

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 15-1203

NATIONAL LABOR RELATIONS BOARD

Petitioner

and

NATIONAL NURSES ORGANIZING COMMITTEE

Intervenor

v.

**BLUEFIELD HOSPITAL CO., LLC, d/b/a Bluefield Regional Medical
Center; GREENBRIER VMC, LLC, d/b/a
Greenbrier Valley Medical Center**

Respondents

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
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**BRIEF FOR
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**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce a Board Order issued against Bluefield

Hospital Co., LLC and Greenbrier VMC, LLC (“the Hospitals”) on December 16, 2014, and reported at 361 NLRB No. 154. (JA 313-18.)¹ In its Decision and Order, the Board found that the Hospitals unlawfully refused to recognize and bargain with the National Nurses Organizing Committee (“the Union”), as the duly certified collective-bargaining representative of the Hospitals’ registered nurses. (JA 315.) The Union, which was the charging party before the Board, has intervened on behalf of the Board.

The Board had jurisdiction over the unfair-labor-practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151 et seq., 160(a)) (“the Act”). The Court has jurisdiction over this proceeding under Section 10(e) of the Act (29 U.S.C. § 160(e)), because the Hospitals committed the unfair labor practices in West Virginia. The Board’s Order is final with respect to all parties. The Board’s application for enforcement, filed on February 27, 2015, was timely, because the Act does not impose a time limit for seeking enforcement of Board orders.

Because the Board’s Order is based in part on findings made in the underlying representation proceedings, the records in those proceedings (Case Nos. 10-RC-087616 and 10-RC-087613) are also before the Court under Section 9(d) of

¹ “JA” references are to the joint appendix. “Br.” references are to the Hospitals’ brief. Where applicable, references preceding a semicolon are to the Board’s December 16, 2014 Decision and Order; those following are to the supporting evidence.

the Act (29 U.S.C. § 159(d)). *Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Section 9(d) does not give the Court general authority over the representation proceedings. Rather, it authorizes review of the Board's actions in those proceedings for the limited purpose of deciding whether to enforce, modify, or set aside the Board's unfair-labor-practice order in whole or in part. The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation cases in a manner consistent with the Court's ruling. *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).²

² *Contra NLRB v. Lundy Packing Co.*, 81 F.3d 25, 26-27 (4th Cir. 1996). *Lundy's* holding that the Board lacks the above-described authority to resume processing the representation case, however, rests on inapposite cases dealing not with Section 9(d)'s limitations on judicial control over representation cases but with Section 10(e)'s limitations on the Board's authority to revisit unfair labor practice issues once they have been considered by a reviewing court. *See Mine Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 339-44 (1945) (absent fraud or mistake, the Board is not entitled to have a court's enforcement order vacated so the Board can enter a new remedial order that, in retrospect, it decides is more appropriate); *W.L. Miller Co. v. NLRB*, 988 F.2d 834, 835-38 (8th Cir. 1993) (once a court enforces the Board's order in an unfair-labor-practice proceeding, the Board lacks authority to reopen the proceeding to award additional relief); *George Banta Co. v. NLRB*, 686 F.2d 10, 16-17 (D.C. Cir. 1982) (rejecting employer's argument that the Board lacked jurisdiction to adjudicate charges of post-strike unfair labor practices while a case against the same employer concerning pre-strike unfair labor practices was pending in court); *Serv. Emps. Local 250 v. NLRB*, 640 F.2d 1042, 1044-45 (9th Cir. 1981) (the Board lacks jurisdiction to adjudicate a union's unfair-labor-practice claim when an earlier court decision implicitly rejected that claim).

STATEMENT OF THE ISSUES

The ultimate issue is whether the Board reasonably found that the Hospitals violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, which the Board's Regional Director certified as the employees' collective-bargaining representative.

That issue turns on the following subsidiary issues:

1. Whether the Hospitals waived all of the arguments they present to the Court both by entering into consent election agreements expressly authorizing the Regional Director to conduct the elections, resolve objections, and certify the Union, and by failing to raise their arguments at the time appropriate under the Board's rules.
2. Whether the Hospitals' challenges to the Regional Director's authority are, in any event, meritless.
3. Whether the Hospitals fail to show that the Regional Director acted arbitrarily and capriciously in overruling objections that the Hospitals failed to support with evidence, as required by Board rules.

STATEMENT OF THE CASE

The Hospitals and the Union voluntarily entered into consent election agreements to hold representation elections at two hospitals in August 2012. The agreements provided that the Board's Regional Director would rule on any post-

election objections and certify the election results, and that his decisions would be final without Board review. After the Union won both elections, the Hospitals filed election objections with the Regional Director. They failed, however, to provide supporting evidence, as mandated by the Board's rules. Accordingly, the Regional Director overruled the objections and certified the Union as the representative of the Hospitals' registered nurses. Dissatisfied with the results of the elections to which they had agreed, and unwilling to abide by the Regional Director's rulings that they had agreed would be final, the Hospitals refused to bargain with the Union. The Board found that their refusals violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)).

Before the Court, the Hospitals do not dispute that they refused to bargain, but instead offer an assortment of belatedly raised arguments, none of which are properly before the Court. The Hospitals waived their challenges to the Regional Director's authority to act in the representation proceedings by entering into binding consent election agreements that expressly authorized the Regional Director to take the very actions they now attempt to challenge. Those challenges are further waived due to the Hospitals' failure to timely raise them in the representation proceedings. Finally, the Regional Director's decision to overrule the Hospitals' election objections was not arbitrary or capricious, but reasonable, given the Hospitals' failure to submit any supporting evidence.

I. THE REPRESENTATION PROCEEDING

A. The Parties Agree to Elections Supervised by the Regional Director; the Union Prevails in the Elections

The Hospitals operate hospitals in Bluefield and Ronceverte, West Virginia. (JA 314-15; 15, 18.) On August 20, 2012, the Union filed two petitions with the Board, seeking certification as the bargaining representative of the Hospitals' registered nurses in separate bargaining units at the two facilities. (JA 11-14.) On August 22 and 24, the Hospitals voluntarily entered into consent election agreements with the Union. (JA 314 n.6; 15-20.) Under the agreements, the parties waived their respective rights to pre-election hearings, otherwise mandatory under Section 9(c)(1) of the Act (29 U.S.C. § 159(c)(1)). (JA 15, 18.) Instead, the Hospitals agreed with the Union as to the appropriate bargaining units and further agreed that, on August 29 and 30, two secret-ballot elections "under the Board's Rules and Regulations shall be held under the supervision of the Regional Director." (JA 15, 18.)

The agreements required that any objections to conduct affecting the results of the elections be filed with the Regional Director within 7 days after the tally of ballots. (JA 16-17, 20.) They further specified that "[t]he method of investigation of objections and challenges, including whether to hold a hearing, shall be determined by the Regional Director, whose decision shall be final." (JA 314; 17, 20.) The agreements authorized the Regional Director to certify the Union as the

representative of the Hospitals' registered nurses, where appropriate. (JA 17, 20.) They concluded by reiterating that “[a]ll rulings and determinations made by the Regional Director will be final” (JA 314 n.6; 17, 20.)

On August 29 and 30, elections were held in accordance with the agreements' terms, with the Hospitals' full participation. (JA 315; 15, 18, 21-22.) In both elections, a majority of voting employees selected the Union as their collective-bargaining representative. At Bluefield, the tally of ballots showed 79 votes for the Union and 49 votes against it, with 11 nondeterminative challenged ballots. (JA 21.) At Greenbrier, the tally was 59 votes for the Union and 45 against it, with 6 nondeterminative challenged ballots. (JA 22.)

B. The Hospitals File Post-Election Objections Which the Regional Director Overrules for Lack of Evidence

On September 5 and 6, the Hospitals filed objections alleging that the Union had engaged in improper pre-election conduct, and requesting that the elections be set aside. (JA 23-27.) On September 6 and 7, in accordance with Board practice, the Regional Director reminded the Hospitals in writing of their obligation, under Section 102.69 of the Board's Rules and Regulations (29 C.F.R. § 102.69),³ to

³ Various amendments to the Board's representation-case procedures recently became effective on April 14, 2015. *See* 79 Fed. Reg. 74,308, 74,308 (Dec. 15, 2014). The prior rules in effect when the Board's Order (JA 314-18) issued, as cited in this brief and reproduced in the Addendum, may be found on the Board's website. *See* National Labor Relations Board, Rules and Regulations—Part 102,

submit evidence in support of their objections within 7 days after filing the objections. (Br. 5, JA 34, 36.) Initially, an Acting Regional Director issued a Report on Objections and Notice of Hearing in each of the proceedings. (JA 28-33.) The Hospitals, however, failed to furnish the Region with evidence in support of their objections within the 7 days provided under the Board's rules, nor did they seek extensions of time in which to do so. (JA 34, 36.) Accordingly, the Acting Regional Director issued orders overruling the objections and withdrawing the notices of hearings. (JA 34-37.) In those orders, the Acting Regional Director also noted that, in accordance with the terms of the parties' consent election agreements, the decision overruling the objections was final. (JA 34, 36.) On September 25, the Acting Regional Director certified the Union as the collective-bargaining representative of the Hospitals' registered nurses. (JA 38-41.)

II. THE UNFAIR-LABOR-PRACTICE PROCEEDING

A. The Hospitals Refuse To Bargain With the Union

On October 16, 17, and 26 and November 2, the Union requested that the Hospitals recognize and bargain with it as the exclusive collective-bargaining representative of the registered nurses. (JA 315; 73-78.) The Hospitals refused. (JA 315; 73-78.) Based on unfair-labor-practice charges filed by the Union, the Regional Director issued a consolidated complaint alleging that the Hospitals'

available at http://www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

refusals violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (JA 313; 44-50.) In their answer, the Hospitals admitted their refusals. (JA 313; 55 ¶16.) They claimed, however, that they had no duty to bargain because, among other things, “an oral ‘ad hoc’ agreement” between the Union and the Hospitals provided for an arbitrator, and not the Regional Director, to rule on the Hospitals’ election objections. (JA 314; 56-57.)

B. The Acting General Counsel Files a Motion for Summary Judgment

The Board’s Acting General Counsel subsequently filed a motion for summary judgment, and the Board issued a notice to show cause. (JA 313; 63-72, 81-82.) On January 14, 2013, the Hospitals submitted an amended answer to the consolidated complaint and an opposition to the motion for summary judgment, in which they claimed, as a new affirmative defense, that the Union’s post-certification affiliation with another labor organization had substantially altered the identity of the Union, eliminating the Hospitals’ obligation to bargain with it as the employees’ representative. (JA 313-14; 101, 111, 116-18, 130-32.) In response, the Acting General Counsel sought a partial remand to allow the Region to investigate that claim. (JA 134-37.)

Along with their opposition, the Hospitals submitted a statement from attorney Don T. Carmody that stated that he and an attorney for the Union had orally agreed that the Bluefield and Greenbrier elections would be governed by

“the terms and conditions set forth in a document entitled ‘Election Procedure Agreement.’” (JA 124-25.) According to Carmody, that document required the parties to submit election objections concurrently to both the Board and an arbitrator, who was to rule on them within 14 days. (JA 126.) The Hospitals, however, never submitted the asserted “Election Procedure Agreement” to the Region or the Board. Carmody’s statement also declared that after the Hospitals filed their objections with the Board, he informed Board agents of the parties’ arrangement and asked for the Region to hold its disposition in abeyance. (JA 127.)

On January 25, 2013, the United States Court of Appeals for the District of Columbia Circuit issued its decision in *NLRB v. Noel Canning*, 705 F.3d 490, *affirmed on other grounds*, 134 S. Ct. 2550 (2014). There, the D.C. Circuit held that the President’s recess appointments of three Board members on January 4, 2012, were unlawful and that the Board as then constituted lacked a quorum. 705 F.3d at 499-507. On February 8, 2013, citing the D.C. Circuit’s decision, the Hospitals filed a second amended answer raising new affirmative defenses. Specifically, as relevant here, the Hospitals argued for the first time that the certifications were invalid because they were issued at a time when the Board was without a quorum. (JA 154.)

C. The Board Remands the Case for Investigation of One of the Hospitals' Affirmative Defenses; the Hospitals Refuse To Provide Supporting Evidence

On June 20, 2013, the Board (Chairman Pearce and Members Griffin and Block) issued an order remanding the proceeding to the Region for investigation of the Hospitals' affirmative defense based on the Union's affiliation with another labor organization. (JA 175.) The Region asked the Hospitals to provide evidence regarding the affirmative defense, but the Hospitals declined to do so. The Region's investigation concluded that the defense was meritless. (JA 221-27.) Accordingly, on August 8, 2013, the Acting General Counsel renewed his motion for summary judgment. (JA 218-25.) That same month, the Board regained a quorum, with five Senate-confirmed members.⁴

On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which held three recess appointments to the Board in January 2012 invalid under the Recess Appointments Clause, including the appointments of Members Griffin and Block. On August 14, the Hospitals filed a third amended answer to the complaint, this time raising 8 new affirmative defenses. (JA 295-307.) Citing the Supreme Court's decision, the Hospitals argued, among other things, that the Regional Director lacked authority to approve

⁴ See The National Labor Relations Board Has Five Senate Confirmed Members, NLRB Office of Public Affairs (Aug. 12, 2013), *available at* <http://www.nlr.gov/news-outreach/news-story/national-labor-relations-board-has-five-senate-confirmed-members>.

the consent election agreements or issue certifications in August and September, 2012, when the Board lacked a quorum. (JA 301-02.) The Hospitals further argued that, in particular, Regional Director Claude T. Harrell, Jr. lacked authority to take those actions because neither the Acting General Counsel, who had recommended his appointment to Region 10, nor the Board, which approved it, could lawfully act at the time. (JA 302-05.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On December 16, 2014, the Board (Chairman Pearce and Members Hirozawa and Schiffer) issued its Decision and Order granting the General Counsel's motion for summary judgment and finding that the Hospitals' refusals to bargain with the Union violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (JA 313-18.) The Board also set aside its June 20, 2013 order remanding the proceeding to the Region, in light of the Supreme Court's holding in *Noel Canning* that two members of the Board panel that issued the order were not validly appointed. (JA 313.) Having considered the parties' filings and the record anew, the properly constituted Board panel granted the General Counsel's motion for summary judgment. (JA 314.) The Board concluded that all of the Hospitals' arguments pertaining to the underlying representation case were or could have been litigated in that proceeding. (JA 314.) The Board further noted that the Hospitals, by entering into the consent election agreements, had agreed that the

Regional Director would resolve election objections and that his rulings and determinations would be final. (JA 314.) Accordingly, the Board found that the Hospitals waived Board review of the Regional Director's actions. (JA 314.)

In addition to finding the Hospitals' arguments waived, the Board found them to be without merit. (JA 314 & nn.5-6.) In particular, the Board noted that when Regional Director Harrell was appointed as Regional Director for Region 10 on December 22, 2011, Lafe Solomon had been validly designated as Acting General Counsel, and the Board had a quorum. (JA 314 n.5.) The Board also explained that, after the Board lost its quorum, Regional Director Harrell validly exercised authority over these representation proceedings under the longstanding delegation of such authority by the Board to its Regional Directors in 1961. (JA 314 n.5.) Finally, regarding the Hospitals' contention that the Regional Director should not have resolved their election objections because of an asserted oral agreement between the Hospitals and the Union to have an arbitrator decide them, the Board emphasized that the Hospitals had expressly consented to the Regional Director's issuance of a final decision on any objections. (JA 314 n.6.) In addition, however, the Board noted that, in related cases, it had already rejected the

Hospitals' argument for deferral of election objections based on an oral ad hoc agreement with the Union. (JA 314 n.6.)⁵

The Board's Order requires the Hospitals to cease and desist from refusing to recognize and bargain with the Union, or in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 (29 U.S.C. § 157). (JA 315-16.) Affirmatively, the Board's Order directs the Hospitals, on request, to bargain with the Union, to embody any resulting understanding in a signed agreement, and to post a remedial notice. (JA 316.)

SUMMARY OF ARGUMENT

1. None of the Hospitals' arguments are properly before the Court. The Hospitals contend that the Regional Director lacked authority to act in the representation proceedings, and that he should not have ruled on the Hospitals' election objections because of an asserted agreement between the parties for an arbitrator to rule on objections. But in the consent election agreements the Hospitals freely entered into with the Union, the parties agreed that the Regional Director would supervise the elections, resolve any objections, and certify the

⁵ The Board declined to remand the proceeding for the Region to investigate the Hospitals' argument that their refusals to bargain were justified based on the Union's post-election affiliation with another labor organization. (JA 313-14.) Under settled law, the Board noted, "an employer may not defend an earlier refusal to bargain by relying on subsequent events." (JA 314.) Before the Court, the Hospitals do not contest that ruling. (Br. 11 n.6.)

Union if it prevailed, and that the Regional Director's rulings and determinations would be final. The Hospitals voluntarily participated in the elections, and during the representation case never challenged the Regional Director's authority to conduct those proceedings.

It is well established that consent election agreements are binding contracts. It is equally settled that parties to Board election proceedings must timely raise all of their arguments in the representation case, rather than waiting until the unfair-labor-practice proceeding. Thus, the Hospitals waived their challenges to the Regional Director's authority to act both by entering into the consent election agreements without reservation and by failing to raise their challenges in the representation case. Likewise, because the Hospitals expressly agreed to have the Regional Director resolve election objections and failed to properly present any arguments to the contrary in the representation case, they are precluded from arguing now that he should have instead deferred resolution of the objections to an arbitrator based on an asserted oral arrangement between the parties.

2. In any event, the Hospitals' challenges to the Regional Director's authority are baseless. First, the Board reasonably rejected the Hospitals' argument that the Regional Director could not properly take action in the representation proceedings because the Board was temporarily without a quorum at the time. The Regional Director acted pursuant to authority delegated by the

Board to its Regional Directors in 1961 which, the Board reasonably determined, did not lapse when the Board's membership dropped below a quorum. The Court should defer to the Board's interpretation of the statutory and regulatory language governing its longstanding delegation. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). That interpretation is supported by foundational principles of administrative law and consistent with the basic purposes that led Congress to authorize such delegations in 1959.

In arguing that the Board's temporary loss of a quorum voided the 1961 delegation, the Hospitals erroneously rely on common-law agency principles which have no application here. They also cite legislative history which only undercuts their argument. As the Hospitals note, in permitting the delegation at issue, Congress sought to reduce delay in representation proceedings. But that legislative intent would be frustrated by the Hospitals' view of the law, particularly in cases like this one, where, in the interest of a prompt and final resolution, the parties have contractually bound themselves to forego Board review and entrust the Regional Director with final decision-making authority.

There is also no basis for the Hospitals' attempt to extend to the Regional Directors' delegated authority the quorum requirement that the Act sets forth for delegee groups of Board members. The Hospitals' analogy between the two very different types of delegations is particularly unwarranted in light of *New Process*

Steel, L.P. v. NLRB, 560 U.S. 674 (2010). There, the Supreme Court noted that its holding “that the delegee group ceases to exist once there are no longer three Board members to constitute the group does not cast doubt on the prior delegations of authority to nongroup members, such as the regional directors or the general counsel.” *Id.* at 684 n.4.

The Board also properly rejected the Hospitals’ challenges to the Regional Director’s appointment. First, the Hospitals argue that the Board had no quorum when it approved Regional Director Harrell’s appointment. But the Board approved the appointment on December 22, 2011, before its quorum lapsed, as demonstrated by an official minute of Board action. The Hospitals fail to show otherwise by producing an administrative, human-resources document and a newsletter prepared after that date, neither of which have any legal bearing on the issue at hand. Second, the Hospitals assert that when Acting General Counsel Lafe Solomon recommended Claude Harrell’s appointment as Regional Director of Region 10, Solomon had already served longer than the term allowed under Section 3(d) of the Act (29 U.S.C. § 153(d)). President Obama, however, appointed Solomon under the Federal Vacancies Reform Act (5 U.S.C. § 3345(a)), and he was properly serving pursuant to that appointment when he recommended Harrell.

3. Finally, the Regional Director did not act arbitrarily and capriciously in overruling the Hospitals' objections after they refused to comply with Board rules requiring them to timely submit supporting evidence. As noted above, the Hospitals signed consent election agreements authorizing the Regional Director to resolve all election objections, and he properly did so in accordance with the Board's rules. It is wholly immaterial whether, as the Hospitals claim, the parties also had an oral side agreement to submit objections to an arbitrator. Under Board law that the Hospitals do not challenge, deferral to arbitration would have been inappropriate in light of the lack of a written collective-bargaining agreement setting forth a grievance-arbitration procedure and the absence of a long and productive collective-bargaining relationship between the parties.

STANDARD OF REVIEW

“Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). *Accord Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257, 262 (4th Cir. 2000). For that reason, the results of a representation election conducted “under the safeguards provided by Board procedure” are presumptively valid. *NLRB v. Columbia Cable TV Co.*, 856 F.2d 636, 638 & n.1 (4th Cir. 1988). The Court will overturn such an election “only where the Board has clearly abused its

discretion.” *NLRB v. Md. Ambulance Servs.*, 192 F.3d 430, 433 (4th Cir. 1999).

Similarly, “[t]he Board’s decision concerning deferral to arbitration is to be affirmed unless found to be an abuse of discretion.” *NLRB v. Am. Nat’l Can Co.*, 924 F.2d 518, 522 (4th Cir. 1991). *Accord NLRB v. Elec. Workers, Local 11*, 772 F.2d 571, 575 (9th Cir. 1985); *Office and Prof’l Employees Local 425 v. NLRB*, 419 F.2d 314, 317, 318 (D.C. Cir. 1969).

Further, it is settled that where the parties have entered into a consent election agreement providing that the Regional Director’s decision will be final, the courts will not set aside that decision in the absence of arbitrary and capricious action. *See NLRB v. Jas. H. Matthews & Co.*, 342 F.2d 129, 131 (3d Cir. 1965) (collecting cases). *Accord NLRB v. Chelsea Clock Co.*, 411 F.2d 189, 192 (1st Cir. 1969); *NLRB v. Standard Transformer Co.*, 202 F.2d 846, 849 (6th Cir. 1953) (noting the “well established rule” that a Regional Director’s findings under consent election agreement “can be invalidated if found to be arbitrary and capricious” (citing, *inter alia*, *NLRB v. Gen. Armature & Mfg. Co.*, 192 F.2d 316, 317 (3d Cir. 1951) (“It is clear that nothing short of capricious and arbitrary action by the Regional Director would invalidate his decision which the parties had agreed to accept as final.”))).

Finally, the Court defers to the Board’s reasonable interpretation of an ambiguous provision of the Act. *See Chevron*, 467 U.S. at 842-44.

ARGUMENT

An employer violates Section 8(a)(5) and (1) of the Act by refusing to bargain collectively with the representative of its employees.⁶ The Hospitals admit (Br. 6-7) that they have refused to bargain with the Union. They assert, however, that their refusals did not violate Section 8(a)(5) and (1) because the Regional Director improperly certified the Union.

A majority of the Hospitals' employees freely chose representation by the Union in secret-ballot elections to which the Hospitals voluntarily agreed. The Hospitals contend (Br. 15-21) that the tally of ballots should have no effect because, at the time the Regional Director approved the consent agreements and certified the Union, the Board was temporarily without a quorum. They further argue that Regional Director Claude T. Harrell, Jr. was improperly appointed. (Br. 21-26.) Finally they argue in the alternative that Regional Director Harrell should not have overruled their objections due to noncompliance with the Board's rules. (Br. 26-29.) The Hospitals' arguments are not properly before the Court, and they are, in any event, meritless.

⁶ A violation of Section 8(a)(5) produces a "derivative" violation of Section 8(a)(1), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the[ir] statutory rights." *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

I. THE HOSPITALS WAIVED ALL OF THEIR CHALLENGES TO THE REGIONAL DIRECTOR'S AUTHORITY AND ACTIONS

As explained more fully below (pp. 23-31), the Hospitals waived their claims of ultra vires acts as well as their contention that the Regional Director should not have ruled on their objections by failing to raise those defenses in the representation case and instead expressly agreeing that the Regional Director would resolve election objections and certify the Union where appropriate. “No procedural principle is more familiar . . . than that a constitutional right,’ or a right of any other sort, ‘may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.” *United States v. Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)). See *Standard Transformer Co.*, 202 F.2d at 848-49 (“it is clear that the parties can waive the rights . . . conferred by the Act”). That principle applies to claims that the actions of government officials are ultra vires. See *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (rejecting belated challenge to authority of hearing examiner, while acknowledging that the defective appointment would have invalidated the resulting order “if the [Agency] had overruled an appropriate objection made during the hearings”); *NLRB v. Newton-New Haven Co.*, 506 F.2d 1035, 1038 (2d Cir. 1974) (declining to grant relief on a forfeited challenge to the composition of a Board

panel, notwithstanding that the court had previously upheld a similar challenge, because the argument was not timely raised).

“The purpose of a consent-election agreement is to provide for a prompt and final settlement of such controversies as may arise between the parties and thus minimize the delay in the administration of the Act and . . . there is no reason why [employers] should not be bound by the provisions of the election agreement, to which [they are] a party.” *Traders Oil Co.*, 119 NLRB 746, 764-65 (1957) (citing *Semi-Steel Casting Co. v. NLRB*, 160 F.2d 388 (8th Cir. 1947)), *enforced*, 263 F.2d 835 (5th Cir. 1959) (per curiam). Moreover, it was not until the unfair-labor-practice case that the Hospitals, for the first time, challenged the authority of the Regional Director to approve the agreements and certify the Union. That was too late. It is well established that “a party must raise all of [its] available arguments in the representation proceeding rather than reserve them for an enforcement proceeding.” *Pace Univ. v. NLRB*, 514 F.3d 19, 23 (D.C. Cir. 2008) (collecting cases); *accord Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257, 265 (4th Cir. 2000) (employer waived election objection by failing to preserve it in the representation case).

In sum, as explained in more detail below, because the Hospitals failed to challenge the Regional Director’s authority during the representation proceedings and instead entered into binding consent election agreements authorizing the

Regional Director to conduct and finally resolve those proceedings, none of the Hospitals' contentions are properly before the Court.

A. The Hospitals Waived Their Challenges to the Regional Director's Authority and His Decision to Rule on their Objections by Failing to Timely Raise Them and Instead Agreeing To Have the Regional Director Conduct the Elections, Resolve Objections, and Certify the Union Where Appropriate

In the representation proceeding, the Hospitals raised no objection to the Regional Director's authority, and instead voluntarily and without reservation entered into consent election agreements with the Union. Those agreements expressly provided for representation elections to be conducted on August 29 and 30, 2012, under Regional Director Harrell's supervision. (JA 15, 18.) They specified that the Regional Director would determine "[t]he method of investigation of objections and challenges, including whether to hold a hearing," and that his "decision shall be final." (JA 17, 20.) *See* 29 C.F.R. § 102.62(a) (providing that, when an election is held pursuant to a consent election agreement, "the rulings and determinations by the Regional Director of the results thereof shall be final"). The agreements further provided that the Regional Director "will issue a certification of the results of the election, including a certification of representative where appropriate." (JA 17, 20.) *See* 29 C.F.R. § 102.62(a).

In exchange for entering into the agreements, the Hospitals received important procedural benefits. Specifically, absent such agreements, the Regional

Director would have proceeded, in accordance with standard Board procedures, to conduct a hearing on such pre-election issues as the scope and composition of the appropriate bargaining unit. He then would have issued a decision resolving such issues subject to limited, certiorari-type review by the Board. *See Magnesium Casting Co. v. NLRB*, 401 U.S. 137 (1971) (describing the Regional Director-directed election procedures that apply in the absence of agreement by the parties); 29 C.F.R. § 102.67(c) (setting forth the circumstances in which the Board will grant review of a Regional Director's decision and direction of election). By entering into the agreements, the Hospitals secured prompt elections in units to which they agreed and the assurance of expeditious, final resolutions of any objections by the Regional Director. *See* 29 C.F.R. § 102.62(a) (incorporating by reference the election procedures set forth in 29 C.F.R. §§ 102.69 and 102.70).

It is well established that “election agreements are ‘contracts,’ binding on the parties that executed them.” *T&L Leasing*, 318 NLRB 324, 325 (1995) (quoting *Barceloneta Shoe Corp.*, 171 NLRB 1333, 1343 (1968), *enforced mem.*, 1970 WL 5417 (1st Cir.1970)). *See, e.g., NLRB v. Carolina Natural Gas Corp.*, 386 F.2d 571, 574 (4th Cir. 1967) (noting that consent election agreements are “contracts,” which “amount[] to full-fledged agreements, reflecting a true meeting of the minds”); *NLRB v. United Dairies, Inc.*, 337 F.2d 283, 286 (10th Cir. 1964) (a consent agreement is “a contract between the parties and, unless it is otherwise

contrary to law, it is binding upon the parties thereto according to its terms”).
Accord NLRB v. Parkhurst Mfg. Co., 317 F.2d 513, 517 (8th Cir. 1963); *NLRB v. Carlton Wood Prods. Co.*, 201 F.2d 863, 866 (9th Cir. 1953).

The Board and the courts of appeals have long recognized the important statutory policies that justify holding parties to those contracts. The consent election is “a valuable, and indeed necessary, device” which “is to be encouraged” because it “fairly expedites th[e] process” of determining “employee choice with respect to a bargaining representative.” *Chelsea Clock Co.*, 411 F.2d at 192. See *Hollywood Med. Ctr.*, 275 NLRB 307, 308 (1985) (noting Board’s “policy of encouraging consent election agreements” and unwillingness to allow a party to “void[] an unwanted election result” by challenging the terms of such agreements (citing *A. J. Tower Co.*, 329 U.S. 324)). Parties enter into consent election agreements—and the Board and courts refrain from upsetting Regional Directors’ determinations pursuant to those agreements—“to provide for the final settlement without delay of disputes concerning objections to such elections.” See *NLRB v. Cont’l Nut Co.*, 395 F.2d 830, 832 (9th Cir. 1968). See *United Dairies, Inc.*, 144 NLRB 153, 154 (1963) (“[T]he Board has recognized the value of such agreements not only in saving the expenditure of time and effort by the Government, but also because of their tendency to stabilize labor-management relations and to expedite the settlement of labor disputes.”), *enforced*, 337 F.2d 283 (10th Cir. 1964). But

“parties are far less likely to enter into [election] agreements if they are worth little more than the paper they are printed on.” *Cnty. Care Sys.*, 284 NLRB 1147, 1147 (1987). And the prompt and certain completion of representation proceedings that consent agreements exist to ensure is thwarted if the parties are not held to their bargain. *See Semi-Steel Casting Co.*, 160 F.2d at 391 (“To hold otherwise would permit [a party] deliberately to ignore binding commitments embodied in [an election] agreement; would open the door to subterfuges for hampering and delaying a final determination of a bargaining representative; and would tend to defeat, rather than to effectuate, the policies of the Act.” (internal citations and quotation marks omitted)).

Accordingly, courts routinely uphold the Board’s refusal to permit parties to challenge election arrangements to which they agreed. *See, e.g., NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 330-31 (5th Cir. 1991) (Board properly found employer “precluded from objecting to the stipulated date” to which it had agreed); *Van Leer Containers, Inc. v. NLRB*, 841 F.2d 779, 787-88 (7th Cir. 1988) (employer “voluntarily waived its right to litigate [an] issue” dealt with in its election agreement with union). Moreover, the Board has found that a party cannot unreservedly enter into an agreement for an election but then—dissatisfied with the outcome—challenge the Regional Director’s authority to conduct it, as such a party “is estopped from attacking the propriety of an election to which it has

expressly agreed.” *See Mission Produce, Inc.*, 362 NLRB No. 15, 2015 WL 502320, at *1 (Feb. 5, 2015); *accord ManorCare of Kingston, PA, LLC*, 361 NLRB No. 17, 2014 WL 3919913, at *1 n.1 (Aug. 11, 2014), *review pending*, Nos. 14-1166, 14-1200 (D.C. Cir.).⁷ Thus, because the Hospitals expressly agreed to representation proceedings conducted by the Regional Director and failed to challenge his authority during those proceedings, they are foreclosed from raising such challenges before the Court. And by the same token, because they signed agreements specifically providing for the Regional Director to rule on any election objections and failed to properly argue in the representation proceeding that he could not do so, the Hospitals are bound by their agreements and cannot be heard to argue that he was instead required to defer to an arbitrator.⁸

⁷ The Board’s estoppel approach is in accord with basic principles of equity. *See, e.g., In re Varat Enters., Inc.*, 81 F.3d 1310, 1317 (4th Cir. 1996) (“The doctrine of equitable estoppel allows ‘a person’s act, conduct or silence when it is his duty to speak,’ to preclude him from asserting a right he otherwise would have had against another who relied on that voluntary action.” (quoting *Black’s Law Dictionary* 538)).

⁸ As discussed below (pp. 52-56), the Hospitals seek to avoid the plain language of the consent election agreements by asserting they had oral agreements with the Union to arbitrate election objections. But the Hospitals’ parol evidence of a prior understanding (JA 123-28) cannot alter the unambiguous, written, agreed-upon terms of the consent election agreements (JA 15-20), which committed the resolution of election objections to the Regional Director. The Board, with court approval, excludes parol or extrinsic evidence where it “would not merely explain or clarify the parties’ intent regarding the provisions of the agreement but would instead invalidate and nullify the written agreement.” *Beech & Rich, Inc.*, 300 NLRB 882, 882 (1990), *enforced*, 945 F.2d 405 (6th Cir. 1991). *See also NLRB v.*

B. The Hospitals' Arguments in the Refusal-To-Bargain Case Came Too Late

Under settled law, it was simply too late for the Hospitals to argue, as they did for the first time in the unfair-labor-practice case, that Regional Director Harrell lacked the authority to approve the consent election agreements and certify the Union and that he should have deferred resolution of objections to an arbitrator. As the Court has long recognized, an employer in a refusal-to-bargain case ordinarily “is not entitled to litigate issues that were or could have been litigated in a prior representation proceeding.” *NLRB v. Sandpiper Convalescent Ctr.*, 824 F.2d 318, 323 (4th Cir. 1987) (citing *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941)). *See also Pace Univ.*, 514 F.3d at 23-25 (“[A] party must raise all of [its] available arguments in the representation proceeding rather than reserve them for an enforcement proceeding.”).

The policies underlying the Board’s rule are much the same as those which require holding parties to the terms of their consent election agreements: precluding parties from raising new issues in the unfair-labor-practice proceeding furthers “the long-held objective of avoiding undue and unnecessary delay in representation elections.” *Pace Univ.*, 514 F.3d at 23 (quoting *Amalgamated Clothing Workers v. NLRB*, 365 F.2d 898, 905 (D.C. Cir. 1966)). Further, judicial

Elec. Workers, Local 11, 772 F.2d 571, 575 (9th Cir. 1985) (“Where contractual provisions are unambiguous, the NLRB need not consider extrinsic evidence. Parol evidence is therefore not only unnecessary but irrelevant.”).

enforcement of that settled rule accords with the basic principle that “[s]imple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.” *L.A. Tucker Truck Lines*, 344 U.S. at 37.

During the representation proceedings, the Hospitals never questioned the Regional Director’s authority to approve consent agreements, certify the Union, or otherwise supervise the elections. Rather, they raised those challenges for the first time in their second amended answer in the unfair-labor-practice case. (JA 147-57.) Similarly, nothing the Hospitals filed in the representation proceedings in any way suggested that they opposed the Regional Director’s resolution of the election objections. (*E.g.*, JA 15-20 (consent election agreements), 23-27 (election objections).) It was not until the unfair-labor-practice case that the Hospitals first claimed in writing that “an oral ‘ad hoc’ agreement” somehow granted an arbitrator “exclusive jurisdiction” to rule on objections. (JA 56-57.)⁹ Having

⁹ As discussed below (pp. 52-56), the Hospitals submitted a statement during the unfair-labor-practice proceedings asserting that their attorney had orally informed Board agents of the purported arbitration agreement. (JA 127.) Even assuming the truth of that statement, the Hospitals did not adequately raise an argument that they were not required to submit evidence supporting their objections, in accordance with the Board’s rules, merely by telling “Board Agents” that the parties had an oral side agreement. *See Lindsley Indus.*, 199 NLRB 647, 648 (1972) (“If, indeed,

failed to properly raise their challenges to the Regional Director’s authority and resolution of the election objections at the appropriate time under the Board’s rules, the Hospitals have failed to preserve those challenges for the Court’s review. *Pace Univ.*, 514 F.3d at 23. *See also Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257, 266 n.5 (4th Cir. 2000) (“[W]e will not overturn elections on the basis of objections that were not properly preserved.”).

There are only “limited exceptions” to the requirement that a party must first raise its arguments in the representation case: newly discovered evidence, after-arising facts, or changes in governing law. *Pace Univ.*, 514 F.3d at 23. In their opening brief, the Hospitals advance no such arguments.¹⁰ Nor would there be any basis for them to do so. In particular, the Hospitals cannot point to a change in governing law. Arguments based on the Board’s 2012 recess appointments were available from the time the appointments were made, over nine months before the Regional Director certified the Union. *Cf. NLRB v. RELCO Locomotives, Inc.*, 734

circumstances exist which may warrant the grant of additional time for the objecting party to perfect its statement of objections in the manner our rules require, that party has the obligation to explicate these circumstances to the Regional Director and to request from him the extension of the deadline date *in writing*.” (emphasis added)). Thus, the Hospitals failed to properly preserve their argument in the representation case.

¹⁰ The Court, therefore, should not consider any such claims, should the Hospitals seek to raise them for the first time in their reply. *See Schlossberg v. Barney*, 380 F.3d 174, 182 n.6 (4th Cir. 2004) (arguments not raised in a party’s opening brief are deemed waived).

F.3d 764, 797 (8th Cir. 2013) (finding no extraordinary circumstances justifying employer’s failure to raise recess-appointment challenge before the Board, which issued relevant decisions in April 2012, because “[a]ll the relevant facts and constitutional clauses were known to [the employer] at the time of its Board hearing”).¹¹ Accordingly, as the Board found, “[a]ll representation issues raised by the [Hospitals] were or could have been litigated in the prior representation proceedings,” and could not be raised for the first time in the unfair-labor-practice proceedings. (JA 314.)

In sum, by failing to challenge the Regional Director’s authority at any point during the representation proceeding and instead entering into the consent election agreements, the Hospitals waived their right to challenge actions the Regional Director took in conformity with those agreements. The Hospitals’ challenges to the Regional Director’s authority are not properly before the Court, and should be summarily rejected on that basis.

¹¹ In *Noel Canning*, 705 F.3d at 497, the D.C. Circuit found extraordinary circumstances permitting it to address a constitutional challenge to the Board’s composition that was not preserved before the Board. Unlike in *Noel Canning*, however, a properly constituted panel of President-appointed and Senate-confirmed Board Members issued the unfair-labor-practice order that the Court is asked to enforce. Accordingly, the issues presented here are more akin to those in *Newton-New Haven Co.*, 506 F.2d at 1038, where the Second Circuit declined to hear an argument based on its own path-breaking precedent because it was untimely raised. See also *Intercollegiate Broadcast Sys. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009) (declining to consider a belatedly raised Appointments Clause claim, while recognizing that “[i]t is certainly within [the Court’s] power to consider”).

II. THE BOARD REASONABLY REJECTED THE HOSPITALS' CHALLENGES TO THE REGIONAL DIRECTOR'S AUTHORITY TO APPROVE CONSENT ELECTION AGREEMENTS AND CERTIFY THE UNION

The Hospitals' arguments are not only forfeited but also baseless. The Hospitals argue that the Regional Director lacked authority to approve the consent election agreements and certify the Union for three reasons. First, the Hospitals argue that the Regional Director's delegated authority over representation cases lapsed when the Board lost its quorum in January 2012. Second, they contend that the Board invalidly appointed the Regional Director after January 2012. Third, they argue that the Acting General Counsel who recommended the Regional Director's appointment was himself invalidly appointed. All three arguments fail.

A. The Board Reasonably Concluded That Its 1961 Delegation of Authority To Conduct Elections to Regional Directors Remains in Effect When the Board Itself Lacks a Quorum

The Board reasonably rejected the Hospitals' argument (Br. 30) that the secret-ballot elections conducted while the Board temporarily was without a quorum count for nothing, and that new elections must be conducted to re-ascertain the views of employees who voted decisively for union representation in 2012.

(JA 314 n.5.) The Board relied on the rationale it set forth in *Durham School Services*, 361 NLRB No. 66, 2014 WL 5338923, at *1-2 (Oct. 20, 2014), *review pending*, Nos. 14-1284, 15-1017 (D.C. Cir.). There, the Board determined that its longstanding delegation of representation-case authority to Regional Directors did

not lapse merely because the Board lost a quorum. As shown below, the Hospitals fail to show that the Board’s interpretation of its own statute and regulations, which accords with fundamental principles of administrative law, was impermissible. *See Chevron*, 467 U.S. at 843. Therefore, the Hospitals’ argument must be rejected.

As the Board recognized in *Durham School Services*, 361 NLRB No. 66, 2014 WL 5338923, at *2, Section 3(b) of the Act (29 U.S.C. § 153(b)) authorizes the Board to delegate its power over representation elections to its Regional Directors.¹² Congress amended Section 3(b) in 1959 to add that authorization, having recognized that the Board had developed a vast backlog, including a large number of pending representation petitions. *See Magnesium Casting*, 401 U.S. at 142; *Amalgamated Clothing Workers*, 365 F.2d at 903 & n.9. The new authority was ““designed to expedite final disposition of cases by the Board, by turning over part of its caseload to its regional directors for final determination.”” *Magnesium*

¹² The applicable portion of Section 3(b) provides that the Board is authorized:

to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot . . . and certify the results thereof, except that upon the filing of a request therefore with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.

Casting, 401 U.S. at 141 (quoting Sen. Goldwater, a Conference Committee member).

Acting on that authority, the Board in 1961 delegated to Regional Directors “its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof.” 26 Fed. Reg. 3911 (Apr. 28, 1961) (internal quotation marks omitted). The Board thereafter promulgated rules implementing that delegation. *See* 29 C.F.R. § 102.67; *Magnesium Casting*, 401 U.S. at 138.¹³ The delegation has remained in effect without interruption for more than half a century, and Regional Directors have routinely exercised their authority under it throughout the intervening decades, including during those periods when the Board itself lacked a quorum.

¹³ Shortly after the 1961 delegation, the Board described it as “a new procedural step—and one of the most important in Board history.” 26th Annual Report of the NLRB, at 1 (1961). “The significance of this delegation was confirmed when the regional directors disposed of the first 52 cases in an average of 34 days from filing to direction of election,” when cases in the prior six months had averaged 113 days. *Id.* at 2.

Indeed, in 2011 the Board issued regulations reaffirming that the delegation remains in effect during those periods.¹⁴

1. The Board’s interpretation of the relevant statutory language and regulations is consistent with the fundamental principle of administrative law, essential to stable yet responsive government, that “[i]nstitutional delegations of power are not affected by changes in personnel, but rather continue in effect as long as the institution remains in existence and the delegation is not revoked or altered.” *R.R. Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1343 (D.C. Cir. 1983). *Accord United States v. Wyder*, 674 F.2d 224, 227 (4th Cir. 1982) (“The acts of administrative officials continue in effect after the end of their tenures until revoked or altered by their successors in office.”); *Donovan v. Spadea*, 757 F.2d 74, 77 (3d Cir. 1985); *Donovan v. Nat’l Bank of Alaska*, 696 F.2d 678, 682-83 (9th Cir. 1983); *Champaign Cnty., Ill. v. U.S. Law Enforcement Assistance Admin.*, 611 F.2d 1200, 1207 (7th Cir. 1979) (“[A] delegation of authority survives the resignation of the person who issued the delegation.”). Nothing in the Act indicates that loss of a quorum deprives the Board’s delegation of representation actions to Regional Directors of its legal force and effect, or abrogates that delegation any more than the loss of a quorum abrogates the Board’s other prior

¹⁴ See JA 195 & n.4 (citing 29 C.F.R. § 102.182, *codifying* 76 Fed. Reg. 82,131 (Dec. 30, 2011) and 29 C.F.R. § 102.178, *codifying* 76 Fed. Reg. 77,699 (Dec. 14, 2011)).

actions and decisions. *Cf. Republic of Iraq v. Beauty*, 556 U.S. 848, 866 (2009) (noting that the “expiration of the *authorities* . . . is not the same as cancellation of the *effect* of the . . . prior valid exercise of those authorities”).

Accordingly, the Hospitals’ reliance (Br. 17-18) on common-law agency principles is misplaced. Questions regarding the scope and duration of statutory delegations of authority within public bodies cannot be adequately resolved by mechanically applying common-law agency and corporate-law principles, for governmental bodies are often subject to special rules not applicable to private entities. Indeed, that distinction is clearly set forth in agency and corporate-law treatises. *See* Restatement (Third) of Agency 6 (2006) (noting that the restatement “deals at points, but not comprehensively, with the application of common-law doctrine to agents of governmental subdivisions and entities created by government”); 1 Fletcher Cyclopedia of the Law of Corporations § 2, at 6 (2006) (explaining that “the law of municipal corporations [is] its own unique topic,” and that the treatise therefore “does not cover municipal corporations”); Restatement (Second) of Agency 2 (1958) (explaining that the Restatement “does not state the special rules applicable to public officers”).

2. Further, contrary to the Hospitals’ claims (Br. 19-21), the Board’s interpretation of the nature of its delegation fully effectuates congressional intent. As the Hospitals recognize (Br. 19-20), Congress amended Section 3(b) of the Act

in 1959 to empower the Board to issue the delegation to expedite disposition of representation cases. (*See* pp. 33-35.) In the judgment of Congress, authorizing the delegation advanced Congress’s overarching desire—reflected in the representation mechanism established by Section 9 of the Act—that elections be conducted expeditiously, unimpeded by dilatory tactics and other delays that might interfere with employees’ right to select a collective bargaining representative. *See Boire*, 376 U.S. at 478-79 (recognizing Congress’s concern that unless an election can promptly be held to determine the choice of representation, the union runs the risk of impairment of strength by attrition and delay while the case is dragging on); *Am. Fed’n of Labor v. NLRB*, 308 U.S. 401, 409-11 (1940) (representation proceedings are excluded from appellate review afforded by Section 10 of the Act (29 U.S.C. § 160)); *NLRB v. ARA Serv., Inc.*, 717 F.2d 57, 63 (3d Cir. 1983) (*en banc*) (recognizing that Congress structured the Act “to prevent attrition of union support caused by delay in the commencement of collective bargaining”). The amendment to Section 3(b) also reflects Congress’s judgment that Regional Directors’ expertise in representation matters warranted permitting the Board to entrust them with significant responsibility over representation matters. *See Magnesium Casting*, 401 U.S. at 141. Those congressional judgments would be substantially undermined if, as the Hospitals contend, the congressionally authorized delegation were to lapse whenever the Board lost a quorum.

The Hospitals fail to show otherwise by citing Section 3(b)'s provision for discretionary review of Regional Directors' exercise of their delegated authority. (Br. 20 & n.12.) That provision supports, rather than undermines, the Board's interpretation. When Congress added the delegation-authorizing language in 1959, it preserved Section 9(c)(4) of the Act, which permits parties to enter into consent election agreements like the one at issue in this case. *See, e.g., Standard Transformer Co.*, 202 F.2d at 848-49 (noting that Section 9(c)(4) permits parties to waive rights under the Act in binding consent election agreements). In those agreements, as explained above (pp. 23-27), parties who deem discretionary Board review unnecessary can agree to waive it at the outset. *See* 29 C.F.R. § 102.62(a).

Under those circumstances, the parties voluntarily "agree to forego resort to the Board for resolution of disputes and . . . leave the determination of their fate to the Regional Director." *Chelsea Clock Co.*, 411 F.2d at 192. Thus, for those parties it is critical that Regional Directors are empowered and available to resolve representation disputes even during periods when the Board lacks a quorum. Their exercise of the authority delegated to them in 1961 avoids the unnecessary delay in holding elections with which Congress was concerned in 1959 and preserves contemporaneous evidence of the employees' choice with respect to union

representation even during periods when the Board itself cannot issue decisions and orders.¹⁵

In sum, the continuing nature of the Board's 1961 delegation permits parties who desire a prompt and final resolution of a question concerning representation to waive Board review of the Regional Director's rulings, as the Hospitals and the Union did here, and proceed even in the absence of a Board quorum. The Hospitals' misguided contrary view would deprive those parties of the benefit of their voluntary bargain—a highly expeditious resolution of the representation case—and force them to instead wait for the Board to regain a quorum, thereby imposing unnecessary delay Congress sought to avoid.

3. Finally, there is no merit to the Hospitals' attempt (Br. 20) to equate delegee groups of Board members with Regional Directors for purposes of the Board's quorum requirement. With regard to delegee groups, Section 3(b) of the Act authorizes the Board "to delegate to any group of three or more members any or all of the powers which it may itself exercise." 29 U.S.C. § 153(b). It also

¹⁵ Where, unlike the Hospitals here, parties elect to preserve the option of discretionary Board review, the continuing nature of the delegation allows for a prompt election while ensuring the representation case will be ready for the Board to evaluate when its quorum is restored. For such parties, no disputed decision or action of the Regional Director is fully effective until the Board acts by either denying or granting requested review. In addition, no unfair-labor-practice proceedings based on the results of the election can commence until after a properly constituted Board has decided whether the legal issues raised by the election warrant its review.

provides that “three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.” 29 U.S.C. § 153(b). In *New Process Steel*, the Supreme Court was presented with the question whether a two-member quorum of a three-member panel, delegated all the powers of the Board, could continue to exercise that delegated authority after the third Board member’s appointment expired. 560 U.S. at 679. The Court held that the two-member quorum of a three-member delegee group could no longer exercise the full power of the Board “when the group’s membership falls below three.” *Id.* at 684.

The Supreme Court, however, emphasized that its holding “that the delegee group ceases to exist once there are no longer three Board members to constitute the group does not cast doubt on the prior delegations of authority to nongroup members, such as *the regional directors* or the general counsel.” *Id.* at 684 n.4 (emphasis added). Rather, it recognized that the status of delegations to Regional Directors during such periods “implicates a separate question,” which the Court did not decide. *Id.* at 684 n.4. Unlike the D.C. Circuit in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), the Supreme Court declined to “equat[e] . . . a quorum requirement with a membership requirement

that must be satisfied or else the power of any entity to which the Board has delegated authority is suspended.” *New Process Steel*, 560 U.S. at 684 n.4.¹⁶

Since *New Process Steel* highlighted the distinction between delegations of the Board’s plenary authority to its own members and delegations of particular authorities to other entities within the agency, four circuits have decided the question whether the loss of a Board quorum causes delegations to the General Counsel to lapse. All have held that they do not. *See Kreisberg v. HealthBridge Mgmt., LLC*, 732 F.3d 131, 140 (2d Cir. 2013) (holding that the Board’s delegation of authority to its General Counsel to seek injunctions under Section 10(j) of the Act (29 U.S.C. § 160(j)) did not lapse when the Board lost a quorum), *cert. denied*, 135 S. Ct. 869 (Dec. 15, 2014); *Frankl v. HTH Corp.*, 650 F.3d 1334, 1354 (9th Cir. 2011) (same), *cert. denied*, 132 S. Ct. 1821 (2012); *Osthus v. Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011) (same); *Overstreet v. El Paso Disposal, LP*, 625

¹⁶ In light of *New Process Steel*, the Hospitals appropriately do not attempt to rely on *Laurel Baye*, 564 F.3d 469, which they cite only in passing. (Br. 18.) Nothing in that case, which addressed the same delegee-group issue the Supreme Court resolved in *New Process Steel*, should be read to call into question the Board’s determination in this case. *Laurel Baye* did not address the provision of Section 3(b) relating to Regional Directors, 564 F.3d at 470, and therefore took no account of the important statutory policies which undergird it. (*See* pp. 32-39.) Moreover, as explained above (pp. 35-36), the “tenets of [common-law] agency and corporation law,” *id.* at 473, discussed in *Laurel Baye* are inapplicable here.

F.3d 844, 853-54 (5th Cir. 2010) (same).¹⁷ The Hospitals’ attempt to distinguish those cases (Br. 19) is unavailing, as all of them broadly rejected the common-law agency and corporate-law principles upon which the Hospitals’ position is founded. *See HealthBridge Mgmt. LLC*, 732 F.3d at 140 (reaffirming “reject[ion] [of] the agency theory”); *HTH Corp.*, 650 F.3d at 1354 (“[T]he Act’s quorum requirement must be satisfied when the Board is acting directly through its members, but does not need to be satisfied for the Board’s earlier exercises and assignments of its authority, made with a proper quorum, to remain valid and in effect.”); *Whitesell Corp.*, 639 F.3d at 844 (noting the Supreme Court’s unwillingness to endorse *Laurel Baye*’s position); *El Paso Disposal, LP*, 625 F.3d at 853 (“[T]he operative fact here is that, at the time of its delegation to the General Counsel, the Board comprised the requisite number of members to constitute a quorum. The fact that Board membership subsequently dipped below a quorum does not retroactively invalidate the Board’s prior delegation.”).

In conclusion, the Board’s determination (JA 314 n.5) that the 1961 delegation did not lapse in the absence of a quorum furthers the specific congressional purpose underlying the authorization of that delegation, which, in

¹⁷ *See also NLRB v. C&C Roofing Supply, Inc.*, 569 F.3d 1096, 1098 (9th Cir. 2009) (pre-*New Process* case holding that Board’s 1955 delegation to the General Counsel of full authority to initiate and maintain enforcement actions and resist petitions for review of Board orders “is permanently within the General Counsel’s authority”).

turn, promotes the overarching statutory goal of avoiding delay in representation cases. The Board’s conclusion represents a reasonable interpretation of the statutory language, which does not speak specifically to the effect of a loss of the Board’s quorum on the delegation. Because Congress has expressly authorized the Board to delegate its authority in representation cases to Regional Directors, the Board’s administrative interpretation of that grant of authority, under which a delegation survives lapses in the Board’s quorum, is entitled to deference from the Court. *See Chevron*, 467 U.S. at 842-44 (“[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the [C]ourt is whether the agency’s answer is based on a permissible construction of the statute.”). *See also United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (“the well-reasoned views of the agencies implementing a statute ‘constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance’” (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998))); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

B. The Properly Constituted Board Appointed Regional Director Harrell

The Hospitals’ next belatedly asserted claim is that Regional Director Harrell was unable to act in the representation proceedings because the Board’s quorum had lapsed before it approved his appointment as Regional Director of

Region 10. The Board properly rejected that argument (JA 314 n.5), which is refuted by authoritative official records.

As the Board found, Claude Harrell was appointed as Regional Director of Region 10 on December 22, 2011.¹⁸ (JA 314 n.5.) His appointment is memorialized in a Minute of Board Action from that day, submitted with a motion accompanying this brief, which documents that Board Chairman Pearce and Members Becker and Hayes “unanimously approved the recommendations of Acting General Counsel Solomon . . . for the selection of Regional Directors,” including Claude Harrell for Region 10. (*See* Motion, Attachment “A,” Minute of Board Action (December 22, 2011).)¹⁹ It is undisputed that the Board’s membership fell below the Act’s quorum requirement (29 U.S.C. § 3(b)) over a week later, on January 3, 2012.²⁰ (Br. 23.)

For over 200 years, “the rule as to when an appointment takes place has been clear: ‘when the last act to be done by the [appointing authority] was performed.’” *NTEU v. Reagan*, 663 F.2d 239, 242 (D.C. Cir. 1981) (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Here, the appointing authorities took the last

¹⁸ Prior to that date, Harrell was the Regional Director of Region 14. (*See* Attachments to the Hospitals’ Brief.)

¹⁹ The Minute of Board Action is a self-authenticating public document subject to judicial and administrative notice. *See* Fed. R. Evid. 902, 201.

²⁰ *See* Members of the NLRB Since 1935, available at <https://www.nlr.gov/who-we-are/board/members-nlr-1935>.

steps required of them on December 22, 2011. Therefore, Harrell was properly appointed before the Board's quorum lapsed.

The Hospitals fail to show otherwise by pointing to Harrell's Notification of Personnel Action (Standard Form 50) and a Region 10 newsletter. Neither document has legal significance in this regard. Plainly, "the completion of the Form 50 was not the 'last act' required of the appointing authorities within the meaning of *Marbury*." *NTEU*, 663 F.2d at 246. *See also Grigsby v. U.S. Dep't of Commerce*, 729 F.2d 772, 776 (Fed. Cir. 1984) ("[T]he SF-50 is not a legally operative document controlling on its face an employee's status and rights."). Rather, a Form 50 "is merely an administrative record of the accomplished action." *Harrison v. United States*, 120 Fed. Cl. 533, 548-49 (2015) (quoting *Hardy v. MSPB*, 13 F.3d 1571, 1575 (Fed.Cir.1994)). *See also NTEU*, 663 F.2d at 243 (rejecting "[t]he notion that the 'processing' of this Form is anything more than the ministerial act"). Thus, the fact that the Form 50 reflects approval of Harrell's paperwork by the Director of the Board's Human Resources Branch on April 20, 2012, with an effective date of April 8, 2012, is entirely irrelevant. (Br. 23.) It is likewise immaterial if, as the Region's newsletter appears to indicate (Br. 23), Harrell physically arrived at his Region 10 office only in April 2012, well after his appointment had been accomplished. *See Marbury*, 5 U.S. at 157.

C. The Acting General Counsel Was Properly Serving Pursuant to His Appointment Under the Federal Vacancies Reform Act When He Recommended Harrell’s Appointment as Regional Director

In a further attempt to avoid their bargaining obligations, the Hospitals erroneously argue (Br. 24-26) that Regional Director Harrell lacked authority because Acting General Counsel Solomon recommended his appointment after Solomon’s time in office had exceeded the term provided by Section 3(d) of the Act. Section 3(d) authorizes the President to designate an individual to act as General Counsel during a vacancy, but prohibits an Acting General Counsel “so designated” from serving “for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate.” 29 U.S.C. § 153(d). However, Solomon was not designated under Section 3(d). Rather, the President directed Solomon to perform the duties of General Counsel “[p]ursuant to the Constitution and the laws of the United States, including section 3345(a) of title 5, United States Code, as amended by the Federal Vacancies Reform Act of 1998 [“Vacancies Act”].” (See Motion, Attachment “B,” Presidential Memorandum (June 18, 2010).) The Vacancies Act, unlike Section 3(d), requires designees to meet certain criteria, *see, e.g.*, 5 U.S.C. § 3345(a)(3), but as the Hospitals acknowledge (Br. 25), it also permits them to serve a longer term, *see* 5 U.S.C. § 3346.

Although Section 3(d) provides one avenue to fill Board General Counsel vacancies, the subsequently enacted Vacancies Act clearly “provides a valid ‘alternative procedure.’” *Benjamin H. Realty Corp.*, 361 NLRB No. 103, 2014 WL 6068930, at *1 (Nov. 13, 2014) (quoting S. Rep. No. 105-250, at 17 (1998)); *Huntington Ingalls Inc.*, 361 NLRB No. 64, 2014 WL 4966737, at *4 n.8 (Oct. 3, 2014), *review pending*, Nos. 14-2051, 14-2148 (4th Cir.). The express terms of the Vacancies Act, with four immaterial exceptions, apply to all federal appointments requiring Senate confirmation. 5 U.S.C. § 3349c. Thus, as the Court has previously recognized, the Vacancies Act’s procedures apply to the General Counsel’s position. *Muffley v. Spartan Mining Co.*, 570 F.3d 534, 539 n.1 (4th Cir. 2009). And the Vacancies Act’s legislative history confirms congressional intent to provide the President an additional means to fill vacancies. The Senate Report explains that the Vacancies Act “retains existing statutes,” including Section 3(d), that permit the designation of an official to serve in a temporary acting capacity, but also “provide[s] an alternative procedure for temporarily occupying” an office. S. Rep. No. 105-250, 105th Cong. 2d Sess. 16, 17 (1998). Therefore, Section 3(d) is no longer the sole means of filling the Board’s General Counsel vacancies, even though 5 U.S.C. § 3347(a)(1)(A) preserves it as an available option.²¹

²¹ Section 3347(a) provides that the Vacancies Act is “the exclusive means” for the President to appoint such an official in an acting capacity “unless—(1) a statutory provision expressly—(A) authorizes the President” to make such an

The Hospitals fail to show otherwise. First, their argument that repeals by implication are disfavored (Br. 25) is irrelevant because the Vacancies Act supplements, rather than supplants, Section 3(d). Second, the Hospitals’ passing reference to *Hooks v. Kitsap Tenant Support Services, Inc.* does nothing to bolster their position. (Br. 26 (citing *Kitsap*, 2013 WL 4094344 (W.D. Wash., Aug. 13, 2013), *appeal pending decision*, No. 13-3592 (9th Cir.).) That decision said nothing about the 40-day term described in Section 3(d)—the sole basis for the Hospitals’ challenge to Solomon’s appointment. (Br. 24-26.) Rather, the *Kitsap* decision turned on a mistaken interpretation of Section 3345(b)(1) of the Vacancies Act, which the Hospitals have not urged before the Court.²²

In sum, the President had the option of designating an Acting General Counsel under either Section 3(d) of the Act or the Vacancies Act. He chose the latter option. Thus, the Hospitals’ arguments regarding compliance with Section 3(d)’s time limitations must be rejected.

appointment. Thus, where there is independent statutory authority, as here, the Vacancies Act is not the “exclusive” means for appointments, but merely provides an option.

²² By failing to raise any such an argument in their opening brief, the Hospitals have waived it. *See Schlossberg*, 380 F.3d at 182 n.6 (4th Cir. 2004). *See also SEC v. Banner Fund Int’l*, 211 F.3d 602, 613-14 (D.C. Cir. 2000) (appellate courts “will not address an ‘asserted but unanalyzed’ argument” (quoting *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983))).

III. THE REGIONAL DIRECTOR DID NOT ACT ARBITRARILY OR CAPRICIOUSLY IN OVERRULING OBJECTIONS THAT THE HOSPITALS REFUSED TO SUPPORT WITH EVIDENCE

The Hospitals' final argument is that the Regional Director should not have overruled their objections after they deliberately chose not to comply with Board rules requiring them to submit supporting evidence. As shown above (pp. 23-27), the Hospitals are bound by the agreements they signed expressly providing for the Regional Director to rule on their objections, so they cannot be heard to argue that only an arbitrator could carry out that role. But in any event, the Hospitals cannot demonstrate that the Regional Director's adherence to the Board's strict guidelines for the prompt resolution of election objections was arbitrary and capricious.

A party seeking to overturn the results of a representation election "bears a heavy burden." *NLRB v. Herbert Halperin Distrib. Corp.*, 826 F.2d 287, 290 (4th Cir. 1987). The challenging party "must prove by specific evidence not only that campaign improprieties occurred, but also that they prevented a fair election." *Elizabethtown*, 212 F.3d at 262. *See also NLRB v. Hydrotherm, Inc.*, 824 F.2d 332, 335 (4th Cir. 1987) (to be entitled to a hearing on its objections, objecting party must proffer evidence "which *prima facie* would warrant setting aside the election").²³

²³ "[T]he Board does not require that such evidence include signed witness statements or affidavits." *Health Care & Ret. Corp.*, 313 NLRB 655 (1994). But "[a]t a minimum," the party must "identif[y] witnesses and provide[] a description

In accordance with the important statutory policies discussed above (pp. 25-26, 28-29), the Board’s rules governing post-election objections are “designed to resolve expeditiously questions preliminary to the establishment of the bargaining relationship and to preclude the opportunity for protracted delay of certification of the results of representation elections.” *Amalgamated Clothing Workers v. NLRB*, 424 F.2d 818, 828 (D.C. Cir. 1970) (quoting *NLRB v. Golden Age Beverage*, 415 F.2d 26, 32 (5th Cir. 1969)). *See also NLRB v. Sun Drug Co.*, 359 F.2d 408, 414 (3d Cir. 1966) (“Time is a critical element in election cases.”); *Drum Lithographers*, 287 NLRB 22, 24 (1987) (recognizing “the need for promptness in resolving representation issues”). To that end, Board rules require a party to file its election objections “[w]ithin 7 days after the tally of ballots has been prepared.” 29 C.F.R. § 102.69(a). The rules further dictate that “[w]ithin 7 days after the filing of objections, or such additional time as the Regional Director may allow, the party filing objections *shall* furnish to the Regional Director the evidence available to it to support the objections.” 29 C.F.R. § 102.69(a) (emphasis added). *See also Hincer Mfg. Co.*, 106 NLRB 1314, 1316 (1953) (“The Board has consistently held . . . that, unless such evidence is produced, the Regional Director

of the relevant information they could provide.” *The Daily Grind*, 337 NLRB 655, 656 (2002). Thus, a party “ha[s] many ways in which it c[an] support its case, but it [cannot] simply rely on its bare allegations.” *Id.* Where an objecting party fails to make an adequate “offer of proof,” its objections are overruled. *Hydrotherm*, 824 F.2d at 335.

is not required further to pursue his investigation of such objections.”); NLRB Casehandling Manual (Part 2, Representation Proceedings) § 11392.6 (2014), *available at* <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/CHM2-Sept2014.pdf> (“Absent the timely receipt of sufficient evidence, the Regional Director should overrule the objections without any further processing.”).

As the Regional Director noted, “it is well established that the Board has adopted a policy of strictly applying the time periods for the submission of evidence in support of objections.” (JA 34, 36 (citing *Star Video Entm’t*, 290 NLRB 1010 (1988)).) Under that policy, the Board summarily overrules even timely-filed election objections if evidence in support of them is not submitted in time. *See, e.g., Goody’s Family Clothing, Inc.*, 308 NLRB 181, 181-82 (1992); *Operator Servs. West*, 300 NLRB 473, 473 n.1 (1990); *Pub. Storage, Inc.*, 295 NLRB 1034, 1034-35 (1989). *See also H.P. Hood, Inc. v. NLRB*, 30 F. App’x 148, 157 (4th Cir. 2002) (“The Board has explained that Rule 102.69(a) will be ‘strictly applied,’ and it has frequently rejected late-filed evidence submitted by both employers and unions.” (citing *Star Video Entm’t*, 290 NLRB at 1010)). Indeed, although Rule 102.69(a) permits Regional Directors to grant a proper request for additional time to file evidence, the Board has held that they lack discretion to accept late-filed evidence in the absence of such a request. *See Pub. Storage*, 295

NLRB at 1034 (a Regional Director cannot accept a late filing when the party has “not requested an extension within the time allowed by the Rules”).

The Hospitals concede (Br. 5, 27) that they were fully aware that the deadlines for their evidence were September 12 and 13, 2012, and that they declined to submit any evidence. Under the above authorities, therefore, the Regional Director properly overruled their objections on September 24, after the 7-day deadline had passed and the Hospitals had submitted nothing to support their objections. (JA 34-38.) *See Adler Metal Prods. Corp.*, 114 NLRB 170, 171 (1955) (objections properly overruled where objecting party “persistently refused to furnish [supporting] evidence”).

The Hospitals assert (Br. 5, 27) that they “explained to the Region’s agents” that they could not provide supporting evidence because the Hospitals and the Union had orally agreed that an arbitrator would resolve any election objections, and that any evidence in support of objections would be submitted exclusively to the arbitrator.²⁴ Even assuming the parties had a side agreement to that effect, it

²⁴ As noted above (pp. 29-30), the Hospitals made no written submission to the Regional Director claiming any such agreement, nor did they provide any evidence of an agreement. In a statement signed by the Hospitals’ counsel, submitted during the unfair-labor-practice proceeding, counsel averred that the oral agreement was to abide by procedures set forth in a document entitled “Election Procedure Agreement.” (JA 125). The Hospitals, however, make no claim that they submitted any such document to the Region, either when they filed their objections or when they submitted counsel’s statement.

would not have excused the Hospitals from complying with the Board’s rules for submission of evidence, because, as the Board found, deferral would have been inappropriate. (JA 314 n.6 (citing *Barstow Cmty Hosp.*, 361 NLRB No. 34, 2014 WL 4302559 (Aug. 29, 2014), *review pending*, Nos. 14-1167, 14-1195 (D.C. Cir.); *Fallbrook Hosp. Corp.*, 360 NLRB No. 73, 2014 WL 1458265 (Apr. 14, 2014), *enforced*, 785 F.3d 729 (D.C. Cir. 2015)).)

In the two cases the Board cited (JA 314 n.6) and a third subsequent case, all involving the Union and other hospitals controlled by the Hospitals’ parent corporation, the Board has rejected exactly the same argument the Hospitals have made here—that “an oral ad hoc agreement between the parties gave exclusive jurisdiction to an arbitrator” to resolve disputes.²⁵ *See Affinity Med. Ctr.*, 362 NLRB No. 78, 2015 WL 1956191, at *1 n.3 (Apr. 30, 2015) (rejecting that argument and noting that an “identical” defense has been rejected in *Barstow*, 361 NLRB No. 34, 2014 WL 4302559, at *1 n.3 and *Fallbrook*, 360 NLRB No. 73, 2014 WL 1458265, at *1 n.2, *21). In each of those cases, as here, the Board declined to defer to the parties’ oral agreement because they “ha[d] no collective-bargaining agreement setting forth an agreed-upon grievance-arbitration

²⁵ (See JA 56-57 (Answer), 98-99 (Amended Answer), 152-53 (Second Amended Answer), 299-300 (Third Amended Answer) (all arguing that elections were held pursuant to “an oral *ad hoc* agreement between [the Hospitals] and the [Union], whereby the parties agreed that an arbitrator would hold exclusive jurisdiction to determine challenged ballots and objections related to the conduct of the [elections]”).)

procedure,” *id.* (citing *Ariz. Portland Cement Co.*, 281 NLRB 304, 304 n.2 (1986)), and they had not enjoyed ““a long and productive collective-bargaining relationship,”” *id.* (quoting *United Tech. Corp.*, 268 NLRB 557, 558 (1984)).

Before the Court, the Hospitals have not attempted to dispute the Board’s finding that those factors render deferral inappropriate, and precedent amply supports it. *See San Juan Bautista Med. Ctr.*, 356 NLRB No. 102, 2011 WL 702297, at *2 (Feb. 28, 2011) (“We are unaware of any decision finding that a relationship as new and contentious as the one at issue here can be considered ‘long and productive’ for the purposes of a [deferral]. . . .”); *Beverly Enters.*, 310 NLRB 222, 257-58 (1993) (deferral inappropriate where relationship was under two years old), *enforced in relevant part sub nom. Torrington Extend-A-Care Employee Ass’n v. NLRB*, 17 F.3d 580 (2d Cir. 1994); *Anaconda Co.*, 224 NLRB 1041, 1045 (1976) (“Nor will the Board defer where disputes arise independently of a collective-bargaining agreement”), *enforced mem.* 578 F.2d 1385 (9th Cir. 1978). Accordingly, the Hospitals cannot meet their heavy burden of showing that the Regional Director’s certification of the Union pursuant to the consent agreement was arbitrary and capricious. *See NLRB v. Hood Corp.*, 346 F.2d 1020, 1022 (9th Cir. 1965) (“The failure of the Regional Director to honor the alleged pre-election oral accord or agreement could hardly be considered to be arbitrary or

capricious for it is established Board policy to require that such agreements be in writing.”)

Instead of addressing the Board’s governing standards concerning deferral, the Hospitals claim that the Regional Director simply could not overrule their objections based on their refusal to submit evidence because their allegations “called the legitimacy of the elections into question.” (Br. 29.) That argument is patently wrong. Parties cannot flout the Board’s procedural rules merely because their arguments might have had merit if they had been timely made and properly supported. *See A.J. Tower Co.*, 329 U.S. at 333 (“[T]he determination of whether a majority in fact voted for the union must be made in accordance with such formal rules of procedure as the Board may find necessary to adopt in the sound exercise of its discretion.”). *See also, e.g., Hincer Mfg. Co.*, 106 NLRB at 1315-16 (overruling unsupported objections notwithstanding employer’s argument that its refusal to furnish evidence was justified based on fear of union retaliation against witnesses). That basic principle is well illustrated by the Board’s decision in *Public Storage*. 295 NLRB at 1034-35. The union in that case filed timely objections to an election, but the Regional Director’s letter reminding it to submit evidence was lost in the mail. *Id.* at 1034. For that reason, the Regional Director excused the union’s failure to timely supply supporting evidence and ordered a hearing on its objections. *Id.* The Board overturned that order and overruled the

union's objections purely based on its failure to comply with Section 102.69(a), notwithstanding the Regional Director's judgment that the objections warranted a hearing on their merits. *Id.* at 1034-35. Similarly, in the present case, the Hospitals' failure to comply with the Board's rules precluded the Regional Director from proceeding to a hearing on their objections and required that the objections be overruled.

The cases the Hospitals cite (Br. 29) are inapposite because they address a wholly different circumstance. None of them suggest that the Board cannot dispose of objections based on a party's procedural default, much less that it must tolerate a deliberate refusal to submit evidence. Rather, as the Board has recognized, those cases represent "a limited number" of isolated instances where the Board's changed view of the law caused it to depart from the well-established rule that, "in a certification-testing unfair labor practice case, issues that had been presented to and decided by the Board in a prior, related representation case cannot be relitigated." *Warren Unilube, Inc.*, 357 NLRB No. 9, 2011 WL 2784210, at *1 n.3 (July 15, 2011) (discussing *Sub Zero Freezer Co.*, 271 NLRB 47 (1984), *enforced*, 690 F.3d 969 (8th Cir. 2012). *Accord Salem Hosp. Corp.*, 357 NLRB No. 119, 2011 WL 5976073, at *1 n.5 (Nov. 29, 2011).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enforce the Board's Order in full.

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STATUTORY AND REGULATORY ADDENDUM

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Relevant provisions of the National Labor Relations Act (29 U.S.C. § 151, et seq.) are as follows:

Sec. 3 [29 U.S.C. § 153]

(b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 [section 159 of this title] and certify the results thereof, except that upon the filing of a request therefore with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

....

(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

Sec. 7. [29 U.S.C. § 157]

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8. [29 U.S.C. § 158]

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

....

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

....

Sec. 9 [29 U.S.C. § 159]

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a); the Board shall

investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

- (2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).
 - (3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.
 - (4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.
 - (5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.
- (d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation

shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Sec. 10 [29 U.S.C. § 160]

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . .

. . . .

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in such 2112 of title 28, United States Code. Upon the filing of such petition, the Court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive. . . .

. . . .

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to

have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

Relevant provisions of the Federal Vacancies Reform Act, 5 U.S.C. 3345, et seq., are as follows:

Sec. 3345. Acting officer [5 U.S.C. § 3345]

(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office--

(1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;

(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346; or

(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if--

(A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and

(B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.

(b)(1) Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if--

(A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person--

(i) did not serve in the position of first assistant to the office of such officer; or

(ii) served in the position of first assistant to the office of such officer for less than 90 days; and

(B) the President submits a nomination of such person to the Senate for appointment to such office.

(2) Paragraph (1) shall not apply to any person if--

(A) such person is serving as the first assistant to the office of an officer described under subsection (a);

(B) the office of such first assistant is an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate; and

(C) the Senate has approved the appointment of such person to such office.

(c)(1) Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve in that office subject to the time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.

(2) For purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of a term of office is an inability to perform the functions and duties of such office.

Sec. 3346. Time limitation [5 U.S.C. § 3346]

(a) Except in the case of a vacancy caused by sickness, the person serving as an acting officer as described under section 3345 may serve in the office--

(1) for no longer than 210 days beginning on the date the vacancy occurs; or

(2) subject to subsection (b), once a first or second nomination for the office is submitted to the Senate, from the date of such nomination for the period that the nomination is pending in the Senate.

(b)(1) If the first nomination for the office is rejected by the Senate, withdrawn, or returned to the President by the Senate, the person may

continue to serve as the acting officer for no more than 210 days after the date of such rejection, withdrawal, or return.

(2) Notwithstanding paragraph (1), if a second nomination for the office is submitted to the Senate after the rejection, withdrawal, or return of the first nomination, the person serving as the acting officer may continue to serve--

(A) until the second nomination is confirmed; or

(B) for no more than 210 days after the second nomination is rejected, withdrawn, or returned.

(c) If a vacancy occurs during an adjournment of the Congress sine die, the 210-day period under subsection (a) shall begin on the date that the Senate first reconvenes.

Sec. 3347. Exclusivity [5 U.S.C. § 3347]

(a) Sections 3345 and 3346 are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) for which appointment is required to be made by the President, by and with the advice and consent of the Senate, unless--

(1) a statutory provision expressly--

(A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

(B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

(2) the President makes an appointment to fill a vacancy in such office during the recess of the Senate pursuant to clause 3 of section 2 of article II of the United States Constitution.

(b) Any statutory provision providing general authority to the head of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) to delegate duties statutorily vested in that agency head to, or to reassign duties among, officers or employees of such Executive agency, is not a statutory provision to which subsection (a)(1) applies.

Sec. 3349c. Exclusion of certain officers [5 U.S.C. § 3349c]

Sections 3345 through 3349b shall not apply to--

(1) any member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity that--

(A) is composed of multiple members; and

(B) governs an independent establishment or Government corporation;

(2) any commissioner of the Federal Energy Regulatory Commission;

(3) any member of the Surface Transportation Board; or

(4) any judge appointed by the President, by and with the advice and consent of the Senate, to a court constituted under article I of the United States Constitution.

Relevant provisions of the Board's Rules and Regulations are as follows:

Sec. 102.178 [29 C.F.R. § 102.178]

Normal operations should continue.— The policy of the National Labor Relations Board is that during any period when the Board lacks a quorum normal Agency operations should continue to the greatest extent permitted by law.

Sec. 102.182 [29 C.F.R. § 102.182]

Representation cases should be processed to certification.— During any period when the Board lacks a quorum, the second proviso of § 102.67(b) regarding the automatic impounding of ballots shall be suspended. To the extent practicable, all representation cases should continue to be processed and the appropriate certification should be issued by the Regional Director notwithstanding the pendency of a request for review, subject to revision or revocation by the Board pursuant to a request for review filed in accordance with this subpart.

Sec. 102.62 [29 C.F.R. § 102.62]

Election agreements.—(a) Consent election agreements with final regional director determinations of post-election disputes. Where a petition has been

duly filed, the employer and any individual or labor organizations representing a substantial number of employees involved may, with the approval of the Regional Director, enter into an agreement providing for the waiver of a hearing and for an election and further providing that post- election disputes will be resolved by the regional director. Such agreement, referred to as a consent-election agreement, shall include a description of the appropriate unit, the time and place of holding the election, and the payroll period to be used in determining what employees within the appropriate unit shall be conducted under the direction and supervision of the regional director. The method of conducting such election shall be consistent with the method followed by the Regional Director in conducting elections pursuant to sections 102.69 and 102.70 except that the rulings and determinations by the Regional Director of the results thereof shall be final, and the Regional Director shall issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect, in that case, as if issued by the Board, provided further that rulings or determinations by the Regional Director in respect to any amendment of such certification shall also be final.

Sec. 102.67 [29 C.F.R. § 102.67]

Proceedings before the Regional Director; further hearing; briefs; action by the Regional Director; appeals from action by the Regional Director; statement in opposition to appeal; transfer of case to the Board; proceedings before the Board; Board action.

(a) The Regional Director may proceed, either forthwith upon the record or after oral argument, the submission of briefs, or further hearing, as he may deem proper, to determine the unit appropriate for the purpose of collective bargaining, to determine whether a question concerning representation exists, and to direct an election, dismiss the petition, or make other disposition of the matter. Any party desiring to submit a brief to the Regional Director shall file the original and one copy thereof, which may be a typed carbon copy, within 7 days after the close of the hearing: Provided, however, That prior to the close of the hearing and for good cause the hearing officer may grant an extension of time not to exceed an additional 14 days. Copies of the brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the Regional Director together with the brief. No reply brief may be filed except upon special

leave of the Regional Director.

(b) A decision by the Regional Director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the Regional Director shall be final: Provided, however, That within 14 days after service thereof any party may file a request for review with the Board in Washington, D.C. The Regional Director shall schedule and conduct any election directed by the decision notwithstanding that a request for review has been filed with or granted by the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of the election or any other action taken or directed by the Regional Director: Provided, however, That if a pending request for review has not been ruled upon or has been granted ballots whose validity might be affected by the final Board decision shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such decision.

(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

(2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(d) Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record; however, the Board may, in its discretion, examine the record in evaluating the request. With respect to ground (2), and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a

summary of argument. But such request may not raise any issue or allege any facts not timely presented to the Regional Director.

(e) Any party may, within 7 days after the last day on which the request for review must be filed, file with the Board a statement in opposition thereto, which shall be served in accordance with the requirements of paragraph (k) of this section. A statement of such service of opposition shall be filed simultaneously with the Board. The Board may deny the request for review without awaiting a statement in opposition thereto.

(f) The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the Regional Director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

(g) The granting of a request for review shall not stay the Regional Director's decision unless otherwise ordered by the Board. Except where the Board rules upon the issues on review in the order granting review, the appellants and other parties may, within 14 days after issuance of an order granting review, file briefs with the Board. Such briefs may be reproductions of those previously filed with the Regional Director and/or other briefs which shall be limited to the issues raised in the request for review. Where review has been granted, the Board will consider the entire record in the light of the grounds relied on for review. Any request for review may be withdrawn with the permission of the Board at any time prior to the issuance of the decision of the Board thereon.

(h) In any case in which it appears to the Regional Director that the proceeding raises questions which should be decided by the Board, he may, at any time, issue an order, to be effective after the close of the hearing and before decision, transferring the case to the Board for decision. Such an order may be served on the parties upon the record of the hearing.

(i) If any case is transferred to the Board for decision after the parties have filed briefs with the Regional Director, the parties may, within such time after service of the order transferring the case as is fixed by the Regional Director, file with the Board the brief previously filed with the Regional

Director. No further briefs shall be permitted except by special permission of the Board. If the case is transferred to the Board before the time expires for the filing of briefs with the Regional Director and before the parties have filed briefs, such briefs shall be filed as set forth above and served in accordance with the requirements of subsection (k) of this section within the time set by the Regional Director. If the order transferring the case is served on the parties during the hearing, the hearing officer may, prior to the close of the hearing and for good cause, grant an extension of the time within which to file a brief with the Board for a period not to exceed an additional 14 days. No reply brief may be filed except upon special leave of the Board.

(j) Upon transfer of the case to the Board, the Board shall proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or further hearing, as it may determine, to decide the issues referred to it or to review the decision of the Regional Director, and shall direct a secret ballot of the employees or the appropriate action to be taken on impounded ballots of an election already conducted, dismiss the petition, affirm or reverse the Regional Director's order in whole or in part, or make such other disposition of the matter as it deems appropriate.

(k)(1) All documents filed with the Board under the provisions of this section shall be filed in eight copies, double spaced, on 8-1/2-by 11-inch paper, and shall be printed or otherwise legibly duplicated. Carbon copies of typewritten materials will not be accepted. Requests for review, including briefs in support thereof; statements in opposition thereto; and briefs on review shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the Board by motion, setting forth the reasons therefor, filed not less than 5 days, including Saturdays, Sundays, and holidays, prior to the date the document is due. Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page references and an alphabetical table of cases and other authorities cited.

(2) The party filing with the Board a request for review, a statement in opposition to a request for review, or a brief on review shall serve a copy thereof on the other parties and shall file a copy with the Regional Director. A statement of such service shall be filed with the Board together with the document.

(3) Requests for extensions of time to file requests for review, statements in opposition to a request for review, or briefs, as permitted by this section, shall be filed with the Board or the Regional Director, as the case may be. The party filing the request for an extension of time shall serve a copy thereof on the other parties and, if filed with the Board, on the Regional Director. A statement of such service shall be filed with the document.

Sec. 102.69 [29 C.F.R. § 102.69]

Election procedure; tally of ballots; objections; certification by the Regional Director; report on challenged ballots; report on objections; exceptions; action of the Board; hearing

(a) Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the Regional Director in whose Region the proceeding is pending. All elections shall be by secret ballot. Whenever two or more labor organizations are included as choices in an election, either participant may, upon its prompt request to and approval thereof by the Regional Director, whose decision shall be final, have its name removed from the ballot: Provided, however, That in a proceeding involving an employer-filed petition or a petition for decertification the labor organization certified, currently recognized, or found to be seeking recognition may not have its name removed from the ballot without giving timely notice in writing to all parties and the Regional Director, disclaiming any representation interest among the employees in the unit. Any party may be represented by observers of its own selection, subject to such limitations as the Regional Director may prescribe. Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election the ballots will be counted and a tally of ballots prepared and immediately made available to the parties. Within 7 days after the tally of ballots has been prepared, any party may file with the Regional Director an original and five copies of objections to the conduct of the election or to conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. A person filing objections by facsimile pursuant to §102.114(f) shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing by facsimile, if otherwise

proper. In addition, extra copies need not be filed if the filing is by facsimile pursuant to §102.114(f). The Regional Director will cause a copy of the objections to be served on each of the other parties to the proceeding. Within 7 days after the filing of objections, or such additional time as the Regional Director may allow, the party filing objections shall furnish to the Regional Director the evidence available to it to support the objections.

(b) If no objections are filed within the time set forth above, if the challenged ballots are insufficient in number to affect the results of the election, and if no runoff election is to be held pursuant to section 102.70, the Regional Director shall forthwith issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect as if issued by the Board, and the proceeding will thereupon be closed.

(c)(1) If timely objections are filed to the conduct of the election or to conduct affecting the results of the election, or if the challenged ballots are sufficient in number to affect the results of the election, the Regional Director shall, consistent with the provisions of section 102.69(d), initiate an investigation, as required, of such objections or challenges.

(2) If a consent election has been held pursuant to section 102.62(b), the Regional Director shall prepare and cause to be served on the parties a report on challenged ballots or on objections, or on both, including his recommendations, which report, together with the tally of ballots, he shall forward to the Board in Washington, D.C. Within 14 days from the date of issuance of the report on challenged ballots or on objections, or on both, any party may file with the Board in Washington, D.C., exceptions to such report, with supporting documents as permitted by section 102.69(g)(3) and/or a supporting brief if desired. Within 7 days from the last date on which exceptions and any supporting documents and/or supporting brief may be filed, or such further period as the Board may allow, a party opposing the exceptions may file an answering brief, with supporting documents as permitted by section 102.69(g)(3) if desired, with the Board in Washington, D.C. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case. The report on challenged ballots may be consolidated with the report on objections in appropriate cases.

(3) If the election has been conducted pursuant to a direction of election issued following any proceeding under section 102.67, the Regional Director may (i) issue a report on objections or on challenged ballots, or on both, as in the case of a consent election pursuant to paragraph (b) of section 102.62, or (ii) exercise his authority to decide the case and issue a decision disposing of the issues, and directing appropriate action or certifying the results of the election.

(4) If the Regional Director issues a report on objections and challenges, the parties shall have the rights set forth in paragraph (c)(2) of this section and in section 102.69(f); if the Regional Director issues a decision, the parties shall have the rights set forth in section 102.67 to the extent consistent herewith, including the right to submit documents supporting the request for review or opposition thereto as permitted by section 102.69(g)(3).

(d) In issuing a report on objections or on challenged ballots, or on both, following proceedings under section 102.62(b) or 102.67, or in issuing a decision on objections or on challenged ballots, or on both, following proceedings under section 102.67, the Regional Director may act on the basis of an administrative investigation or upon the record of a hearing before a hearing officer. Such hearing shall be conducted with respect to those objections or challenges which the Regional Director concludes raise substantial and material factual issues.

(e) Any hearing pursuant to this section shall be conducted in accordance with the provisions of sections 102.64, 102.65, and 102.66, insofar as applicable, except that, upon the close of such hearing, the hearing officer shall, if directed by the Regional Director, prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues. In any case in which the Regional Director has directed that a report be prepared and served, any party may, within 14 days from the date of issuance of such report, file with the Regional Director the original and one copy, which may be a carbon copy, of exceptions to such report, with supporting brief if desired. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director. Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an

answering brief with the Regional Director. An original and one copy, which may be a carbon copy, shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director. If no exceptions are filed to such report, the Regional Director, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.

(f) In a case involving a consent election held pursuant to section 102.62(b), if exceptions are filed, either to the report on challenged ballots or on objections, or on both if it be a consolidated report, and it appears to the Board that such exceptions do not raise substantial and material issues with respect to the conduct or results of the election, the Board may decide the matter forthwith upon the record or may make other disposition of the case. If it appears to the Board that such exceptions raise substantial and material factual issues, the Board may direct the Regional Director or other agent of the Board to issue and cause to be served on the parties a notice of hearing on said exceptions before a hearing officer. The hearing shall be conducted in accordance with the provisions of sections 102.64, 102.65, and 102.66 insofar as applicable. Upon the close of the hearing the agent conducting the hearing, if directed by the Board, shall prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations to the Board as to the disposition of the challenges or objections, or both if it be a consolidated report. In any case in which the Board has directed that a report be prepared and served, any party may within 14 days from the date of issuance of the report on challenged ballots or on objections, or on both, file with the Board in Washington, D.C., exceptions to such report, with supporting brief if desired. Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further period as the Board may allow, a party opposing the exceptions may file an answering brief with the Board in Washington, D.C. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case. The Board shall thereupon proceed pursuant to section 102.67: *Provided, however,* That in any proceeding wherein a representation case has been consolidated with an unfair labor practice case for purposes of hearing the provisions of section 102.46 of these rules shall govern with respect to the filing of exceptions or an answering brief to the exceptions to the administrative law judge's decision.

(g)(1)(i) In a proceeding pursuant to this section in which a hearing is held, the record in the case shall consist of the notice of hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, and exhibits, together with the objections to the conduct of the election or to conduct affecting the results of the election, any report on such objections, any report on challenged ballots, exceptions to any such report, any briefs or other legal memoranda submitted by the parties, the decision of the Regional Director, if any, and the record previously made as defined in section 102.68. Materials other than those set out above shall not be a part of the record.

(ii) In a proceeding pursuant to this section in which no hearing is held, the record shall consist of the objections to the conduct of the election or to conduct affecting the results of the election, any report on objections or on challenged ballots and any exceptions to such a report, any Regional Director's decision on objections or on challenged ballots and any request for review of such a decision, any documentary evidence, excluding statements of witnesses, relied upon by the Regional Director in his decision or report, any briefs or other legal memoranda submitted by the parties, and any other motions, rulings, or orders of the Regional Director. Materials other than those set out above shall not be a part of the record, except as provided in paragraph (g)(3) of this section.

(2) Immediately upon issuance of a report on objections or on challenges, or on both, upon issuance by the Regional Director of an order transferring the case to the Board, or upon issuance of an order granting a request for review by the Board, the Regional Director shall transmit to the Board the record of the proceeding as defined in paragraph (g)(1) of this section.

(3) In a proceeding pursuant to this section in which no hearing is held, a party filing exceptions to a Regional Director's report on objections or on challenges, a request for review of a Regional Director's decision on objections or on challenges, or any opposition thereto may support its submission to the Board by appending thereto copies of documentary evidence, including copies of any affidavits, it has timely submitted to the Regional Director and which were not included in the report or decision. Documentary evidence so appended shall thereupon become part of the record in the proceeding. Failure to timely submit such documentary

evidence to the Regional Director, or to append that evidence to its submission to the Board in the representation proceeding as provided above, shall preclude a party from relying on such evidence in any subsequent related unfair labor practice proceeding.

(h) In any such case in which the Regional Director or the Board, upon a ruling on challenged ballots, has directed that such ballots be opened and counted and a revised tally of ballots issued, and no objection to such revised tally is filed by any party within 7 days after the revised tally of ballots has been made available, the Regional Director shall forthwith issue to the parties certification of the results of the election, including certifications of representative where appropriate, with the same force and effect as if issued by the Board. The proceeding shall thereupon be closed.

(i)(1) The action of the Regional Director in issuing a notice of hearing on objections or on challenged ballots, or on both, following proceedings under section 102.62(b) shall constitute a transfer of the case to the Board, and the provisions of section 102.65(c) shall apply with respect to special permission to appeal to the Board from any such direction of hearing.

(2) Exceptions, if any, to the hearing officer's report or to the administrative law judge's decision, and any answering brief to such exceptions, shall be filed with the Board in Washington, D.C., in accordance with subsection (f) of this section.

(j)(1) All documents filed with the Board under the provisions of this section shall be filed in eight copies, double spaced, on 8-1/2-by 11-inch paper, and shall be printed or otherwise legibly duplicated. Carbon copies of typewritten materials will not be accepted. Briefs in support of exceptions or answering briefs shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the Board by motion, setting forth the reasons therefor, filed not less than 5 days, including Saturdays, Sundays, and holidays, prior to the date the brief is due. Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page references and an alphabetical table of cases and other authorities cited.

(2) The party filing with the Board exceptions to a report, a supporting brief, or an answering brief shall serve a copy thereof on the other parties

and shall file a copy with the Regional Director. A statement of such service shall be filed with the Board together with the document.

(3) Requests for extensions of time to file exceptions to a report, supporting briefs, or answering briefs, as permitted by this section, shall be filed with the Board or the Regional Director, as the case may be. The party filing the request for an extension of time shall serve a copy thereof on the other parties and, if filed with the Board, or the Regional Director. A statement of such service shall be filed with the document.

Sec. 102.70 [29 C.F.R. § 102.70]

Runoff election.—(a) The Regional Director shall conduct a runoff election, without further order of the Board, when an election in which the ballot provided for not less than three choices (i.e., at least two representatives and “neither”) results in no choice receiving a majority of the valid ballots cast and no objections are filed as provided in section 102.69. Only one runoff election shall be held pursuant to this section.

(b) Employees who were eligible to vote in the election and who are in an eligible category on the date of the runoff election shall be eligible to vote in the runoff election.

(c) The ballot in the runoff election shall provide for a selection between the two choices receiving the largest and second largest number of votes.

(d) In the event the number of votes cast in an inconclusive election in which the ballot provided for a choice among two or more representatives and “neither” or “none” is equally divided among the several choices, or in the event the number of ballots cast for one choice in such election is equal to the number cast for another of the choices but less than the number cast for the third choice, the Regional Director shall declare the first election a nullity and shall conduct another election, providing for a selection from among the three choices afforded in the original ballot; and shall thereafter proceed in accordance with subsections (a), (b), and (c) of this section. In the event two or more choices receive the same number of ballots and another choice receives no ballots and there are no challenged ballots that would affect the results of the election, and if all eligible voters have cast valid ballots, there shall be no runoff election and a certification of results of

election shall be issued. Only one such further election pursuant to this subsection may be held.

(e) Upon the conclusion of the runoff election, the provisions of section 102.69 shall govern, insofar as applicable.

Federal Register

26 Fed. Reg. 3911

Delegation of Authority

Pursuant to the provisions of section 3(a) of the Administrative Procedure Act (Pub. Law 404, 79th Cong., 2d Sess.), the National Labor Relations Board hereby separately states and currently publishes in the FEDERAL REGISTER the following Delegation of Authority to the Regional Directors of the National Labor Relations Board:

Pursuant to section 3(b) of the National Labor Relations Act, as amended, and subject to the amendments to the Board's Statements of Procedure, Series 8, and to its Rules and Regulations, Series 8, effective May 15, 1961, and subject to such further amendments and instructions as may be issued by the Board from time to time, the Board delegates to its Regional Directors "its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof."

Such delegation shall be effective with respect to any petition filed under subsection (c) or (e) of section 9 of the Act on May 15, 1961.

Dated, Washington, D.C., April 28, 1961.

By direction of the Board.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. _____ Caption: _____

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)

Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

- 1. Type-Volume Limitation: Appellant’s Opening Brief, Appellee’s Response Brief, and Appellant’s Response/Reply Brief may not exceed 14,000 words or 1,300 lines. Appellee’s Opening/Response Brief may not exceed 16,500 words or 1,500 lines. Any Reply or Amicus Brief may not exceed 7,000 words or 650 lines. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include footnotes in the count. Line count is used only with monospaced type.

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

- [] this brief contains _____ [state number of] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or
[] this brief uses a monospaced typeface and contains _____ [state number of] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

- 2. Typeface and Type Style Requirements: A proportionally spaced typeface (such as Times New Roman) must include serifs and must be 14-point or larger. A monospaced typeface (such as Courier New) must be 12-point or larger (at least 10½ characters per inch).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

- [] this brief has been prepared in a proportionally spaced typeface using _____ [identify word processing program] in _____ [identify font size and type style]; or
[] this brief has been prepared in a monospaced typeface using _____ [identify word processing program] in _____ [identify font size and type style].

(s) _____

Attorney for _____

Dated: _____

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD)	
)	
Petitioner)	
)	No. 15-1203
and)	
)	
NATIONAL NURSES ORGANIZING COMMITTEE)	
)	
Intervenor)	Board Case Nos.
)	10-CA-093042
v.)	10-CA-093065
)	
BLUEFIELD HOSPITAL CO., LLC)	
d/b/a Bluefield Regional Medical Center;)	
GREENBRIER VMC, LLC,)	
D/B/A Greenbrier Valley Medical Center)	
)	
Respondents)	
)	

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2015, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

NATIONAL LABOR RELATIONS BOARD

1015 Half Street, SE

Washington, DC 20570

(202) 273-2960

Dated at Washington, DC
this 24th day of July 2015