the Respondent, not the Union, that prevented employees who opposed the Union from voting in a secret-ballot election, by failing to file a petition itself and by instead withdrawing recognition unilaterally. It is obviously unjust to vindicate their interests by endorsing the Respondent's conduct.

[40] *SNE Enterprises*, 344 NLRB 673, 673 (2005).

[41] *Levitz*, supra, 333 NLRB at 729.

[42] The majority's effort to paint the Union here as somehow culpable extends even to misleadingly asserting that the "Union's offer to disclose its evidence [was] conditioned on reciprocity." As described, the correspondence between the Union and the Respondent shows that the Respondent repeatedly refused to provide the Union with the evidence that it claimed demonstrated the Union's loss of majority support, i.e., the employee petition. The Union offered to compare evidence with the Respondent, an offer that the Respondent rejected, without explanation. The Union never told the Respondent that it would *not* present its cards *unless* the Respondent presented its evidence. The stalemate here, in short, was the Respondent's doing, and the Respondent must be held responsible, because it had the legal burden to show that the Union had lost majority support and because it was put on notice that its evidence was insufficient to make that showing.

[43] It was the Respondent that had the right, and every reason, to file an election petition, rather than unilaterally withdrawing recognition, under the *Levitz* option.

[44] Instead of attempting to explain why no "particular injustice" is presented by retroactivity here, my colleagues try to change the subject by citing other Board decisions involving retroactivity in circumstances unlike those presented here. In *John Deklewa & Sons*, 282 NLRB 1375, 1389 (1987) enfd. 843 F.2d 770 (3d Cir. 1988), the Board pointed to the "unsettled and confusing nature" of precedent as making it "less likely" that the respondent employer had acted in reliance on it. Here, there is nothing "unsettled and confusing" about the precedent the majority overrules.

In turn, my colleagues argue that it is "difficult to reconcile" my opposition to retroactivity here with my support for retroactive application of the revised joint-employer standard in *BFI Newby Island Recyclery*, 362 NLRB 1599 (2015). But that case also presented nothing like the "particular injustice" created by the majority today. The *Browning Ferris* Board clarified the applicable standard in an unsettled an area of the law by reestablishing longstanding prior precedent that had been altered without explanation. By contrast, the majority today invents an entirely new procedural requirement from whole cloth, turning longstanding presumptions and precedents on their head. It should be obvious that it is manifestly unjust for the Union be punished for failing to comply with a requirement that the Board had not yet imposed (or even hinted it). Further, and importantly, unlike the current majority, the *Browning Ferris* Board provided advance notice to the parties and the public at large that it was considering revising the joint-employer standard and invited briefing from all concerned. Thus, the parties there—unlike here—at least had an opportunity to address the consequences of potential revisions before they were made.

V.

Today, the majority imposes a contrived solution on a nonexistent problem. Employers in cases like this one face no real dilemma. The situation is this: Presented with objective evidence that the union has lost majority support—but precluded (under the Board's "contract bar" doctrine) from withdrawing recognition because a collective-bargaining remains in effect the employer announces that it *will* withdraw recognition *when the contract expires* (under the "anticipatory withdrawal" doctrine). But before the contract expires, and so before withdrawal can be effectuated, the union gathers evidence showing that it has *not* lost majority support, and, though not required to do so, even offers to share that evidence with the employer. What is the employer to do? The answer under *Levitz* is obvious: petition for a Board election.

Instead of following sound precedent, the majority constructs an entirely new scheme for addressing cases like this one. Disregarding the union's continuing presumption of majority support and dismissing the union's rebuttal evidence as immaterial, the employer is now permitted to oust the union as the employees' bargaining representative the second the contract expires—and the union remains ousted, unless and until it seeks and wins a Board election.[45]

The Supreme Court has observed that when it comes to employers who unilaterally withdraw recognition from incumbent unions, "[t]here is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom."[46] That is precisely what *Levitz* and the Board's "anticipatory withdrawal" cases have done, with the approval of the federal courts. In contrast, the majority's apparent aim is to let employers off the leash completely, even in cases like this one, where it is clear that the employer is vindicating not "employees' organizational freedom," but rather its own interest in ousting a Board-certified union without an election. Here, letting employers off the leash means that unions and the workers that support them will get bit. That result may not trouble the majority, but it is inimical to the National Labor Relations Act. Accordingly, I dissent.

[45] While the majority's new framework applies to only a narrow class of *Levitz* cases, its approach is especially troubling insofar as it might signal a desire to impose similar "recertification" requirements on unions that currently enjoy a presumption of majority support. Such a requirement would be fundamentally at odds with the Act and its policies.

[46] *Auciello Iron Works,* supra, 517 U.S. at 790.

Dated, Washington, D.C. July 3, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

Scott C. Thompson, Esq., Jordan Wolfe, Esq., and *John Evans, Esq.,* for the General Counsel.

Mark M. Stubley, Esq. and *H. Ellis Fisher, Esq. (Ogletree Deakins Nash Smoak),* of Greenville, South Carolina, for the Respondent.

Shira T. Roza, Esq., of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. During the term of a collective-bargaining agreement, and in a context free of unfair labor practices, the Respondent received a disaffection petition signed by more than half of the bargaining unit employees. Even though some of the petition signers later signed union authorization cards, their testimony established that they remained opposed to union representation. After the contract expired, the Respondent lawfully withdrew recognition because the Union no longer enjoyed majority support.

PROCEDURAL HISTORY

This case began on May 8, 2015, when the Charging Party, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO and its affiliated Local Union No. 366 (collectively referred to herein as the Union), filed an unfair labor practice charge against the Respondent, Johnson Controls, Inc., with Region 10 of the National Labor Relations Board. The Region docketed the charge as Case 10–CA–151843 and began an investigation.

On August 31, 2015, the Regional Director for Region 10, acting pursuant to authority delegated by the Board's General Counsel, issued a complaint and notice of hearing in this matter. Respondent filed a timely Answer.

On November 16, 2015, a hearing opened before me in Florence, South Carolina. At the hearing, I granted the petition of two of Respondent's employees, Brenda Lynch and Anna Marie Grant, to intervene.

The parties called witnesses and introduced evidence on November 16, 17, and 18, 2015. All of the witnesses testified in person at the hearing, as is customary in Board proceedings. Respondent also sought to call, by videoconference, a witness who was on active military duty and therefore unable to come to the courtroom. However, technical problems frustrated this attempt.

After the Respondent rested, I adjourned the hearing until January 19, 2016, when it would resume by telephone so that the attorneys could present oral argument. During this recess, the Respondent would have another opportunity to call the

unavailable witness by videoconference which counsel, the court reporter and I could "attend" using our individual computers.

During an off-the-record conference call with all counsel on December 28, 2015, I directed that the hearing would resume on January 13, 2016, by videoconference so that Respondent could call and examine the previously unavailable witness. At this point, the General Counsel objected to the videoconference on the basis that the witness no longer would be on active military duty on January 13, 2016, and therefore would be available to testify in person.

The Respondent stated that the testimony of this witness largely would be corroborative and estimated it would take about 15 minutes. Requiring counsel and the court reporter to return to Florence for one-quarter hour of testimony would have entailed costs which, I concluded, would have outweighed the potential benefit of seeing the witness face-to-face rather than on a computer screen. Therefore, I overruled the objection.

On January 13, 2016, the hearing resumed by videoconference to take the testimony of the one witness. Subsequently, the Respondent provided a DVD recording of the testimony, which I have received into the record and reviewed.

On January 19, 2016, the hearing resumed by telephone conference call. After all parties presented oral argument, the hearing closed.

ADMITTED ALLEGATIONS

Based on the admissions in Respondent's answer, I find that the General Counsel has proven the allegations in complaint paragraphs 1, 2, 3, 4, 5(a), 5(b), 7, and 9. Additionally, Respondent's answer admits some of the allegations raised in complaint paragraphs 8(a) and 8(b).

More specifically, I find that the Charging Party filed and served the unfair labor practice charge as alleged. Further, I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act), and that it is appropriate for the Board to assert jurisdiction.

Further, I find that at all material times, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO and its affiliate Local Union No. 3066 have been labor organizations within the meaning of Section 2(5) of the Act.

Moreover, I find that the following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of the Section 9(b) of the Act:

> All Production and Maintenance employees at its facility located at 3046 Bill Crisp Road, Florence, South Carolina for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment covered by this Agreement. Whenever used in the Agreement, the word "employee" shall mean any person employed in the unit as defined by the National Labor Relations Board, Case No. ll-RC-6736 in the Certification of Representative, but excluding all other employees such as but not limited to Supervisors, Professional Employees, Guards, Office Employees, employees whose duties are of a confidential nature, and any excluded employee as defined in the Labor Management Relations Acts of 1947, as amended

The Respondent's answer admits that from August 18, 2010, to May 7, 2015, the Union was the designated bargaining representative of employees in the Unit and their exclusive representative pursuant to Section 9(a) of the Act. I so find. The Respondent denies that the Union remained the exclusive representative after May 7, 2015. That issue will be discussed below.

The Respondent's answer also admits, and I find, that on April 22, 2015, the Union requested to engage in bargaining for a successor collective-bargaining agreement. The Respondent further admits, and I find, that Respondent withdrew recognition from the Union on May 8, 2015.

LEGAL PRINCIPLES

Labor law extends to the workplace some of the same principles which guide other human interactions, but tailors and adapts them to the unique relationships of employer, union and employee. One such principle underlies the caselaw relevant here.

Typically, once someone's status as representative or agent has been established, unless there is some new circumstance casting doubt on that authority, he does not have to keep proving it over and over again. For example, a judge ordinarily does not keep asking a lawyer whether she really is this particular client's attorney.

In labor law, this general sense of what is appropriate and helpful, and what is not, leads to very important and specific rules which further the Act's purpose, "removing certain recognized sources of industrial strife and unrest, *by encouraging practices fundamental to the friendly adjustment of industrial disputes*. . .and by restoring equality of bargaining power between employers and employees." 29 U.S.C. Section 151 (emphasis added). In other words, the rules further the stability of collective bargaining relationships and thereby promote the flow of commerce.

One of these rules concerns when an employer may withdraw recognition from an incumbent union representing a bargaining unit of its employees. In *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), the Board overruled a previous line of cases and established the principle applicable here:

> [A]n employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees, and we overrule *Celanese* and its progeny insofar as they permit withdrawal on the basis of good-faith doubt. Under our new standard, an employer can defeat a postwithdrawal refusal to bargain allegation if it shows, as a defense, the union's actual loss of majority status.

The Board's decision to overrule *Celanese Corp.*, 95 NLRB 664 (1951), meant that an employer no longer could justify its decision to withdraw recognition from a union by producing evidence which only proved it had bonafide reasons to doubt the union's continuing majority status. The *Levitz* decision, which imposed the more stringent "actual proof" standard,

furthered the purposes of the Act because an ongoing collective-bargaining relationship constitutes one of the "practices fundamental to the friendly adjustment of industrial disputes" which Congress intended to encourage. If a mere uncertainty about a union's majority status sufficed to end a collective-bargaining relationship, then a significant part of the statutory framework would be built of straw rather than brick. In *Levitz* the Board stated:

> We find no basis in either the language or the policies of the Act to warrant withdrawing recognition from a union that has not actually lost majority support. Indeed, we find that allowing withdrawal of recognition from unions that enjoy majority support undermines the Act's policies of both ensuring employee free choice and promoting stability in bargaining relationships.

333 NLRB at 723. Under the policy announced in *Levitz*, an employer itching with doubt about whether its employees supported the union can relieve that uncertainty by requesting the Board to conduct a secret ballot "RM" election. Thus, in *Levitz*, the Board further held:

> While adopting a more stringent standard for withdrawals of recognition, we find it appropriate to adopt a different, more lenient standard for obtaining RM elections . . . we shall allow employers to obtain RM elections by demonstrating reasonable good-faith uncertainty as to incumbent unions' continued majority status.

Id. The privacy of the voting booth and the Board's neutrality make such a Board-conducted election the gold standard for determining employee sentiment. However, an employer may withdraw recognition from a union based on other evidence if that evidence actually proves the loss of majority support. In *Levitz*, the Board stressed that an employer relying on such evidence bears the risk should it turn out to be insufficient:

> An employer with objective evidence that the union has lost majority support - for example, a petition signed by a majority of the employees in the bargaining unit - withdraws recognition at its peril.

333 NLRB at 726.

However, even when an employer has enough evidence to prove that the union has lost its majority support, it is not always free to withdraw recognition. For example, a union's majority status may not be questioned during the life of a collective-bargaining agreement, up to 3 years. *Auciello Iron Works v. NLRB*, 517 U.S. 781, 786 (1996).

If an employer, during the term of such a collective-bargaining agreement, receives proof that a majority of bargaining unit employees no longer supports the union, it may announce its intention to withdraw recognition after expiration of the contract. However, it must continue to recognize the union while the contract is in effect.

In determining whether an employer lawfully withdrew recognition, the Board considers whether a majority of employees supported the union *at the time of withdrawal*. Even though the employer may have announced its intent to withdraw recognition months earlier, the actual withdrawal of recognition does not occur until after the agreement has expired. The extent of employee support for the union at this point, when the withdrawal of recognition becomes effective, determines whether the withdrawal was lawful.

In *Parkwood Developmental Center*, 347 NLRB 974 (2006), the employer and the union had entered into a collective-bargaining agreement which expired on March 8, 2003. Three months earlier, during the contract's term, the employer announced that it had received proof that a majority of bargaining unit employees no longer supported the union, and that it would cease to recognize the union after the contract's expiration. During the 3-month period between the employer's announcement and the contract expiration date, the union asked employees to sign a petition authorizing the union to act as their bargaining representative. The signatures on this petition established that a majority of unit employees did support the union at the time the employer withdrew recognition, making that withdrawal unlawful. The Board rejected the employer's argument that the relevant point was in December rather than in March when the contract expired:

> In its exceptions, the Respondent contends that it actually withdrew recognition on December 2, when the only evidence before it pointed to a loss of majority status, and that it was entitled to withhold recognition thereafter pursuant to the "anticipatory withdrawal of recognition" line of cases. See, e.g., *Abbey Medical*, 264 NLRB 969 (1982), enfd. mem. 709 F.2d 1514 (9th Cir. 1983); *Burger Pits*, 273 NLRB 1001 (1984), enfd. sub nom. *HERE v. NLRB*, 785 F.2d 796 (9th Cir. 1986). In essence, the Respondent argues that, having announced on December 2 that it was withdrawing recognition, it was entitled to rely on the evidence existing at that time and to ignore any contradictory evidence that might be presented later. There is no merit in this contention.

347 NLRB at 975. This principle, which results in the union having until the contract expires to build up its support, figures in the present case.

RELEVANT FACTS

The Respondent has admitted that it had recognized the Union as the exclusive bargaining representative of employees in a unit appropriate for collective-bargaining. More specifically, it has admitted that, during the period August 18, 2010, through May 7, 2015, the Union was the designated exclusive representative of employees in that unit. Respondent's answer also admits that it "withdrew recognition on May 8, 2015, after the expiration of the collective bargaining agreement." However, the Respondent asserts that it withdrew recognition lawfully, based on evidence it had received which proved that a majority of bargaining unit employees no longer wished the Union to represent them.

Specifically, in withdrawing recognition the Respondent relied on a petition, signed by 83 employees,[1] which it had received on April 21, 2015. The petition began as follows:

[1] As noted below, an 84th employee signed the petition before the contract's expiration.

UNION DECERTIFICATION PETITION

> WE, THE UNDERSIGNED, EMPLOYEES OF Johnson Controls, Florence facility, DO NOT WISH TO CONTINUE TO BE REPRESENTED BY THE United Auto Workers, LOCAL UNION ~~509~~ 3066 (Local ~~509~~ 3066) FOR PURPOSES OF COLLECTIVE BARGAINING OR ANY OTHER PURPOSE ALLOWED BY LAW. WE UNDERSTAND THIS PETITION MAY BE USED TO OBTAIN AN ELECTION SUPERVISED BY THE NATIONAL LABOR RELATIONS BOARD OR TO SUPPORT WITHDRAWAL OF RECOGNITION OF THE UNION.

(Capitalization as in original. The handwritten number "3066" appeared above the lined-out "509" in both instances.) Below this text were employee signatures and dates.[2]

The same day Respondent received the petition, it sent a letter to the Union. The letter, addressed to International Representative David Bortz and signed by Larry Boswell, the Respondent's U.S. Director of Operations, East Region, stated as follows:

> On April 21, 2015, Johnson Controls, Inc. received objective evidence that a majority of employees employed at the Florence, South Carolina plant within the unit defined in 11-RC-6736 no longer desire to be represented by the UAW. The objective evidence provided to Johnson Controls was an employee petition signed by a majority of employees. Therefore, effective upon expiration of the current labor agreement on May 7, 2015, Johnson Controls will no longer recognize the UAW as the legal representative of the workforce.
>
> We will continue to honor the collective bargaining agreement through the expiration date. However, our previously scheduled dates for bargaining a successor agreement are canceled.
>
> If you have any questions, feel free to contact me.

International Representative Bortz replied by letter dated April 22, 2015. It stated:

> I am in receipt of your letter dated April 21, 2015. The UAW has not received a petition or any verifiable evidence that a majority of employees have expressed not to be represented by our Union.
>
> Therefore, the Union demands to return to the bargaining table to negotiate a successor agreement. You have previously scheduled dates of April 27-30, 2015. We would expect that we resume bargaining on Monday, April 22, 2015.
>
> If you have any questions, feel free to contact me.

In an April 24, 2015 reply, the Respondent informed the Union that it would not provide the Union with its evidence and also declined the Union's request to resume bargaining. The Union then began an effort to counter the disaffection petition. Some prounion employees began asking other employees to sign authorization cards. The cards included the following language:

> I,_____, authorize the United Auto Workers to represent me in collective bargaining.

Among the employees who signed such cards were seven who previously had signed the disaffection petition. These seven employees (and the date each signed a Union authorization card) are Kyle Robinson (May 3, 2015), Harry Lee Jefferson (May 4, 2015), Martha Rogers (May 8, 2015), John Smith (May 6, 2015[3]), McFadden (May 5, 2015), Johnny W. Smith (May 5, 2015), and Kenneth Waters (May 5, 2015). Thus, all but Rogers signed authorization cards before the Respondent withdrew recognition the Union.

On May 5, 2015, the Respondent received a second petition with the same wording quoted above and bearing the signature of one employee. In effect, it added one name to the existing disaffection petition.

Also on May 5, the Respondent sent the Union another letter. It stated, in part:

> We have not received any evidence from the union or otherwise that the union continues to have the majority support of the bargaining unit employees. In the absence of such evidence, the Company will withdraw recognition of the union upon expiration of the contract as previously indicated.
>
> The Company remains willing to meet about other matters through the expiration of the contract.

The Union replied that it did enjoy majority support and repeated its request to negotiate. On May 7, 2015, the Respondent sent the Union a letter stating as follows:

> We are in receipt of your May 6, 2015 letter. We have objective evidence of the union's loss of majority support - a petition signed by a majority of the bargaining unit employees. While we acknowledge the union's request to meet, we are not willing, as we previously advised in our April 24, 2015 letter, to share the names of the employees who signed the petition.
>
> You indicate that despite the evidence the Company has re-

[2] The complaint does not allege and the General Counsel does not argue that the Respondent provided any unlawful assistance in the preparation and circulation of the petition and the record would not support such a finding. I conclude that the petition constituted objective evidence that, on the respective dates they signed the petition, the signers did not want the Union to represent them.

[3] Smith could not recall exactly when he signed the Union authorization card but the card itself bore the handwritten date 5–15–15. Although Smith recognized the signature as his own, he testified that the "5–5–15" in the date box did not look like his handwriting. However, Smith mentioned that he had a "problem seeing." When he looked at the date on the card, initially he misread it as "5–15–15" rather than "5–5–15." No other evidence suggests that Smith signed the authorization card on a date other than May 5, 2015. The handwritten date does not appear markedly different from other writing on the union authorization card. In view of Smith's vision problem, I do not attach great weight to his testimony that the date did not look like his handwriting. In the absence of evidence to the contrary, I find that Smith signed the card on May 5, 2015.

> ceived from our employees, the union has evidence it has not lost majority support. However, while the employees provided the Company with their evidence, to date the union has not provided any substantiated evidence supporting its position. Absent contrary evidence, we must rely upon the evidence in our possession and proceed as previously indicated.

The collective-bargaining agreement expired on May 8, 2015, and the Respondent withdrew recognition from the Union.

As noted above, the government does not claim that the petition had been tainted by unfair labor practices. Rather, the General Counsel argues that when the seven employees signed union authorization cards, they effectively removed their names from the disaffection petition, making it insufficient to support a withdrawal of recognition. If the signatures of these seven employees are disregarded, then the total number of petition signers falls below half of the number of employees in the bargaining unit. A disaffection petition signed by less than half of the bargaining unit does not, by itself, prove that the Union had lost majority support.

Here, timing becomes important. The seven employees did not sign union authorization cards until early May 2015 so, when the Respondent received the petition on April 21, no action had called into question the validity of any signatures. Thus, when the Respondent received the petition, it did constitute proof that a majority of bargaining unit employees did not wish to be represented by the Union. If a collective-bargaining agreement had not been in effect, the Respondent lawfully could how withdrawn recognition after it received the petition.

However, the existence of a current collective-bargaining agreement barred the Respondent from withdrawing recognition until that contract expired. Accordingly, the Respondent did no more than notify the Union of its intent to withdraw recognition.

As noted above, under *Levitz*, the Respondent must prove a lack of majority support *at the time it withdraws recognition*, and the opportunity to withdraw recognition would not come until May 8. Therefore, when the Union received the Respondent's April 21 letter, it had about 2 weeks before the figurative "game over" buzzer would sound. During that time, it collected authorization cards signed by a number of bargaining unit employees, including the seven who had signed the disaffection petition. Only the cards signed by the seven petition signers are relevant here because employees who did not sign the disaffection petition are presumed to support the Union.

The government contends that the Union authorization cards signed by the seven petition signers invalidated their earlier signatures on the petition, making it insufficient proof that the Union had lost its majority support. Thus, during oral argument, the General Counsel stated:

> Respondent relied solely on an employee disaffection petition purportedly signed by 83 out of 160 unit employees. Seven of these unit employees who signed the disaffection petition subsequently signed a union authorization card prior to May 8th, which precluded Respondent from relying on their signatures on the petition pursuant to *HQM of Bayside*, 348 NLRB 758 (2006), and *Fremont Medical Center*, 354 NLRB 453 (2009).

To prove that seven of the petition signers had changed their mind, the government introduced into evidence the union authorization cards they had signed. The General Counsel argues that the authorization cards effectively removed the 7 names from the disaffection petition, thereby dropping the total number of signers to 76, or less than half of the 160-employee bargaining unit.

The government's case therefore turns on whether signing the union authorization cards had the effect of nullifying the employees' earlier signatures on the disaffection petition. All of the cards bore the same straightforward language, quoted above, that the signer authorized "the United Auto Workers to represent me in collective bargaining." These words directly contradict the language on the disaffection petition, that the signers "DO NOT WISH TO CONTINUE TO BE REPRESENTED BY THE United Auto Workers."

The authorization cards certainly constitute evidence suggesting that the signers had changed their minds. See *HQM of Bayside*, above. However, the testimony of some of the card signers indicates that they did not understand the significance of signing the authorization card and that they remained opposed to union representation. To what extent should I consider such testimony, and what weight should I give it?

In deciding how this testimony should be treated, it is helpful to consider exactly what the General Counsel must prove to establish that Respondent failed and refused to bargain in good faith, in violation of Section 8(a)(5), when it withdrew recognition from the Union. There is obviously a refusal to bargain - the Respondent admits that it withdrew recognition from the Union - so the inquiry necessarily focuses either on the existence of a duty to bargain or on the Respondent's good faith. Whether or not a duty to bargain existed depends on an objective fact, namely, that a majority of employees continued to support the Union. Whether or not the Respondent acted in good faith presents a subjective question relating to the Respondent's state of mind.

Before *Levitz*, the Board applied a subjective test.[4] The lawfulness of the withdrawal of recognition did not turn on whether a majority of bargaining unit employees wanted union representation but rather depended on the employer's state of mind. The *Levitz* decision changed that standard. Thus, in *Heritage Container, Inc.*, 334 NLRB 455 (2001), the Board explained:

> In *Levitz*, 333 NLRB No. 105 (2001). . .the Board overruled *Celanese Corp.*, 95 NLRB 664 (1951), and its progeny insofar as they permitted an employer to withdraw recognition from an incumbent union on the basis of a good-faith doubt of the union's continued majority status. The *Levitz* Board held that "an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees."

334 NLRB 455, citing *Levitz Furniture Co.*, 333 NLRB at 717. A cursory reading of the *Levitz* decision might leave the im-

[4] This discussion assumes that no circumstance, such as a current collective-bargaining agreement) barred a withdrawal of recognition, and also assumes that the employer had not committed unfair labor practices which prompted or contributed to the employees' disaffection.

pression that the lawfulness of the withdrawal of recognition depends on an actual fact external to the employer's decision-making process. Thus, the decision stated that "unless an employer has proof that the union has actually lost majority support, there is simply no reason for it to withdraw recognition unilaterally." *Levitz Furniture Co.*, 333 NLRB at 725. The Board also stated:

> [W]e hold that an employer may rebut the continuing presumption of an incumbent union's majority status, and unilaterally withdraw recognition, only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit.

Id. At first glance, these quoted passages might seem to suggest that the lawfulness of the withdrawal of recognition turns solely on an objective, ascertainable fact external to the employer's decision-making process: Whether or not the Union enjoyed majority support at the time the employer withdrew recognition. However, the actual analysis is more complicated.

If the existence or nonexistence of majority support were the sole deciding factor then, logically the employer would be allowed to present all relevant evidence on this point, regardless of when it obtained the information, that is, whether it obtained the information before or after the withdrawal of recognition. Under such a totally objective standard, the employer's knowledge at the time it withdrew recognition would not matter but only the objective fact that the union had lost majority support. However, under *Levitz*, the lawfulness does not turn on the objective fact alone but rather on whether the employer can prove it. Moreover, the Board will only allow the employer to base this proof on information the employer *actually relied upon* when it decided to withdraw recognition. See, e.g., *Highlands Regional Medical Center*, 347 NLRB 1404 (2006).

Thus, the *Levitz* decision provides a framework for deciding both the existence of a bargaining duty and the good faith of the employer. As to the existence of a bargaining duty, *Levitz* presumes that an incumbent union continues to enjoy majority support but allows the employer to rebut that presumption. To address the subjective question, an employer's good faith in withdrawing recognition, the Board limits the evidence an employer can use to rebut the presumption of an incumbent union's continuing majority status: The employer may only use evidence it actually possessed and considered when it made the decision to withdraw recognition. If such evidence does not rebut the presumption, then the employer's decision to withdraw recognition could not have been in good faith.

The *Levitz* framework thus provides a way to decide the two intertwined issues—the existence of a bargaining duty and the employer's good faith—at the same time. The unusual facts of this case, however, complicate the use of this framework. The disaffection petition, on its face, carried the Respondent's burden of rebutting the presumption that the incumbent Union continued to enjoy majority support. When the government introduced the union authorization cards, it was attacking the sufficiency of the objective evidence which Respondent relied upon, but doing so with evidence the Respondent had not possessed.

In other words, the union authorization card evidence relates to the objective question, whether a bargaining duty still existed, rather than to the subjective question of whether the Respondent acted in good faith when it withdrew recognition. Thus, there appears to be an asymmetry: The Board only allows the Respondent to prove the objective fact—the Union's loss of majority support—using information the Respondent actually had possessed, but it permits the General Counsel to challenge that proof with evidence the Respondent had not possessed.

For reasons discussed above, the government's Union authorization card evidence does not call into question the Respondent's subjective good faith because Respondent had no reason to doubt that the signatures on the disaffection petition reflected the signers' rejection of union representation. Based on the record, I find that Respondent acted in good faith when it relied on the disaffection petition because it did not know about employees signing union authorization cards and reasonably could not have known; the Union did not provide this information.

The General Counsel's evidence that certain petition signers later signed union authorization cards can prove, at most, that Respondent made a mistake in relying on the disaffection petition. But whether Respondent actually made such a mistake depends on the intent of the employees when they signed the union cards. By introducing the union authorization cards and by calling many of the signers as witnesses, the government has opened the door for cross-examination concerning their intent. Fairness requires a careful consideration of this testimony.

Moreover, it is important that this proceeding do justice and neither play nor create the appearance of playing "gotcha." Regardless of whether the Union had any legal duty to inform the Respondent of the authorization cards, its silence about them left the Respondent with no reason to doubt the validity of the signatures on the disaffection petition.

The Union clearly could have furnished this information before the Respondent made the decision to withdraw recognition and the information might well have affected that decision. Thus, 2 days before it withdrew recognition, the Respondent's May 5, 2015 letter to the Union stated:

> We have not received any evidence from the union or otherwise that the union continues to have the majority support of the bargaining unit employees. In the absence of such evidence, the Company will withdraw recognition of the union upon expiration of the contract as previously indicated.

These words clearly imply that Respondent remained open to considering evidence that contradicted the disaffection petition and that such evidence might change its decision to withdraw recognition. When it received this letter on May 5, the Union did have such evidence, the authorization cards, but did not tell the Respondent.

Instead, the Union waited until the Respondent withdrew recognition on May 8 and then, on that same date, filed the unfair labor practice charge in this case. The government then prosecuted the Respondent for taking an action which appeared to be lawful based on the information Respondent possessed, and only appeared unlawful in light of the information which the Union had withheld.

Certainly, it is well established that an employer "acts at its

peril" when it chooses to withdraw recognition rather than petitioning for the Board to conduct an RM election. However, I do not believe that the Board intends this principle to be extended so far that it smiles on "gotcha."

Ultimately, though, the most important interest to be protected here is the employees' right to be represented by representatives of their own choosing or to refrain from having such representation. If a majority of employees did support the Union at the time Respondent withdrew recognition, the harm must be undone. To determine whether the petition signers who later signed union authorization cards had changed their minds, I will weigh their testimony.

Employee Harry Lee Jefferson testified that he received the Union authorization card at the end of a 12-hour shift and "really didn't know really exactly what it was." Jefferson's testimony during cross-examination included the following:

> Q. On May 8, did you support decertifying the Union?
> A. Yes.

Like Jefferson, employee John A. Smith signed the disaffection petition and then later signed a union authorization card. During cross-examination, after acknowledging that he had signed the disaffection petition, Smith testified as follows:

> Q. Did you understand that the Company would rely upon that [petition] and withdraw in recognition?
> A. Yes, sir.
>
> Q. On May 8th when the Company withdrew recognition, did you still intend for the Company to rely upon that?
> A. Yes, sir.

Another employee named John Smith (and referred to as "Johnny Smith") also signed the disaffection petition and later signed a union authorization card. He testified that, when the Respondent withdrew recognition from the Union, he supported that action notwithstanding that he had signed a union authorization card.

Employee Morris McFadden signed the disaffection petition and then later signed a union authorization card. From McFadden's testimony on cross-examination, I conclude that he did not support the Union when he signed the disaffection petition and did not change his mind later. Rather He signed the union authorization card simply to "go along" and avoid conflict with other workers. On cross-examination, McFadden testified, in part, as follows:

> Q. Okay You never intended to back out of your signature to decertify the Union, did you?
> A. No, sir
>
> Q. And on May 8th, when the Company withdrew recognition, you supported the Company taking that action?
> A. Yes, sir.

Based upon my observations of the witnesses during the hearing, I conclude that Harry Lee Jefferson, John A. Smith, Johnny Smith, and Morris McFadden gave reliable testimony. The record affords no reason to doubt Jefferson's testimony that he received the Union authorization card at the end of a 12-hour shift and "didn't know really exactly what it was." Crediting his testimony, I conclude that Jefferson did not understand that signing the card could nullify his signature on the disaffection petition. Further, I find that Jefferson continued to oppose representation by the Union at the time Respondent withdrew recognition.

Crediting Morris McFadden's testimony, I find that when he signed the union authorization, he did not intend to rescind signature on the disaffection petition. Similarly, based on the credited testimony of John A. Smith and Johnny Smith, I find that they did not intend to negate their signatures on the disaffection petition. Further, I conclude that Jefferson, McFadden, and the two Smiths remained opposed to union representation at the time Respondent withdrew recognition.

However, I do not find that another employee, Kyle Robinson, remained opposed to union representation at the time Respondent withdrew recognition. Robinson had signed the deauthorization petition and later signed a union authorization card. Based upon my demeanor observations, I credit Robinson's testimony, but that testimony does not establish that he remained opposed to union representation after he signed the union authorization card. Therefore, I conclude that Robinson's signature on the union authorization card resulted from and reflected a change in his attitude about union representation.

Another employee, Kenneth Waters, signed the disaffection petition but later signed a union authorization card. Waters did not testify. In the absence of evidence that Waters continued to oppose union representation after signing the union authorization card, I conclude that Waters had changed his position on the issue of union representation.

In sum, I find that Waters and Robinson changed from being against union representation to supporting it. Therefore, their signatures on the disaffection petition cannot be counted in determining whether the Union still enjoyed majority support.

Employee Martha Rogers signed a union authorization card on May 8, which was after the Respondent withdrew recognition from the Union. Therefore, her signature on the disaffection petition remained in effect at the time recognition was withdrawn and will be counted in determining whether a majority of bargaining unit employees then wanted Union representation.

For reasons discussed above, I find that employees Jefferson, McFadden, John A. Smith, and Johnny Smith continued to oppose union representation notwithstanding that they signed union authorization cards. Therefore, their signatures on the disaffection petition should be counted.

The total number of signatures on the disaffection petition increased to 84 on May 5, 2015, when the Respondent received a page bearing one additional signature. However, I have found that Waters and Robinson changed from opponents to supporters of union representation. Because their names cannot be counted, I conclude that the disaffection petition constitutes proof that, at the time Respondent withdrew recognition, 82 of the 160 bargaining unit employees opposed representation by the Union.

Because a majority of bargaining unit employees did not want to be represented by the Union, the Respondent lawfully

withdrew recognition.[5] Therefore, I recommend that the Board dismiss the complaint in its entirety.

CONCLUSIONS OF LAW

1. The Respondent, Johnson Controls, Inc., is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO and its affiliated Local Union No. 3066, are, and have been at all material times, labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[6]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. February 16, 2016

[5] In view of this conclusion, based on the validity of 82 signatures on the disaffection petition, it is not necessary to consider Respondent's argument that it possessed and relied upon other information, consisting of oral statements by employees, when it made the decision to withdraw recognition.

[6] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.