

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

CONSTELLATION ENERGY GENERATION, LLC
Employer,

and

Case No. 13-RC-372880

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL 15
Petitioner.

**BRIEF OF *AMICUS CURIAE*
COALITION FOR A DEMOCRATIC WORKPLACE, NATIONAL FEDERATION OF
INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, ASSOCIATED
BUILDERS AND CONTRACTORS, CHRO ASSOCIATION, NATIONAL
ASSOCIATION OF WHOLESALE-DISTRIBUTORS, NATIONAL RETAIL
FEDERATION, INDEPENDENT ELECTRICAL CONTRACTORS, NATIONAL
ASSOCIATION OF MANUFACTURERS, AND
CHAMBER OF COMMERCE OF THE UNITED STATES**

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Interest of the amicus

The Coalition for a Democratic Workplace (“CDW”) represents hundreds of organizations that employ tens of millions of individuals working in every industry and every region in the United States. CDW provides a collective voice to its membership on issues related to labor law reform.

Associated Builders and Contractors is a national construction industry trade association established in 1950 with 67 chapters and 24,000 members. Founded on the merit shop philosophy, ABC helps members offer a robust employee value proposition, develop people, win work, and deliver that work safely, ethically, and profitably for the betterment of the communities in which ABC and its members work. ABC’s membership represents all specialties within the U.S. Construction industry and is composed primarily of firms that perform work in the industrial and commercial sectors.

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation’s courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation’s leading small business association. NFIB’s mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

National Association of Wholesaler-Distributors (NAW) is a non-profit, non-stock, incorporated trade association that represents the wholesale distribution industry—the essential link in the supply chain between manufacturers and retailers as well as commercial, institutional, and governmental end users. NAW is made up of direct member companies and a federation of

national, regional, and state associations across 19 commodity lines of trade which together include approximately 35,000 companies operating nearly 150,000 locations throughout the nation. The overwhelming majority of wholesaler distributors are small-to-medium-size, closely held businesses. As an industry, wholesale distribution generates more than \$8 trillion in annual sales volume providing stable and well-paying jobs to more than 6 million workers.

The CHRO Association is a public policy organization that represents the most senior human resource officers in more than 360 of the largest corporations doing business in the United States and globally. Collectively, member companies employ more than 10 million employees in the United States, nearly nine percent of the private sector workforce, and 20 million employees worldwide. The CHRO Association's member companies are committed to ensuring that the laws and policies affecting the workplace are sound, practical, and responsive to the needs of the modern economy.

The National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 countries. Retailers represent the nation's largest private sector employer, contributing \$5.3 trillion to the annual GDP and supporting more than one in four U.S. jobs—55 million working Americans. For over a century, NRF has been a voice for every retailer and every retail job, educating and communicating the powerful impact retail has on local communities and global economies. NRF regularly submits filings in cases raising significant legal issues for the retail community.

Independent Electrical Contractors (IEC) is a nonprofit trade association federation with 54 educational campuses and affiliate local chapters across the country. IEC represents more than

4,500 member businesses and educates more than 23,000 electrical apprentices each year through world-class training programs. IEC is the leading organization representing America's independent electrical and systems contractors.

The Chamber of Commerce of the United States of America is the world's largest business organization. As the nation's leading advocate for business, the Chamber represents companies and professional organizations of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in all fifty states and in every industrial sector. Manufacturing employs nearly 13 million people, contributes \$3 trillion to the economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation, fostering the innovation that is vital for this economic ecosystem to thrive. The NAM is the voice of the manufacturing community and leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Together, these associations are referred to as the "Amici." The questions presented to the Board in this case are of great importance to the Amici, as the Board's determination will have immediate and long-lasting effects on their members' labor relations, collective bargaining arrangements, and employment relationships. The determination will also have a profound effect on the members' employees, whose freedom to choose or not choose a labor union is at stake.

Summary of argument

Constellation Energy Generation, LLC asks the National Labor Relations Board to reverse the Regional Director’s decision and hold that the International Brotherhood of Electrical Workers, Local 15, should not have been certified. The Board should grant that request. Section 9(a) of the National Labor Relations Act (the “Act”) states that an exclusive representative may be certified only when it is designated or selected by “the majority of the employees in a unit.” 29 U.S.C. § 159(a). The union did not get such a majority here. It instead got only a majority of the votes cast in the election, which was less than an absolute majority of the unit. Because it was not designated or selected by the majority required by Section 9(a), it cannot be certified. The Regional Director’s decision should be reversed.

By reaching that result, the Board would correct a longstanding error in its own doctrine. For decades, the Board has certified exclusive representatives based not on a majority of the employees in the unit, but rather on a majority of the votes actually cast. *See RCA Manufacturing Co.*, 2 NLRB 159, 173–77 (1936). That approach conflicts with the Act’s text. The text specifies the relevant majority—the employees in the unit. It does not allow certification based on some lesser subset. The Board has long glossed over that requirement, and this case presents an opportunity to correct its approach.

Indeed, correcting the Board’s approach is not only desirable; it is required. The meaning of Section 9(a) is a question of law. To answer such a question, the Board must give the Act its “best meaning.” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024). The Board cannot adopt a different meaning simply to serve extra-textual policy goals. Though the Board has historically relied on policy-oriented rationales, such as discouraging election interference and promoting collective bargaining, those rationales cannot override the text. The Board must read

the text to mean what it says. And Section 9(a) says that the relevant majority is a majority of the employees in the unit. 29 U.S.C. § 159(a). *See also Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 511 (2018) (policy concerns cannot override statutory text); *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (same).

But even if policy rationales were relevant, they still would not justify the votes-cast rule. The rule was adopted in 1936, when the Act unequivocally promoted collective bargaining as the way to guarantee labor peace. *See* National Labor Relations Act of 1935, Pub. L. No. 74-198, § 1, 49 Stat. 449, 449 (codified as amended at 29 U.S.C. § 151) [hereinafter “Wagner Act”]. But in 1947, Congress refocused the Act’s policy on individual choice. It specified that one of the Act’s goals was to ensure that employees were free to join unions, form them, and bargain collectively—or do none of those things. *See* Labor-Management Relations Act of 1947, Pub. L. No. 80-101, § 1, 61 Stat. 136, 136 [hereinafter “Taft-Hartley Act”]. And it explicitly protected the right not to participate. *Id.* § 7 (codified as amended at 29 U.S.C. § 157). Those textual changes shifted the policy balance and tempered the Act’s single-minded focus on promoting collective bargaining. So whether or not the votes-cast rule promoted the Act’s policies in 1936, it does not promote the Act’s policies now. The Act itself is different, and the votes-cast rule aims to promote the policies of a statute that no longer exists. *See Int’l Ladies’ Garment Workers’ Union v. NLRB*, 366 U.S. 731, 740 (1961) (recognizing the right to be free of a representative selected by a minority as a fundamental right under the amended Act); *Hosp. Menonita De Guayama, Inc. v. NLRB (Hosp. Menonita De Guayama II)*, 183 F.4th 745, 759 (D.C. Cir. 2026) (same).¹

¹ *See also* James A. Gross, *Broken Promises: The Subversion of U.S. Labor Policy, 1947–1994* 272–73 (1995) (explaining that the Taft-Hartley Act abandoned a single-minded approach focused solely on promoting collective bargaining to reduce labor strife).

The votes-cast rule was always wrong. It always clashed with the plain text of Section 9(a). But it is especially wrong today. Today, the Act explicitly endorses the right to refrain from collective activity. 29 U.S.C. § 157. Today, the courts explicitly require agencies to follow the law’s “best meaning.” *Loper Bright*, 603 U.S. at 400. And today, executive-branch policy explicitly directs agencies, including the Board, to follow statutory text. *See* Exec. Order No. 14219, 90 Fed. Reg. 10583, 10583 (Feb. 25, 2025) (directing agencies to rescind regulations contrary to law); Memorandum, Directing the Repeal of Unlawful Regulations, White House (Apr. 9, 2025) (citing *Loper Bright*).² These changes mean the Board’s policies must change too. No longer can the Board unthinkingly follow an interpretation of the statute that clashes with the statute’s text, no matter how longstanding; *Loper Bright* forbids it. Instead, the Board must reexamine the text and find its best meaning. And here, that meaning is what Section 9(a) says on its face: the Board may certify an exclusive representative only when the representative wins the votes of a majority of the employees in the unit. All of them.

² Available at <https://www.whitehouse.gov/presidential-actions/2025/04/directing-the-repeal-of-unlawful-regulations/>.

Argument

I. The meaning of Section 9(a) is a question of law.

Section 9(a) provides that a labor organization becomes an exclusive representative when it is “designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes.” 29 U.S.C. § 159(a). The key phrase is “the majority of the employees in a unit.” And the meaning of that phrase is a matter of statutory interpretation—in other words, a question of law.

Statutory interpretation is primarily a linguistic exercise: it requires the interpreter to derive meaning from the text. The interpreter must ask: what would a reasonable person reading these words at the time they were written understand them to mean? The interpreter may consider context, since all language is contextual. But the interpreter’s primary source is the text itself: what does the text actually say? *See, e.g., Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (“We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.”); *NLRB v. Starbucks Corp.*, 159 F.4th 455, 469 (6th Cir. 2025) (“In interpreting a statute, we begin, as always, with its text.”). *See also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012) (explaining that legal interpretation involves deriving the meaning of “the very words of the instrument”).

Contrasted with interpretation is policy. Policy is less about linguistics than practicalities. Unlike the interpreter, the policymaker is not asking what a piece of text means. The policymaker asks instead what policy will produce the best results. In other words, the policymaker is not looking for the text’s instructions; he or she is instead pursuing the text’s goals using whatever powers and limitations the text provides. *See, e.g., Loper Bright*, 603 U.S. at 394–95 (contrasting

interpretation with policymaking); *U.S. Dep’t of Lab. v. Americare Healthcare Servs., Inc.*, 171 F.4th 838, 849 (6th Cir. 2026) (same).

The line between policy and interpretation also turns on the text. Federal agencies have policymaking authority only when it is given to them by Congress. *See Americare*, 171 F.4th at 849. And Congress speaks only through the text of statutes. *Bostock v. Clayton Cnty.*, 590 U.S. 644, 654 (2020). A statute may give an agency authority in at least three ways: it may expressly delegate the authority to an agency; it may authorize the agency to develop rules to fill a statutory gap; or it may use language that inherently invites discretion, such as “reasonable” or “appropriate.” *Loper Bright*, 603 U.S. at 395. When a statute uses one or more of these tools, the agency likely has some leeway to develop policy. But when the question focuses merely on what the text means, the question is interpretive and thus a question of law. *See Americare*, 171 F.4th at 849 (observing that, after *Loper Bright*, agencies acting outside their delegated policymaking authority must apply the statute according to its best meaning).

This case involves interpretation. It asks the Board to decide what Section 9(a) means when it refers to “the majority of the employees in a unit.” That question is primarily linguistic: it requires the Board to determine, in the appropriate context, what these words mean. The meaning of statutory terms is a question of law, and the Board must answer it using legal interpretive tools. *See Starbucks*, 159 F.4th at 468 (applying ordinary tools of statutory interpretation to Section 10(c) of the Act, 29 U.S.C. § 160(c)); *Hosp. Menonita De Guayama II*, 183 F.4th at 757 (applying the same approach to Sections 7 and 9).

By contrast, this case lacks the hallmarks of policymaking. It involves no express delegation to the Board. While Congress has delegated some policymaking leeway to the Board, it has not directed the Board to define the relevant phrase: “the majority of the employees in a

unit.” *See* 29 U.S.C. § 159(a). Nor does this case involve the authority to fill gaps with rules. While Congress has given the Board rulemaking authority, 29 U.S.C. § 156, there is no gap for any rules to fill here. Congress has set the relevant standard in the text; the question is simply what that text means. *See Loper Bright*, 603 U.S. at 399–400 (explaining that the text does not give an agency policymaking authority just because it may be ambiguous in application). Nor, finally, does this case involve terms inviting the Board to exercise discretion. Section 9(a) does use one such term, “appropriate.” But it uses that term in relation to defining the relevant unit. *See id.* § 159(a). It uses no similar term for “the majority of the employees” in that unit. The meaning of that language, then, remains an interpretative one. *Hosp. Menonita De Guayama II*, 183 F.4th at 757–58 (recognizing that the meaning of the terms in Sections 7 and 9 remains a question of statutory interpretation and thus a question of law).

Addressing similar questions under the Act, courts have reached the same conclusion. For example, in *Starbucks*, the Sixth Circuit was asked to determine the meaning of “affirmative action” in Section 10(c). The court recognized that parts of Section 10(c) leave the Board with discretion; the Board may, for example, decide what affirmative action is appropriate in a given case. *Starbucks*, 159 F.4th at 477–78. But even so, the phrase “affirmative action” is not an open-ended delegation: it has substantive content. That content sets the outer bounds of the Board’s remedial authority. And determining what that content is requires statutory interpretation—that is, it raises a question of law. *Id.* (declining to defer to the Board’s policymaking judgment in a case involving the meaning of a statutory term) (“We do not defer to the NLRB’s interpretation of the NLRA, but exercise independent judgment in deciding whether an agency acted within its statutory authority.” (quoting *Rieth-Riley Constr. Co. v. NLRB*, 114 F.4th 519, 527–28 (6th Cir. 2024))).

These decisions now provide a clear framework. Before *Loper Bright*, federal agencies were thought to have leeway to choose any “reasonable” meaning of a statute. That leeway was considered part of an agency’s delegated policymaking power. *See, e.g., Hosp. Menonita de Guayama, Inc. v. NLRB (Hosp. Menonita De Guayama I)*, 94 F.4th 1, 17 (D.C. Cir.) (deferring to Board’s “reasonable interpretations” of the Act), *cert. granted, judgment vacated*, 145 S. Ct. 982, 220 L. Ed. 2d 360 (2024). But no longer. As *Loper Bright* held, and lower courts since have confirmed, policy cannot trump text. While statutes may leave some room for policymaking, the outer boundaries are set by the statute’s words. *Loper Bright*, 603 U.S. at 400; *Starbucks*, 159 F.4th at 477–78. No agency is free to stray beyond these verbal bounds. So when an existing interpretation is based on policy, but clashes with the text, the policy must be jettisoned; *Loper Bright* leaves no other choice. The text must be given its best meaning. *See Loper Bright*, 603 U.S. at 386–87, 400. *See Hosp. Menonita De Guayama II*, 183 F.4th at 753–54, 758 (applying same principles to Board’s longstanding “successor bar” and rejecting it as inconsistent with the text).

II. The best meaning of Section 9(a) is that a union becomes an exclusive representative only when it is designated or selected by a majority of *all* employees in the unit—not just the employees who vote.

When interpreting a statute, the interpreter must look for the statute’s best meaning. *Loper Bright*, 603 U.S. at 400. For this purpose, “best meaning” contrasts with “permissible meaning.” Because language is flexible, a single text may allow multiple possible interpretations. But that does not mean all possible meanings are correct meanings. Rather, in each case, there is one best meaning. And when there is a best meaning, no other meaning is permissible. *Id.* (“In the business of statutory interpretation, if it is not the best, it is not permissible.”).

These principles apply to the Board. Following *Loper Bright*, courts have repeatedly held that the Act’s provisions must be given their best meaning. And they have explained that the best

meaning must be found using the normal tools of statutory construction, as explained in *Loper Bright*.³

Here, the standard tools produce a clear result. Start with the text. Section 9(a) refers to “the majority of the employees in a unit.” By using a definite article, “the,” the text implies that there is a single group referred to—only one majority in each unit. *See* Bryan A. Garner, *The Chicago Guide to Grammar, Usage, and Punctuation* §§ 106–07 (2016) (explaining that definite articles are used to limit the items referred to). The text then identifies that group—the “employees in a unit.” Grammatically, then, the answer is straightforward: the majority referred to is a single majority—a majority of the entire unit—not a majority of some other subset.

To be sure, the text does not say “all” employees in the unit. But to use *all* would have been redundant. Unless specified otherwise, a reference to a group refers to the entire group; *all* is unnecessary. And Congress cannot be faulted for failing to include extra qualifiers: “In practice, ‘Congress cannot’ be expected to ‘anticipate (much less account for) every future statutory skirmish—and even if it could, courts have no authority to hold Congress to a “perfect as we see it” standard of drafting.’” *Starbucks*, 159 F.4th at 477 (quoting *Esteras v. United States*, 606 U.S. 185 (2025)) (refusing to attribute meaning to Congress’s failure to specify that “affirmative action” means “affirmative equitable action”). *See also* *Roe v. O’Donohue*, 38 F.3d 298, 303 (7th Cir. 1994) (Easterbrook, J.) (Congress need not add to the text, “and we really mean it!”).

³ *See, e.g., Starbucks*, 159 F.4th at 468 (applying *Loper Bright*’s standards to the Act); *Hosp. Menonita De Guayama II*, 183 F.4th at 753–54 (same); *Miller Plastic Prods., Inc. v. NLRB*, 141 F.4th 492, 503 (3d Cir. 2025) (same); *Hudson Inst. of Process Rsch., Inc. v. NLRB*, 117 F.4th 692, 700 (5th Cir. 2024) (same); *Universal Prot. Servs., LLC v. NLRB*, No. 24-11150, 2026 WL 1194880, at *6 (11th Cir. May 1, 2026) (same); *3484, Inc. v. NLRB*, 137 F.4th 1093, 1103–04 (10th Cir. 2025) (same); *Garten Trucking LC v. NLRB*, 139 F.4th 269, 276 (4th Cir. 2025) (same); *Brown-Forman Corp. v. NLRB*, 169 F.4th 646, 653 (6th Cir. 2026) (same); *United Nat’l Foods, Inc. v. NLRB*, 138 F.4th 937, 946 (5th Cir. 2025) (same); *Siren Retail Corp. v. NLRB*, No. 24-3168, 2026 WL 2588722, at *4 (2d Cir. Sept. 2, 2026) (same).

By contrast, the votes-cast approach requires the interpreter to add words to the text. Though the text refers only to the majority of the employees in the unit, the votes-cast rule implies the words “who cast votes in an election.” That implied phrase is restrictive in the grammatical sense: it changes the meaning of the noun it modifies. *See* Garner, *Chicago Guide*, *supra*, at 525 (explaining that a restrictive clause “defines or identifies by limiting the meaning of a noun element,” such as “we offer loans to people *who have good credit*”). It therefore violates core interpretive principles. Inserting words of any kind would contradict the normal rules of interpretation; but it is especially wrong to insert words that change the meaning of words Congress actually used. *See Bates v. United States*, 522 U.S. 23, 29 (1997) (“We ordinarily resist reading words or elements into a statute that do not appear on its face.”).

That conclusion is reinforced by other textual clues. For example, when the Act wants a standard other than an absolute majority, it repeatedly says so. In Section 9(c)(3), the Act says that when no single choice captures a “majority,” the Board must conduct a runoff election between the two choices that received the most “valid votes cast in the election.” 29 U.S.C. § 159(c)(3). Likewise, in Section 3(b), the Act authorizes the Board itself to act with less than a majority. 29 U.S.C. § 153(b). It states that the Board may delegate its powers to “any group of three or more members.” *Id.* Such a delegation allows the Board to exercise its powers with less than an absolute majority. *See New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 679 (2010). So again, when the Act contemplates less than an absolute majority, it says so. It does not say so in Section 9(a). *See Russello v. United States*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))).

Contemporaneous interpretations point in the same direction. Barely a year after the Act was passed, the Board was called on to determine whether an exclusive representative could be certified with affirmative support from less than a majority of the unit. The Board answered no. In *Chrysler Corp.*, 1 NLRB 164 (1936), an election was held in a unit with 700 eligible voters. The union won an overwhelming number of the votes cast: 121 out of 125, or 96.8%. But the union fell far short of an absolute majority of the unit. The Board therefore duly declined to certify the union under Section 9(a), which, then as now, required “the majority of the employees in a unit.” *See id.* at 172.⁴

The Board, of course, later changed its position. But the point remains: just after the Act became law, the Board understood Section 9(a)’s text to require an absolute majority of the unit. Text, structure, and contemporaneous understanding therefore point in the same direction. Section 9(a) does not silently embed some pliable standard of “representativeness,” which can be modified to fit administrative convenience. It means only what it says: to be certified as an exclusive representative, a union must be “designated or selected . . . by the majority of the employees in a unit.”

⁴ Contemporaneous dictionaries support the same conclusion. In 1928, the Oxford English Dictionary defined *majority* to mean “[t]he greater number or part; a number which is more than half the whole number.” Majority, Oxford English Dictionary (1928). Likewise, writing in 1922, H.W. Fowler defined the term (outside political contexts) to mean “most of a set of persons, or the greater part numerically.” Majority, H.W. Fowler, *A Dictionary of Modern English Usage* (2d ed. 1922). And in 1947, the year the Taft-Hartley Act was passed, Webster’s Collegiate Dictionary defined it as “[t]he greater of two numbers regarded as parts of a whole; the number greater than half; also, the excess of this greater number, as of votes, over the remainder.” Majority, Webster’s Collegiate Dictionary (5th ed. 1947). While these dictionaries also listed other possible meanings, especially in the context of political voting, none listed such a meaning as more common than the standard meaning.

III. *RCA Manufacturing Co.* does not apply here because this case involves a different statute.

From time to time, the Board has justified the votes-cast rule simply by citing *RCA*. *See, e.g., Lemco Constr., Inc.*, 283 NLRB 459, 460 (1987). It may be tempted to do so again here. But that would be a mistake, because *RCA* does not apply to this case. *RCA* interpreted Section 9(a) under the Act as established by the 1935 Wagner Act.⁵ This case, however, arises under the Act as amended by the 1947 Taft-Hartley Act. This case therefore requires the Board to interpret a different law.

The Wagner Act was a product of its time. In the early twentieth century, American labor markets were riven with strife. Strikes and other work stoppages, sometimes involving tens or hundreds of thousands of workers, shut down entire industries. And these work stoppages were often violent, resulting in severe property damage, physical injury, and even death. *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 82 (1994) (describing labor strife in the late nineteenth and early twentieth centuries that led to passage of the Wagner Act). Congress sought to curb the chaos by funneling labor disputes into collective bargaining. Congress believed that the refusal to bargain was a common cause of strife and that peaceful bargaining could resolve disputes without resorting to raw tests of economic strength. S. Rep. No. 573, at 1 (1935) (“The first object of the bill is to promote industrial peace.”). It therefore clearly and unambiguously endorsed collective bargaining as the policy of the United States. *See* Wagner Act, *supra*, § 1 (declaring to be “the policy of the United States to eliminate the causes of certain substantial

⁵ To be clear, *RCA* was wrong even under the Wagner Act. Then as now, Section 9(a) required a “majority of the employees in a unit.” Those words did and can refer only to a majority of all employees in the unit, not a subsection of those employees. *See* section II, *supra*.

obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining”).

But different circumstances prevailed a decade later, when Congress revisited the issue. By then, labor strife had returned to the economy: strikes and other work stoppages were again rippling across the country, costing 38 million man-days in 1945 and a staggering 116 million man-days in 1946. S. Rep. No. 104, 80th Cong., 1st Sess., at 2 (1947). Under those conditions, Congress no longer saw the cause of strife as a lack of collective bargaining; rather, it saw the source as “monopolistic” union practices. *Id.*

In Congress’s view, unions had used the power given to them in the Wagner Act to undesirable ends. They had demanded closed-shop agreements, harassed employees to join, and oppressed workers and employers alike. These abuses were Congress’s chief target when it passed the Taft-Hartley Act, now seen as a fundamental reworking of national labor policy. *Id.* at 6 (describing the dangers of “compulsory unionism” permitted under the Wagner Act) (“[T]he abuses of the system have become too serious and numerous to justify permitting present law to remain unchanged.”).

The Taft-Hartley Act did many things. But perhaps most important, it recognized the right to dissent. As amended, the Act no longer endorses collective bargaining as an unqualified good. Instead, it recognizes a corollary right to refrain. *See* Taft-Hartley Act, *supra*, § 7. It guarantees that if a person does not want to join a union, form one, or bargain collectively, that person has a statutory right to refuse. *Id.* In other words, the Act now tempers its endorsement of collective bargaining and recenters federal policy on individual choice. *See id.* (giving employees “the right to refrain from any or all such activities”). *See also* S. Rep. No. 104, at 6 (describing “compulsory unionism” as one of the main “abuses” targeted by the Taft-Hartley Act); *Bernhard-Altmann*, 366

U.S. at 737 (explaining that the Act as amended “guarantees employees freedom of choice and majority rule”). *See also* John Paul Jennings, *The Right to Strike: Concerted Activity Under the Taft-Hartley Act*, 40 Cal. L. Rev. 13, 13 (1951) (“[T]he Taft-Hartley Act, in principle, represents a reorientation of our labor policy away from encouragement of collective bargaining . . . guarantee[ing] and protect[ing] the right to ‘refrain from’ bargaining collectively.”).

That change makes *RCA* obsolete. In *RCA*, the Board read Section 9(a) with an overt policy gloss. It reasoned that the Act, as the Board then understood it, endorsed collective bargaining as the solution to labor strife. It therefore read the statute to maximize collective bargaining whenever possible. *RCA*, 2 NLRB at 176–77 (adopting votes-cast standard to advance the Act’s “basic policies,” including “to encourage ‘the practice and procedure of collective bargaining’”).

Whatever merits that view had in 1936, it has none now. As amended, the Act endorses a different policy—one that balances labor peace and employee choice. *See* Taft-Hartley Act, *supra*, §§ 1, 7. *RCA* did not account for that balance because the balance did not yet exist. The Board was applying a fundamentally different statute.⁶ *See* Gross, *supra* note 1, at 272–73 (critically describing how the Taft-Hartley Act reoriented national labor policy away from a pure endorsement of collective bargaining).

⁶ The same is true of early court decisions endorsing the Board’s approach. During the 1930s and 1940s, several courts of appeals agreed that the Board could certify an exclusive representative based on a majority of votes cast. *See NLRB v. Standard Lime & Stone Co.*, 149 F.2d 435, 437 (4th Cir. 1945); *N.Y. Handkerchief Mfg. Co. v. NLRB*, 114 F.2d 144, 149 (7th Cir. 1940); *NLRB v. Cent. Dispensary & Emergency Hosp.*, 145 F.2d 852, 853 (D.C. Cir. 1944). But those courts, like the Board in *RCA*, were interpreting a different statute. They did not consider the Taft-Hartley Act’s amendments because those amendments had not been made.

IV. RCA's policy rationales cannot justify the votes-cast rule now.

Because this case presents a question of law, *RCA*'s policy rationales are irrelevant. Again, policy considerations cannot override statutory text. *See Loper Bright*, 603 U.S. at 374–75, 400. But even if policy rationales were relevant, they would still reject the votes-cast rule. The Act's current policy centers on freedom of choice—whether or not to join a union. It also now includes additional tools to protect that choice. None of the concerns motivating *RCA* still exists.

Again, when the Board decided *RCA*, it aimed to promote what it saw as the Act's policy goals. But those goals are now different. Whereas the Act in 1936 endorsed collective bargaining as the path to labor peace, the Act today pursues other goals as well. Most important, it endorses the individual right to choose not to join a union or participate in collective activity. 29 U.S.C. § 157. Any policy consideration must account for that goal as well. *RCA* did not account for that goal because it could not: the Act did not yet protect the choice to refrain from union activity. *See RCA*, 2 NLRB at 176 (considering only the Act's goal of promoting collective bargaining). *RCA*'s policy analysis is therefore outdated; it ignores the Act's major goals.

RCA's analysis is also outdated as a practical matter. The case itself involved misconduct by a union: in a runoff election, the union suppressed turnout to prevent the election from going forward. At the time, nothing in the Act punished that behavior; the Act defined no unfair labor practices by labor organizations. So the *RCA* Board could reasonably conclude that a votes-cast standard was the only practical way to deter the union's misconduct. But that is no longer true. The Taft-Hartley Act closed the gap, providing a range of unfair labor practices aimed at union misconduct. *See Taft-Hartley Act, supra*, § 8(b) (codified at 29 U.S.C. § 158(b)). So today, the Board has the tools it needs. It can police unions' election misconduct without marring the statutory text.

Indeed, even broader executive-branch policy rejects the votes-cast rule. In Executive Order No. 14219, the President directed all agencies to conform their policies to the law. 90 Fed. Reg. at 10583. That means agencies must conform their policies to judicial decisions, including *Loper Bright*. See Memorandum, *supra*. That instruction applies to the Board as much as any other agency. See *Trump v. Slaughter*, 146 S. Ct. 2283, 2295 (2026) (explaining that all executive officers are subordinate and answerable to the President); *Trump v. Wilcox*, 145 S. Ct. 1415 (2025) (interim relief) (concluding that the NLRB was likely subject to presidential control because the NLRB exercises “considerable executive power”). The Board must therefore conform its policies to the text of the law—which requires it to cast aside the votes-cast rule.

RCA could not be squared with the text in 1936, and it cannot be squared with the text now. The decision and its rule contradict Section 9(a)’s literal words. Section 9(a) means and always has meant what it says: to be certified as an exclusive representative, a union must be designated or selected by “the majority of the employees in a unit.” The Board must apply the law as written.

Conclusion

For these reasons, the Board should reverse the Regional Director’s decision and hold that, under Section 9(a) of the Act, a union may be certified as an exclusive representative only when it has been designated or selected by the majority of the employees in the unit.

Respectfully submitted,

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Certificate of Service

Pursuant to Section 102.46(i) of the Board's Rules and Regulations, the undersigned hereby certifies that a copy of the foregoing amicus brief in Case No. 13-RC-372880 was electronically filed via the NLRB E-Filing system with the National Labor Relations Board and served via electronic mail to the parties listed below on this 28th day of October 2026.

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