

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

UPS GROUND FREIGHT, INC.,

Employer

and

Case 04-RC-165805

TEAMSTERS LOCAL 773,

Petitioner

CORRECTED

REQUEST FOR REVIEW OF ACTING REGIONAL DIRECTOR'S DECISION

AND DIRECTION OF ELECTION

AND DECISION ON OBJECTIONS TO ELECTION

AND CERTIFICATION OF REPRESENTATIVE

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Pursuant to Sections 102.67(c) and 102.69(c)(2) of the National Labor Relations Board's Rules & Regulations, 29 C.F.R. §§102.67(c); 102.69(c)(2), UPS Ground Freight Inc., ("UPS Freight" or the "Company"), submits the following Request for Review of the Acting Regional Director's January 5, 2016 Decision and Direction of Election ("RD Decision")¹, and his March 11, 2016 Decision on Objections to Election and Certification of Representative ("Certification of Representative")², and states the following in support:

I. PRELIMINARY STATEMENT

The National Labor Relations Board ("NLRB" or "the Board") is an independent federal agency created to enforce the National Labor Relations Act ("NLRA" or "the Act"), 29 U.S.C. §§ 151-169, which, by its terms, applies equally to both unions and employers. The Board has

¹ The Acting Regional Director's Decision and Direction of Election will be cited in this request as "(D&D, at ____)."

² The Acting Regional Director's Decision on Objections to Election and Certification of Representative will be cited in this request as "(CofR, at ____)."

authorized regional offices across the country to exercise its jurisdiction over matters involving labor relations. Region 4, which maintains jurisdiction over eastern Pennsylvania and southern New Jersey, has, at all times, governed these proceedings, and has exercised the authority granted it by the Board to evaluate the Union's petition for election and accompanying showing of interest, to oversee the pre-election process and representation hearing, to direct and conduct the election, to perform the tally of the ballots, and to consider and resolve the parties' objections to the election, among other duties.

Dennis P. Walsh ("Mr. Walsh") was selected by the Board on January 29, 2013, to serve as Regional Director of Region 4, and has maintained that role at all relevant times during these proceedings. By any reasonable account, Mr. Walsh has been vested with substantial quasi-judicial and quasi-prosecutorial authority over all matters within Region 4's jurisdiction. As the Board is undoubtedly aware, Mr. Walsh was suspended without pay for a period of 30 days at the end of December following the filing of the Union's petition for election in this matter. Although the grounds for his suspension have not been made public by the Region, reports have recently surfaced that raise serious questions regarding the impartiality with which the Region has been exercising its authority. (Exh. A).

While serving as Regional Director of Region 4, Mr. Walsh allegedly is also serving as chairman of the Peggy Browning Fund ("PBF"), an organization whose stated mission "is to educate and inspire the next generation of law students to become advocates for workplace justice." Despite this seemingly benign description, PBF is widely known to have strongly pro-union, anti-employer leanings. Indeed, in a letter recently submitted to members of Pennsylvania's congressional delegation (Exh. B), PBF is described as "a union activist organization funded solely with donations from organized labor," whose signature event is a

“worker’s rights conference” aimed at “organizing low wage workers.” (Id.). The letter characterizes Mr. Walsh as “the chairman of a union activist organization whose stated goal is to organize workers, and at the same time asked to be a neutral investigator of labor unions that violate labor laws and employers that allegedly violate union rights,” and alleges significant conflicts of interests as well as numerous ethical and legal violations. (Id).

The allegations levied against Mr. Walsh raise substantial questions concerning his impartiality, and, by association, the impartiality of the Region itself. The Company maintains that, for the reasons stated herein, Board review of the issues raised in this request is appropriate on their merits. As well, given the allegations regarding Mr. Walsh, and the appearance of culpability raised by his recent disciplinary suspension³, the Company urges the Board to view its request for review with an eye towards the possibility that all of the Region’s actions in this matter have been systematically tainted by a partiality instilled from the top down.

II. BACKGROUND

UPS Freight, headquartered in Richmond, Virginia, provides transportation and delivery services for a variety of customers across the United States, including commercial customers. One of those customers is Advance Auto Parts (“AAP”), a national auto parts retailer. Under its contract with AAP, UPS Freight delivers AAP products from nine AAP distribution centers to AAP retail stores nationwide. The Company employs truck drivers (called “Road Drivers”) to drive tractor trailers on delivery routes from each distribution center to the retail stores serviced by that center.

³ The Company has only learned of the disciplinary action taken against Mr. Walsh as a result of the apparent undisclosed conflict of interest in the past few days, and intends to file an appropriate request under the Freedom of Information Act in order to obtain additional information concerning these matters. Accordingly, the Company reserves the right to file a supplemental brief on this issue, and to take other action, as necessary, to preserve its rights under both the Act and the United States Constitution.

On December 10, 2015, the International Brotherhood of Teamsters Local 773 (“the Union”), filed a petition for election (“the Union’s petition”) seeking to represent a unit of all regular full-time and part-time drivers employed by UPS Ground Freight, Inc. (“UPS Freight” or “the Company”) at its facility located at 9755 Commerce Circle in Kutztown, Pennsylvania (“Kutztown distribution center”). The Union’s petition was processed in accordance with the procedures set forth by the Board in its new election rule entitled “Representation – Case Procedures; Final Rule,” 29 C.F.R. Parts 101, 102, 103, 79 Fed. Reg. 74308, 74439 (“the Final Rule”), which became effective April 14, 2015, and in accordance with guidance set forth in General Counsel Memorandum 15-06 entitled “Guidance Memorandum on Representation Case Procedure Changes.”

In accordance with the requirements set forth in the Final Rule, the Company submitted its timely statement of position⁴ on December 18, 2015. A representation hearing⁵ was conducted by the Region on December 21, 2015. During that hearing, the Union moved to amend its petitioned-for unit to include all “certified safety instructors and dispatchers employed by UPS Ground Freight, Inc. at its Kutztown, Pennsylvania facility.” (Tr., at 8-10). Its motion was subsequently granted in the RD Decision. (D&D, at 1, n. 2). Following the issuance of the RD Decision (and over the Company’s strong objection), the Region conducted the election by mail ballot. A tally of ballots conducted on February 1, 2016, resulted in the Region’s determination that a majority of the employees in the petitioned-for voting unit cast votes in favor of representation.

⁴ The Company’s Statement of Position will be cited in this request as “(SOP, at __).”

⁵ The transcript of the December 21, 2015 representation hearing will be cited in this request as “(Tr, at __).”

Following the election, on February 9, 2016 and February 16, 2016, respectively, the Company filed its Objections to the Result of the Election⁶ and accompanying offer of proof⁷ setting forth, in sum, the following challenges that the Company advances herein:

- A. The Region's decisions and arbitrary treatment of the Company's position throughout these proceedings, including its refusal to address significant issues relating to the supervisory status of employee Frank Cappetta and the potential that his conduct tainted the showing of interest, its conduct of the election by mail ballot and refusal to consider the Company's revised election proposal, and its administration of the pre-election process, the election, and the post-election process, resulted in a patently unfair and prejudicial process that contravened the Company's rights under the Act and its right to due process under both the Act and the Constitution.
- B. The approved voting unit comprised of "all regular full-time and part-time road drivers employed by the Employer at its facility located at 9755 Commerce Circle, Kutztown, Pennsylvania who were employed during the payroll period ending January 2, 2016," was inappropriate because it excludes the regular drivers (full-time and part-time) employed by the Company at its eight other distribution facilities, which the evidence proved share an overwhelming community of interest with the employees sought to be represented by the Union.
- C. The approved voting unit is inappropriate to the extent it includes certified safety instructors and dispatchers, as proposed by the Union at the representation hearing, since the employees performing the duties associated with these positions do not "regularly perform duties similar to those performed by unit members for sufficient periods of time to demonstrate that they have a substantial interest in working conditions in the unit."
- D. The imposition of the Final Rule in this proceeding, and the Region's arbitrary and unfair interpretation and enforcement of its provisions throughout, resulted in significant prejudice to UPS Freight's statutory rights and materially affected the results of the election to the Company's detriment.
- E. The application of the guidance set forth in General Counsel Memorandum 15-06 further restricted and interfered with the Company's right to fully investigate and respond to the representation petition.

These objections, which the Company now sets forth in support of this request for review, are consistent with the positions maintained by the Company throughout these

⁶ The Company's election objection will be cited in this request as "(Obj., at __)."

⁷ The Company's offer of proof in support of its election objections will be cited at "(Offer, at __)."

proceedings, as set forth both in the Company's statement of position and its election objections, and are supported by substantial evidence contained in the transcript of the December 21, 2016 representation hearing and submitted by the Company in its offer of proof. The Company incorporates fully by reference the arguments and evidence set forth in these filings and transcripts such that they shall be deemed to be set forth fully herein.

III. STANDARD OF REVIEW

Section 102.67(c) of the Board's Rules and Regulations authorizes the Board to grant a request for review 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 any 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.

29 C.F.R. §102.67(c).

IV. ARGUMENT

Upon the Board's stated standards, compelling reasons exist for the Board to grant review of the following issues:

- A. **Board Review is Appropriate Since the Region's Decisions on Substantial Factual Issues, and Prejudicial and Arbitrary Treatment of the Company's Position Throughout These Proceedings, Resulted in Prejudicial Error Adversely Affecting the Company's Rights.**

UPS Freight seeks review as a result of the Region's arbitrary interpretation and enforcement of the Final Rule in this proceeding, which resulted in a patently unfair and prejudicial process that contravened the Company's rights under the Act and its right to due

process under both the Act and the Constitution. At a minimum, the Region's following decisions, and otherwise arbitrary and prejudicial treatment of the Company's position, warrant review, particularly given the dark shadow cast over these proceedings as a result of the aforementioned accusations against Mr. Walsh and the disciplinary suspension that appears to have resulted from them:

1. The Region's Disregard of the Company's Position with Respect to Frank Cappetta's Supervisory Status.

Perhaps the most significant evidence of the Region's arbitrary and prejudicial treatment of the Company's rights in this proceeding lies with its consistent and blatant refusal to address the Company's position that Mr. Cappetta is a statutory supervisor within the meaning of Section 2(11) of the Act.

Since the outset of these proceedings, the Company has steadfastly asserted Mr. Cappetta's supervisory status. Mr. Cappetta's supervisory status under Section 2(11) is significant, and even vital, to the Company's rights in these proceedings for three reasons. First, and most obviously, it dictates his eligibility to vote in the election. Next, and more importantly, Board law makes clear that "an employer is entitled to the undivided loyalty of its representatives." *See NLRB v. Yeshiva University*, 444 U.S. 672, 682, 100 S. Ct. 856, 63 L. Ed. 2d 115 (1980). To this point, the Company has consistently maintained that a determination of Mr. Cappetta's supervisory status was necessary prior to the election to provide UPS Freight fair notice of whether it could expect and require Mr. Cappetta to advocate and support the Company's position during the campaign. Finally, and most significantly, the Company has maintained since the onset of these proceedings that Mr. Cappetta's supervisory status is relevant to the viability of the Union's petition, and ultimately to the results of the election, to the extent it is supported by a showing of interest based on "tainted" cards solicited by him. *See Harborside*

Healthcare, Inc., 343 NLRB 906, 911 (2004) (finding that “solicitations [of union authorization cards by supervisors] are inherently coercive absent mitigating circumstances.”).

a. The Company Presented Substantial Evidence of Mr. Cappetta’s Supervisory Status.

The record evidence shows that Mr. Cappetta is a statutory supervisor. The Company elicited substantial evidence, both at the representation hearing and in its offer of proof, to support its position, all of which was literally ignored by the Region throughout this proceeding. Specifically, the testimony elicited at the hearing demonstrates that, although he performed duties as a dispatcher, certified safety instructor, and (very infrequently) Road Driver, about 80% of Mr. Cappetta’s work hours during the past year were devoted to the functions associated with his dispatcher duties. (Tr., at 219, 265, 290). In this position, Mr. Cappetta, among other duties, regularly coordinated routes and assigned drivers to those routes (Tr., at 125, 127, 129, 135), coordinated with the Company’s customer to determine the number of routes required each day (Tr., at 126-127), identified and resolved “split routes” and “overloads” (Tr., at 136-137), regularly assigned coverage for absences resulting from sick days, vacation days, and other leaves of absence (Tr., at 138, 141-142), was authorized to contact third party temporary labor providers and to schedule temporary drivers as needed (Tr., at 139-141), scheduled vacation and coordinated employee absences with payroll (Tr., at 142), established his own schedule, hours of work, and break times and duration (Tr., at 146-147, 157), held meetings with multiple drivers at a time (Tr., at 157), received and decided complaints from AAP concerning deliveries (Tr., at 169-170), and received and resolved complaints from drivers concerning their assigned routes (Tr., at 129). Importantly, Mr. Cappetta decided which drivers to assign by exercising his independent judgment. (Tr., at 272; 281-82; 310-11).

Additionally, the evidence and testimony demonstrates that Mr. Cappetta evaluated driver applicants and made recommendations concerning new hires (Tr., at 174), administered pre-hire road tests and evaluated employee performance in the completion of the test, evaluated and supervised driver pre-trip and post-trip tasks, and performed driver skill assessments related to driver qualifications, among other tasks (Tr., at 172-174). Additionally, beginning in at least October 2015, Mr. Cappetta physically occupied the site manager's office at the Kutztown distribution center. (Tr., at 187-189).

In addition to the evidence adduced at the hearing, UPS Freight submitted an offer of proof asserting that the new on-site manager at the AAP Kutztown distribution center, Jeremiah Andrefski ("Andrefski"), would testify that, in January 2016, Mr. Cappetta told him: "No offense to you Jeremiah, but I can run this place by myself. I've done it before." (Offer, at 7). This comment is particularly noteworthy given that the conversation occurred after the December 21, 2015 Representation Hearing, during which Mr. Cappetta repeatedly denied performing supervisory functions or that he ran that Kutztown operation. Additionally, the Company offered proof that Andrefski and Matt DiBiase ("DiBiase"), the Operations Supervisor of UPS Freight's Advance Auto Parts Kutztown distribution center, would testify that Road Drivers could not refuse dispatch assignments made by the dispatcher without good cause, and that the penalty for a Road Driver refusing one of Mr. Cappetta's assignments (without good cause) would be disciplinary action up to and including discharge. (Offer, at 8).

Accordingly, the evidence presented at the Representation Hearing, and through the Company's offer of proof, established that Mr. Cappetta performed a number of the supervisory functions contemplated by Section 2(11) (each independently sufficient) with the requisite

independent judgment that was not merely routine or clerical in nature in the interest of the Company. As a result, Mr. Cappetta should have been deemed a statutory supervisor.

b. The Company Presented Substantial Evidence of Supervisory Taint by Mr. Cappetta, and Formally Requested That the Region Conduct an Administrative Investigation.

Furthermore, the Company presented significant evidence to support its position that Mr. Cappetta likely engaged in solicitation efforts and other conduct in support of the Union that had the result of tainting the showing of interest supporting the Union's petition for election, the election campaign, and the vote itself. Indeed, the Company informed the Region prior to the representation hearing, and again in its offer of proof, that Tammy Cadman ("Ms. Cadman"), a former temporary administrative assistant at the AAP Kutztown distribution center employed in the same position on a permanent basis at the Company's Salina, Kansas distribution center, would testify that, in the weeks prior to the filing of the Union's petition for election, Mr. Cappetta approached her and asked her, "Do you know what's going on here?" Ms. Cadman replied that she did not, to which Cappetta replied: "We're going to try to get a union at this location, you may want to share that with your drivers." Ms. Cadman interpreted Cappetta's comment to mean that he was organizing the Kutztown workplace and also that he wanted her to encourage the Road Drivers at UPSF's Salina, Kansas facility to unionize when she returned to that facility following her temporary assignment at Kutztown.

The Company formally requested that the Region conduct an administrative investigation and that a formal check of the cards be conducted by the Acting Regional Director to ascertain Mr. Cappetta's participation as a witness to the card signings for the purpose of evaluating the validity of the showing of interest supporting the Union's petition. (SOP, at 14; CofR, at 6). The Region, therefore, had an obligation to investigate the matter promptly and fully to determine the validity of the showing of interest. *See Perdue Farms, Inc.*, 328 N.L.R.B. 909, 911 (1999)

(“Once presented with evidence that gives the Acting Regional Director reasonable cause to believe that the showing of interest may have been invalidated . . . further administrative investigation should be made provided the allegations of invalidity are accompanied by supporting evidence.”).

Additionally, the Company offered proof that Matt DiBiase (“Mr. DiBiase”), the Operations Supervisor of UPS Freight’s Advance Auto Parts Kutztown distribution center, would testify that, on January 8, 2016, he and the Company’s Implementation Supervisor, Monte Copeland, were entering the Kutztown facility having just returned from lunch, and heard a phone ringing in the office. Mr. Cappetta’s personal phone was sitting in plain sight, unattended, next to his company laptop. Mr. Cappetta was not in the immediate area at the time. When Mr. DiBiase glanced down at the phone (simply because it was ringing), its display reflected an incoming call from Union Organizer/Trustee Brian Taylor. Mr. DiBiase’s anticipated testimony supports a reasonable belief that further investigation or evidence obtained through litigation would provide further proof of Mr. Cappetta’s involvement in the Union’s initial organizing efforts, as well as its pre-election campaign. The date of Taylor’s call to Mr. Cappetta – January 8, 2016 – is particularly noteworthy as it shows that Mr. Cappetta remained in contact with the Union after the representation hearing and during the critical period prior to the date the mail ballots were mailed to eligible voters.

c. **The Region’s Treatment of Mr. Cappetta’s Supervisory Status Evinces a Disdain for the Company’s Rights Under the Act and the Constitution.**

Despite the substantial evidence presented by the Company concerning Mr. Cappetta’s supervisory authority, and the compelling evidence elicited concerning the potential taint by him, the Region simply refused to address the issue of Mr. Cappetta’s supervisory status, for any reason, prior to the election (D&D, at 13), and has provided nothing more than lip service to the

issue since (CofR, at 6-8). In addressing the Company's contention that Mr. Cappetta was a statutory supervisor, and therefore ineligible to vote, the Acting Regional Director stated in the RD Decision as follows:

Although the Hearing Officer received evidence concerning the supervisory status of Frank Cappetta, the Employer's contention that Cappetta is a supervisor and should be excluded from the unit concerns his eligibility to vote, and I conclude that this issue need not be resolved before the election because resolution of the issue would not significantly change the size or character of the unit. Accordingly, I shall not address the Employer's arguments concerning the exclusion of Cappetta . . . from the unit, and [he] may vote under challenge.⁸

(D&D, at 13). The Acting Regional Director's treatment of the Company's position with respect to supervisory taint was equally indifferent. According to the Acting Regional Director:

The Employer's allegations of supervisory taint of the [Union's] showing of interest will be investigated administratively. The Board has long held that it is inappropriate to litigate such matters in representation proceedings, and accordingly I will not consider that issue in this Decision.

(*Id.*).

In addressing these same issues in response to the Company's objections, the Acting Regional Director was more verbose, but nevertheless unresponsive. According to the Acting Regional Director:

[T]he Employer contends that the Region's failure to address Frank Cappetta's supervisory status denied the Employer the opportunity to know what it could expect or require from Cappetta during the campaign. This argument is without merit. As the Board held in issuing the Final Rule, uncertainty as to the supervisory status of employees is inevitable. 79 Fed. Reg. at 74389. A decision as to Cappetta's supervisory status could not have provided the Employer the certainty it sought. Consequently, I find that the Employer was not prejudiced by the fact that Cappetta's supervisory status was not the subject of a preliminary decision prior to the election. *See* GC 15-06 at 18. In the event, **the Employer treated him as a unit employee and the Region determined that he was not a supervisor within the meaning of Section 2(11).** Under the Final Rule, because questions of supervisory status do not directly impact on whether or not there is a

⁸ The Acting Regional Director also addressed the Company's purported assertion that employee Carl David should also be deemed ineligible to vote as a result of his supervisory status. The Company has never alleged that Mr. David was a Section 2(11) supervisor, and does not advance that position herein.

question concerning representation, regional directors may decide not to permit litigation of supervisory status prior to the election. Accordingly, [the Company's objection] is overruled.

(CofR, at 6). In addressing the Company's objections relating to his prior refusal to consider the issue of supervisory taint, the Acting Regional Director stated:

[T]he Employer contends that the Region refused to address whether the Petition was tainted based on Frank Cappetta's involvement. I find no merit to this Objection. The Employer submitted a request to investigate an allegation of taint on December 21, 2015. **The Region conducted an investigation and determined that Cappetta was not a supervisor within the meaning of Section 2(11) of the Act.** Crucially, the Employer had ample opportunity to present evidence on Cappetta's supervisory status at the pre-election hearing. The Employer was not prevented from putting on its supervisory-status case. According it a second bite at the apple would serve no purpose. **Since the investigation (including the record of the pre-election hearing) did not demonstrate that Cappetta was a supervisor, his involvement did not taint the Petition.** The Employer was informed of the findings of the Region's investigation concerning taint prior to the ballot count. Thus, there is no evidence that the Employer was prejudiced by the manner in which the issue of taint was resolved. Accordingly, [the Company's objection] is overruled.

(CofR, at 6). The Acting Regional Director found further that:

[T]he Employer contends that the conduct of the election and its results were tainted by the involvement of purported statutory supervisor Frank Cappetta in the election campaign and in securing the showing of interest. As noted in discussing [the objection above], **the Region conducted an investigation on this issue, which included evidence offered by the Employer during the hearing, and determined that Cappetta is not a statutory supervisor; therefore, the Region found that there was no taint.** Accordingly, Objection 6 is overruled.

(*Id.*).

The above-referenced quotes represent the entirety of the Region's treatment of these substantial factual issues. On the face of the Acting Regional Director's decisions, it is clear that he made no investigative findings, no factual findings, offered no applicable legal standards, and provided no reasoned analysis **at all** regarding Mr. Cappetta's supervisory authority. He simply proclaimed that he was not a supervisor. And, although the Region was obligated to investigate

the Company's allegations of supervisory taint, and the Acting Regional Director expressly stated that the Region had done so, there is no evidence that an investigation actually occurred. Indeed, his "investigation" was his finding, without any factual or legal analysis, that Mr. Cappetta was not a supervisor within the meaning of the Act.

Indeed, the Company offered proof in support of its election objections that Willie Johnson, Kaliek Thomas, Ken Rose, Tim Hertzog, Gene Knappenberger, Don Roush, and Chris Camuso, all of whom are Road Drivers in the proposed bargaining unit, would testify that no one from the NLRB attempted to contact them at any time since the filing of the petition. (Offer, at 10). Given the relatively small size of the petitioned-for unit, it stands to reason that any investigation by the Region would have included interviews with bargaining unit members to determine whether, and how, Cappetta participated in the card signing process and/or the Union's pre-election campaign. The fact that these employees were not interviewed tends to establish that the Region did not make any meaningful effort to interview any bargaining unit members.

Additionally, the Company offered proof in support of its election objections that Tammy Cadman, the former temporary administrative assistant at the AAP Kutztown distribution center who was told by Cappetta that he was organizing the Kutztown facility, discussed *supra*, would also testify that she was never contacted by the Region despite the asserted fact that she had witnessed conduct evincing taint. (Offer, at 10). There is also no indication in the record that the Region conducted the card check formally requested by the Company. It is ironic that the Acting Regional Director chides the Company for seeking what he terms "a second bite of the apple." (CofR. at 6). The record makes abundantly clear that the Company never got a first bite.

Section 120.67(c) of the Board's Rules and Regulations authorizes the Board to grant review if a 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. The Acting Regional Director's decision with respect to the Company's position that Mr. Cappetta was a statutory supervisor – undoubtedly a substantial factual issue given its significance to the issue of taint – is not just erroneous, **it is nonexistent**. The Region effectively punted the ball on the issue before the election, but never returned to the issue after the election. In so doing, the Region left unanswered significant factual issues directly implicating the Company's right to the undivided loyalty of its representatives, *see NLRB v. Yeshiva University*, 444 U.S. 672, 682, 100 S. Ct. 856, 63 L. Ed. 2d 115 (1980), and its employees' right to election conditions free from conduct the Board has repeatedly found to be inherently coercive. *See Harborside Healthcare, Inc.*, 343 NLRB 906 (2004); *Madison Square Garden CT, LLC*, 350 NLRB 117, 122 (2005); *Reeves Bros.*, 277 NLRB 1568, 1568 n.1 (1986); *Sarah Neuman Nursing Home*, 270 NLRB 663, 663 n.2 (1984); *A.T.I. Warehouse, Inc.*, 169 NLRB 580, 580 (1968); *Heck's, Inc.*, 61 LRRM 1128 (1966); *Dejana Industries, Inc.*, 336 NLRB 1202 (2001); *National Gypsum Co.*, 215 NLRB 74 (1974); *Southeastern Newspapers, Inc.*, 129 NLRB 311 (1960); *The Toledo Stamping & Manufacturing Co.*, 55 NLRB 865, 867 (1944),

Any finding – by the Region, the full Board, or a federal court – that Mr. Cappetta is a supervisor would necessarily invalidate the election result in this case, particularly given the Region's apparent failure to follow up on the Acting Regional Director's promise in the RD Decision that the Region would investigate the issue of supervisory taint. The casual manner in which the Region appears to have disposed of the question of Cappetta's supervisory status suggests it may never have intended to investigate the taint claim. This presents yet another

problem for the Region: if the Acting Regional Director had already decided when he issued the Decision and Direction that the Region would not investigate the Company's taint allegations, it could only be because he had determined Cappetta was not a supervisor. In that case, why omit that finding from the Decision and Direction, particularly when doing so kept the Company in the dark about Cappetta's status and prevented it from knowing how to deal with him during the campaign? The Region's handling of these issues suggests it abandoned its role as neutral referee and took sides. This only further illustrates that it has denied the Company's rights to due process and a fair hearing.

2. The Acting Regional Director's Decision to Hold a Mail Ballot Election.

The Acting Regional Director's decision to hold a mail ballot election, as opposed to the traditional Board practice of conducting a manual ballot election, should also be reviewed since it plainly departed from Board precedent and represented an abuse of discretion. The Board has long held that the manual ballot election procedure is presumptively appropriate. *See Nouveau Elevator Industries, Inc.*, 326 NLRB 470, 471 (1998) (denying mail ballot election where voting group consisted of over 1,600 employees employed at various sites throughout New York City metropolitan region and assigned a "myriad of schedules, including being on-call 24 hours a day"); *San Diego Gas and Elec.*, 325 NLRB 1143, 1144 (1998) (The Board's "longstanding policy, to which we adhere, has been that representation elections should as a general rule be conducted manually, either at the workplace or at some other appropriate location."); *see also* NLRB Casehandling Manual (Part Two) Representation Proceedings §11301.2 ("The Board's longstanding policy is that representation elections should, as a general rule, be conducted manually").

When deciding whether to conduct a manual or mail ballot election, a Regional Director should consider: (i) whether eligible voters are "scattered" because of their job duties over a

wide geographic area; (ii) whether eligible voters are “scattered” in the sense that their work schedules vary significantly, so that they are not present at a common location at common times, and (iii) whether there is a work stoppage (i.e., strike or walkout) in progress. *San Diego Gas*, at 1145. Voters may be deemed to be scattered “where they work in different geographic areas, work in the same areas but travel on the road, work different shifts, or work combinations of full-time and part-time schedules.” *Id.* at 1145, n. 7. However, “the mere fact that employees may work multiple shifts, thereby necessitating more than one voting session during the course of the workday, is not in and of itself a sufficient basis for directing a mail ballot election.” *Id.* The evidence presented demonstrated that the voting group in this case was not “scattered” under the standards imposed by existing Board law. Indeed, the Road Drivers who participated in the election start and finish their routes at the same terminal, and their participation in a manual ballot election could easily have been accommodated as a result.

Thus, the Acting Regional Director plainly erred in deciding that a single-site, one-day election in two polling periods over approximately 14 hours was inconsistent with the Board’s longstanding policy favoring manual ballot elections, and his decision constituted an abuse of discretion. The Acting Regional Director’s decision to hold a mail ballot election, as opposed to the prudent and traditional Board practice of conducting a manual ballot election, further abridged the Company’s ability to exercise its 8(c) right to speak to employees in that it precluded the Company’s ability to make group presentations from the date ballots were mailed to the voting group (nearly two weeks before the date of the vote count), unfairly burdened the Company with onerous administrative tasks upon pain of waiver, prejudiced the Company’s ability respond to the Union’s organizing campaign in violation of the United States Constitution and Section 8(c) of Act, and needlessly subjected employees to the potential harms that the

Board's preferred method of manual ballot voting was intended to limit, including the loss of secrecy and integrity in the voting process, as well as the prospect of interference and/or coercion.

3. The Acting Regional Director's Refusal to Consider the Company's Revised Election Proposal.

The Acting Regional Director's refusal to consider the Company's revised election proposal following its objection to his erroneous calculations of the Company's original election proposal represented further arbitrary denial of the Company's rights and interests during the pre-election process. The Company's original proposal at the Representation Hearing called for a one-day, single-site election with the polls to be open for a total of four hours over a 14-hour period, to be conducted at a site about an hour's drive from the Region 4 offices in Philadelphia. During a conference call on January 7, 2016 to discuss the Company's objection to the Acting Regional Director's erroneous interpretation of that proposal, counsel for the Company made a revised election proposal offering a single polling time, from 2:00 a.m. to 8:00 a.m., on a Wednesday of the Acting Regional Director's choosing. (Exh. C). The polling times assured that all employees would have ample opportunity to vote either before they left the terminal on their route or when they returned at the end of their route. In short, UPS Freight's revised proposal eliminated all potential concerns raised by the Acting Regional Director. (Id.).

Nevertheless, the Acting Regional Director refused to consider the revised proposal, stating that, under the Final Rule, "determinations on election arrangements are now expected to be made at the time the Decision and Direction of Election issues." The Acting Regional Director offered no citation to where in the new rules this "expectation" may be found. Inexplicably, the Acting Regional Director also expressed doubt that he had the authority to modify his original decision on the balloting method. (Exh. C). Obviously, it is well within his

broad discretion to revise the election details at any point in the proceedings. The Board recognizes that election details may be worked out by the parties after the issuance of a Decision and Direction of Election. See NLRB Casehandling Manual (Part Two) Representation Proceedings §11301.3 (“a determination may not be possible until, for example, after a decision and direction of election has issued”). Thus, any suggestion by the Region that the Company is limited to the proposal it made at the hearing is without merit and the Acting Regional Director’s assertion that he is unable to revisit the election details following issuance of the RD Decision is incorrect. The Region’s refusal to reconsider this point prejudiced UPS Freight for all of the reasons set forth in Section C(6) above.

4. The Region’s Denial of UPS Freight’s Request for the Issuance of Subpoena *Duces Tecum*.

The Region’s denial of UPS Freight’s Request for the Issuance of Subpoena *Duces Tecum* prejudiced the Company in the preparation of its election objections. Specifically, on February 2, 2016, the Company requested that the Region issue several subpoenas *duces tecum*. The Company requested document subpoenas in order to obtain relevant cell phone records of Mr. Cappetta and Union organizer Brian Taylor (and, perhaps, others at the Union) during the period relevant to this proceeding. For the reasons stated previously in Section A(1), *supra*, the Company had reason to believe that a review of those records would show frequent contact between Mr. Cappetta and the Union, which would further support UPS Freight’s contention that Mr. Cappetta was a key figure in the Union’s organizing campaign and that his participation in the campaign tainted both the Union’s original showing of interest and the results of the election itself. The Region denied the Company’s request on the grounds that no “currently outstanding Notice of Hearing” had been issued.

The Region's denial, which was based on portions of the Casehandling Manual that have not been updated since passage of the Final Rule, is yet another example of the prejudice imposed by the Final Rule, and by its application of the Final Rule in this proceeding. Indeed, Section 102.69(c) of the Final Rule authorizes the conduct of a hearing on objections and challenges to the election if, among other grounds, "the regional director determines that the evidence described in the accompanying offer of proof could be grounds for setting aside the election if introduced at a hearing." Thus, the Final Rule authorizes the Region to decline to hold a post-election hearing if the evidence included in the offer of proof is not sufficient. As such, the Final Rule places an additional and unfair burden on an employer to present all of the evidence it intends to introduce at the hearing in its offer of proof. This is particularly the case since the Casehandling Manual arguably does not provide for the issuance of investigative subpoenas in the absence of a direction of hearing by the Region.

The Company requested subpoenas to further its efforts to compile information relevant to the issue of supervisory taint. The subpoenas were necessary as a result of the Region's comprehensive failure, as set forth in Section A(1), above, to investigate the issue administratively, or to otherwise permit the Company to litigate the matter during the pre-election process. But, its requests were denied by the Region based on policy and procedure that pre-dates the Final Rule and fails to contemplate the administrative processes and deadlines imposed by it. The Region's ruling violated the Company's due process rights by denying it the means to obtain the very evidence that is required under the Final Rule to obtain an post-election evidentiary hearing. Under these circumstances, the Region's subsequent decision not to grant a hearing on the question of supervisory taint based on the Company's "lack" of evidence

presented in its offer of proof indisputably violated the Company's right to a fair hearing under the Act and to due process under the U.S. Constitution.

5. The Acting Regional Director's Partial Denial of the Company's Motion To Postpone Representation Hearing and for Extension of Time to File Statement of Position.

The hardships imposed upon the Company by the unfairly shortened "critical period" prescribed by the Final Rule, discussed *supra*, were exacerbated by the Acting Regional Director's partial denial of the Company's Motion To Postpone Representation Hearing And For Extension Of Time To File Statement Of Position. The Union's petition was filed in the midst of the holiday season, which presented significant logistical difficulties to the Company given the nature of its business. Moreover, although the Union's petition purported to implicate only a limited number of employees at a single location, the potential scope of the appropriate unit was significantly greater⁹ and required investigation of factors involving nearly three hundred employees at nine locations in the same number of states. The natural logistical challenges of gathering evidence in support of the Company's position on the unit were further complicated both by the dispersion of employees during the holiday season and the operational demands on the Company. For these reasons, the Company requested a two-day extension of time to file its statement of position (from Thursday, December 17, 2015 until Monday, December 21, 2015), and also requested that the Representation Hearing be postponed from Friday, December 18, 2015 until Tuesday, December 22, 2015.

The Company's requests were consistent with the provisions of Section 102.63 of the Board's Rules and Regulations, which expressly authorizes the Acting Regional Director to extend the time for filing and serving the Statement of Position, and to postpone the

⁹ The factual and legal grounds supporting a company-wide unit, as opposed to the single-site unit proposed in the Union's petition, are set forth fully in Attachment B to the Company's Statement of Position, filed with the Region on December 18, 2015 (SOP, Attachment B), and in Section B, *infra*.

Representation Hearing, for up to 2 business days. And, given the facts and the gravity of the issues involved, the Company clearly presented “special circumstances” warranting the relief requested. *See* Rules and Regulations of the National Labor Relations Board, §§102.63(a); (b)(1). The Acting Regional Director, however, only partially “granted” the Company’s motion, ordering that the Company’s statement of position be filed by 12:00 PM on Friday, December 18, 2015, and that the hearing be conducted at 10:00 AM on Monday, December 21, 2015. The Acting Regional Director’s arbitrary denial of the full extension requested by the Company prejudiced the Company in its preparation of the statement of position and for the hearing. Moreover, the Acting Regional Director’s partial “granting” of the Company’s motion directly aided the Union in its preparation for the Representation Hearing by giving the Union access to the Company’s statement of position, and thus the issues and facts the Company intended to raise at the hearing, for an entire weekend prior to the hearing. Of course, the Region did not provide equivalent (or any) information to the Company regarding the Union’s evidence and witnesses. Had the Acting Regional Director granted the Company’s request in full, the Union would have had the Company’s statement of position one day prior to the pre-election hearing, which is the amount of time called for under the Rules when applied in due course. This ruling unquestionably resulted in prejudicial error, and warrants Board review.

6. The Region’s Denial of an “Appropriate” Hearing Guaranteed by Section 9(c) of the Act and in Violation of the Company’s Due Process Rights Guaranteed by the Constitution.

The Region denied the Company the “appropriate” hearing guaranteed by Section 9(c) of the Act and the due process guaranteed by the Constitution as a result of the conditions under which the hearing was conducted. There was no practical or legal justification for the Hearing Officer’s decision to begin the hearing over an hour late for reasons unexplained, or her decision

to virtually confine the parties to the building for the duration of the hearing, effectively precluding counsel even from taking a meaningful lunch break.

Moreover, the Final Rule provides that hearings “shall continue from day to day until completed.” *See* 29 C.F.R. §102.64(c). Thus, nothing in the Final Rule requires the completion of the hearing in a single calendar day. Nevertheless, the Hearing Officer repeatedly refused requested adjournments to complete live witness testimony the following morning, and instead required the parties to present live testimony until about 7:00 p.m., nearly two hours beyond the end of the normal business day.

Additionally, the Final Rule expressly provides for the filing of post-hearing briefs upon “special permission” from the Acting Regional Director. *See* 29 C.F.R. §102.66(h). The Acting Regional Director summarily denied the Company’s request without explanation. (Tr., at 328:24-25).

Finally, the Final Rule provides that “any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument.” *See* 29 C.F.R. §102.66(h). But, despite the fact that the nine-and-a-half-hour hearing resulted in over 350 pages of witness testimony concerning a number of facts and issues of which the Company had no prior notice,¹⁰ the Hearing Officer denied the Company’s request for adjournment until the next morning to permit it reasonable time to prepare closing argument. Instead, she permitted only 30 minutes for the Company to prepare its closing argument. The Hearing Officer’s conduct and arbitrary denial of the Company’s requests indicate the existence of bias by the Region that is particularly evident given the fact that the Acting Regional Director’s Decision and Direction of Election did

¹⁰ Unlike the Company, as a result of the events described in Section A(5), above, the Union had full notice of the anticipated issues and evidence the Company intended to present at hearing as a result of its receipt of the Company’s statement of position on the Friday before the Monday hearing. This allowed the Union to prepare both its rebuttal to those issues and an appropriate closing argument.

not issue for over two weeks following the close of the hearing. An overnight adjournment (i.e., until the next morning) to permit Company counsel to review the evidence and to prepare meaningful oral argument was clearly warranted. The Hearing Officer's arbitrary denial of that request violated the Board's own rules, as well as the Company's right to an "appropriate hearing" under Section 9(c) of the Act, and represented an intentional denial of due process.

B. Board Review Is Appropriate Because the Region's Determination as to the Appropriate Bargaining Unit Resulted in Prejudicial Error.

UPS Freight also seeks review of the Region's determination that the Union's petitioned-for voting (and bargaining) unit comprised of "all regular full-time and part-time road drivers employed by the Employer at its facility located at 9755 Commerce Circle, Kutztown, Pennsylvania" is appropriate. Section 9(a) of the Act permits employees to form a bargaining unit "appropriate" for collective bargaining purposes. *See* 29 U.S.C. § 159(a). To determine the appropriateness of a proposed bargaining unit, the National Labor Relations Board ("NLRB" or "the Board") first assesses whether the employees in the petitioned-for unit are identifiable "readily as a group who share a community of interest." *See A.S.V., Inc.*, 360 NLRB No. 138, slip op. at 14-15 (2014) (citing *United Operations, Inc.*, 338 NLRB 123 (2002)). In so doing, the Board considers whether the employees: (1) are organized into a separate department; (2) have distinct job functions and perform distinct work; (3) are functionally integrated with the Employer's other employees; (4) have frequent contact with other employees; (5) interchange with other employees; (6) have distinct terms and conditions of employment; and (7) are separately supervised. *Id.*

In *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), one of its most controversial decisions to date, the NLRB overturned 20 years of precedent by permitting bargaining units to be petitioned-for and certified even when larger and "more

appropriate” bargaining units exist in the employer’s workforce. *See id.* (finding that “[b]ecause a proposed unit need only be an appropriate unit and need not be the only or the most appropriate unit, it follows inescapably that demonstrating that another unit containing the employees in the proposed unit plus others is appropriate, or even that it is more appropriate, is not sufficient to demonstrate that the proposed unit is inappropriate.”).¹¹ Nevertheless, even under *Specialty Healthcare* and its progeny, the Board has recognized that a petitioned-for unit will be deemed inappropriate where **“the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit . . .”** *See Id.*, at 11. (emphasis added).

The Company has maintained throughout these proceedings that the unit is inappropriate because it excludes the regular drivers (full-time and part-time) (“Road Drivers”) employed by the Company at eight other distribution facilities, which the evidence proves to share an overwhelming community of interest with the employees sought to be represented by the Union. Specifically, the evidence demonstrates that UPS Freight is party to a national contract with Advance Auto Parts (“AAP”), under which it performs operations relating to the distribution of AAP parts and other supplies from nine distribution centers to regional AAP stores around the country. (Tr., at 21-24). The distribution centers comprising the Company’s AAP operation are located in Kutztown, PA, Enfield, CT (“Enfield facility”), Lakeland, FL (“Florida facility”), Salina, KS (“Kansas facility”), Gastonia, NC (Gastonia facility”), Delaware, OH (“Delaware facility”), Roanoke, VA (“Virginia facility”), Hazelhurst, MS (“Hazelhurst facility”), and

¹¹ *Specialty Healthcare* was wrongly decided and should be overturned for all of the reasons stated in the dissents of Member Miscimarra in *Macy’s, Inc.*, 361 NLRB No. 4, slip op. at 22-33 (2014) and Member Johnson in *DPI Secuprint*, 362 NLRB No. 172, slip op. at 9-19 (2015). *See also NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1581-82 (4th Cir. 1995). These dissents are fully incorporated into this request for review by reference, and the Company expressly preserves its right to rely upon them throughout the course of these proceedings in asserting that the Board’s traditional community of interest standards should apply.

Thomson, GA (“Thomson facility”) (collectively the “AAP distribution facilities”). (Tr., at 23). UPS Freight considers the nine AAP distribution facilities part of a single integrated customer service initiative set up just for AAP. (Tr., at 24-25).

The Company has a single centralized management team (Regional Operations Manager, AAP Manager, Operational Support Supervisor, Support Manager) that is responsible for overseeing the Company’s contractual and operational relationship with AAP, including the provision of services by Road Drivers from all of the Company’s AAP distribution facilities. (Tr., at 25-31). The Company has centralized Human Resources and Employee Relations functions that are responsible for all nine AAP distribution facilities. (Tr., at 78-79).

All Road Drivers employed by the Company at the nine AAP distribution facilities have the same job title. (Tr., at 36, 39). All Road Drivers use, and are trained on, the same equipment – tractor trailers (either sleeper cabs or day cabs). (Tr., at 36, 39). UPS Freight Road Drivers working under the AAP contract do the same work, and do not perform work, or make deliveries, for any other UPS Freight customer besides AAP. (Tr., at 38-39). All Road Drivers are evaluated under the same Company performance criteria, including accident frequency, safety and efficiency indicia such as “hard brakes” and “overspeed,” miles per gallon on tractors, and delivery performance. (Tr., at 48-51). All Road Drivers are employed under the same UPS Freight policies. (Tr., at 46-47, 72). All Road Drivers receive roughly the same rates of pay. (Tr., at 75-76, 116-118). All Road Drivers are entitled to the same benefit plans. (Tr., at 105). All Road Drivers receive substantially the same training/orientation, as well as specialized training from AAP regarding hazards and operational matters relevant to working in one of its distribution centers. (Tr., at 45-48).

All Road Drivers at the Company's AAP distribution facilities have access to a centralized job database and are eligible to apply for driving jobs at any of the other AAP distribution facilities. (Tr., at 51-52). Road Drivers have, in fact, permanently transferred from one AAP distribution facility to another in the past. (Tr. at 52-56; Emp. Exh. 1). In the past several years, 27 UPS Freight Road Drivers assigned to one AAP distribution center have been transferred to a different AAP distribution center within the system. (Tr., at 52; Emp. Exh. 1). There is significant driver interchange between locations. (Tr., at 56-61). Recently, six Road Drivers have been temporarily assigned to the AAP Kutztown distribution center from other AAP distribution facilities (3 from the Florida facility, 3 from the Hazlehurst facility) to assist with a shortage of available Road Drivers. (Tr., at 56-66). Over the past 3 years, 117 Road Drivers have been temporarily transferred to the Company's other AAP distribution facilities to perform work for a total of 413 weeks. (Tr., at 60; Emp. Exh. 2). In that same time period, 44 Road Drivers have been temporarily transferred to the AAP Kutztown distribution center from the Company's other AAP distribution facilities to perform work for a total of 163 weeks. (Tr., at 65-66; Emp. Exh. 2).

This evidence establishes that an overwhelming community of interest is shared by the Road Drivers employed at all of the Company's AAP distribution facilities. Accordingly, the Company has maintained throughout these proceedings that the Union's petitioned-for unit is clearly inappropriate and should have been rejected by the Region in favor of the bargaining unit comprised of the regular drivers (full-time and part-time) employed by the Company at its eight other distribution facilities. The Acting Regional Director rejected the Company's position in his Decision and Direction of Election, and found in his Supplemental Decision on Objections to Election and Certification of Representative that the issue was not a proper subject of an election

objection, but, rather, was “an issue that can be considered in a Request for Review.” (CofR, at 8). The Company maintains that the Acting Regional Director’s finding that the Union’s petitioned-for unit is appropriate resulted in prejudicial error inasmuch as the Union cannot demonstrate the requisite showing of interest in the appropriate unit proposed by the Company.

C. UPS Freight’s Objection to a Voting Unit That Includes Certified Safety Instructors and Dispatchers

UPS Freight requests Board review to consider the appropriateness of the inclusion of certified safety instructors and dispatchers in the voting unit, as proposed in the Union’s motion to amend the petition for election, is appropriate. At the time of the representation hearing, the Company employed two employees at its Kutztown distribution center, Frank Cappetta (“Mr. Cappetta”) and Carl David (“Mr. David), who served in these roles. Although Mr. Cappetta was originally hired as a Road Driver, he primarily (roughly 80% of his work time) performed duties related to the position of dispatcher. (Tr., at 219). Mr. David was also hired as a Road Driver, but performed functions as a certified safety instructor and assisted Mr. Cappetta with dispatch functions. (Tr., at 149, 190-191).

The Company maintains, as it has throughout these proceedings, that both Mr. Cappetta and Mr. David should have been excluded from the unit and deemed ineligible to participate in any election resulting from the Union’s petition since they do not “regularly perform duties similar to those performed by unit members for sufficient periods of time to demonstrate that they have a substantial interest in working conditions in the unit.” *Berea Publishing Co.*, 140 NLRB 516, 519 (1963). The Hearing Officer, however, refused to take evidence on these issues at the representation hearing. (D&D, at 13).¹²

¹² Although the Hearing Officer excluded evidence as to the issue of Cappetta’s and David’s inclusion in the unit, the record contains significant testimony relating to Cappetta’s primary duties due to

Subsequently, in both the RD Decision and the Certification of Representative, the Acting Regional Director refused to consider their inclusion or exclusion from the unit. According to the Regional Director, “[a]s a threshold matter, the certified safety instructors and dispatchers are neither included, nor excluded. Beyond that, this assertion also is not a proper subject for Objection. Issues of exclusion or inclusion may be examined in a Request for Review.” (CofR, at 8).

Given the Acting Regional Director’s refusal to consider the issue, the Company maintains that Board review is appropriate. Even if their votes are determined not to have materially affected the results of the vote, Mr. Cappetta and Mr. David, and any other employee who now, or in the future, regularly perform duties as a dispatcher and/or certified safety instructor, should be excluded from the bargaining unit since the positions require functions that are, at best, incompatible, and at worst, antagonistic, to those performed by the Road Drivers employed by the Company.

D. Board Review is Appropriate Because There Are Compelling Reasons for Reconsideration of the Final Rule.

The Union’s petition was processed in accordance with the procedures set forth by the Board in the Final Rule, which became effective April 14, 2015. The Final Rule is intended to “remove unnecessary barriers to the fair and expeditious resolution of representation cases, simplify representation case procedures, codify best practices, and make them more transparent and uniform across regions.” *See NLRB Guidance Memorandum on Representation Case Procedure Changes*, Memorandum GC 15-06 (April 6, 2015). According to the Board, the Final Rule provides “targeted solutions to discrete, specifically identified problems to enable the Board

inquiries concerning his supervisory status. The evidence concerning David’s job functions, however, is incomplete as a result of the Hearing Officer’s ruling.

to better fulfill its duty to protect employees' rights by fairly, efficiently, and expeditiously resolving questions of representation." *Id.*

The reality, however, is that the Final Rule enacted comprehensive (and entirely unnecessary) modifications to the Board election process. Viewed as a whole, those modifications severely and unfairly abbreviate the pre-election period, burden employers with new and onerous administrative tasks upon pain of waiver, severely restrict employers in the exercise of their statutory right to communicate their views on unions, and all but eliminate formal consideration of issues integral to the conduct of the election, such as voter eligibility and appropriate inclusion in the proposed unit. Specifically, the Final Rule incorporates, among others, the following modifications:

- The Final Rule requires employers to post a notice of election within 2 business days after service of the notice of hearing and prior to any determination by the Board that the petition has sufficient merit to justify an election. *See* 29 C.F.R. §102.63(a).
- The Final Rule severely abbreviates the time between the filing of the union petition and the first day of a hearing, except in limited cases shown to be sufficiently "complex" to warrant delay for a limited additional time period or under undefined "special circumstances" and/or "extraordinary circumstances." *See* 29 C.F.R. §102.63(a).
- The Final Rule requires employers, during the critical initial days following the filing of a petition for election, to prepare and file a burdensome written "statement of position" addressing, *inter alia*, the basis for any employer contention that the petitioned-for unit is inappropriate, the basis for any employer contention for excluding individual employees from the petitioned-for unit, and the basis for all other issues the employer intends to raise at the hearing, upon risk of waiving employers' legal rights to contest any omitted issues at the hearing. *See* 29 C.F.R. §§102.63(b); 102.66(d).
- The Final Rule requires employers to prepare and include with the statement of position a list of all employees in the petitioned-for unit, including their work location, shifts, and job classifications, as well as a second list (together with the above described additional information) of all individuals in any alternative unit contended for by the employer; and a third list (together with the above described additional information) of all individuals who the employer contends should be excluded from the petitioned-for unit. *See* 29 C.F.R. §102.63(b).

- The Final Rule contemplates that the pre-election hearing required under Section 9(c) of the Act be conducted solely “to determine if a question of representation exists,” and provides that “disputes concerning individuals’ eligibility to vote or inclusion in an appropriate unit,” which have traditionally been deemed necessary and appropriate issues for pre-election consideration, “ordinarily need not be litigated or resolved before an election is conducted.” *See* 29 C.F.R. §102.64(a).
- Relatedly, the Final Rule limits the parties’ right to introduce evidence at the Section 9(c) hearing solely to that which is “relevant to the existence of a question of representation.” *See* 29 C.F.R. §102.66(a).
- The Final Rule requires parties to prepare and present “offers of proof” at the outset of the Section 9(c) hearing, and authorizes Regional Directors to bar the parties from entering evidence into the record if such offers of proof are deemed to be insufficient to sustain the proponent’s position. *See* 29 C.F.R. §102.66(c). Employers are further precluded from introducing evidence into the record on issues that were not previously addressed in the newly-required statement of position. *Id.*
- The Final Rule precludes employers from presenting post-hearing briefs and from reviewing a record transcript prior to stating their post-hearing positions, except upon special permission from, and addressing only subjects permitted by, the Regional Director. *See* 29 C.F.R. §102.66(h).
- The Final Rule requires employers to disclose to unions unprecedented personal and private information pertaining to employees, including home phone numbers and personal email addresses. *See* 29 C.F.R. §102.67(1). The Final Rule drastically shortens the time in which such information must be prepared and provided by employers and requires such personal disclosures even as to employees whose eligibility to vote has been contested and not yet determined.

For the reasons articulated by the Plaintiffs in *Chamber of Commerce of the United States v. NLRB*, 1:15-cv-00009 (D. D.C. 2015), *Assoc. Builders and Contractors of Texas, Inc. v. NLRB*, 1:15-cv-00026 (W.D. Tex. 2015), and *Baker DC, LLC v. NLRB*, 1:15-cv-00571 (D. D.C. 2015), compelling reasons exist for the Board to reconsider application of the Final Rule. UPS Freight incorporates by reference each and every objection to the Final Rule raised by the Plaintiffs in those proceedings such that those objections and arguments shall be deemed to be set forth fully herein. The relevant filings are attached to this request as Exhibit D. Additionally,

among other harms, the procedural modifications imposed by the Final Rule warrant reconsideration of it for the following reasons:

1. The Final Rule Severely Hinders an Employer’s Ability and Opportunity to Effectively Respond to a Petition for Election.

The Final Rule severely hinders an employer’s ability and opportunity to investigate all issues related to the petition, unfairly burden employers with onerous administrative tasks upon pain of waiver, all but eliminates formal consideration of issues integral to the conduct of the election, such as voter eligibility and appropriate inclusion in the proposed unit, and prejudices an employer’s ability to respond to a union’s organizing campaign in violation of the United States Constitution and Section 8(c) of the NLRA.

Despite these obvious harms, the Company attempted, in good faith, to investigate and to preserve its rights in these proceedings to the best of its ability given the considerable time limitations, and attempted in good faith to comply with the procedural requirements imposed by the Final Rule despite their obvious prejudicial impact. For these reasons, and for the others set forth herein, the Company maintains that its submission of its Statement of Position and its other efforts to comply with the Final Rule throughout these proceedings cannot be deemed a waiver of its request for review of the Final Rule, and respectfully asserts that the Region’s processing of the Union’s petition in accordance with the Final Rule rendered it unable to ascertain all facts and issues necessary to effectively protect its rights, and the rights of its employees, in the instant proceeding.

2. The Final Rule Severely Hinders an Employer’s Ability and Opportunity to Respond to a Union’s Organizing Campaign in Violation of Section 8(c).

Section 8(c) of the Act provides that “[t]he expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of

reprisal or force or promise of benefit.” Consistent with Section 8(c), “an employer’s free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). The Final Rule, however, severely infringes upon an employer’s Section 8(c) rights in several respects.

a. The Final Rule Violates the Section 8(c) Policy of Encouraging Uninhibited Debate.

By unfairly reducing the critical period between the filing of the petition for election and the election itself, the Final Rule effectively deprives an employer of adequate time to present its views in a meaningful manner to employees. Such a result is inconsistent with the policies reflected in Section 8(c) favoring uninhibited, robust, and wide-open debate.

This is particularly true given the Final Rule’s imposition of additional and unilateral obligations, including: (1) the compelled posting of an election notice within 2 business days after service of the notice of hearing; (2) the expectation that the hearing is to be opened within 8 days after the service of the notice of hearing; (3) the requirement that the employer prepare and file a comprehensive Statement of Position addressing the issues it wishes to litigate at the hearing, among other information, upon risk of waiving its legal rights to contest any issue not presented in the statement; (4) the requirement that the employer prepare and present written “offers of proof” in support of its position at the hearing; and (5) the requirement that an employer prepare and provide to the labor representative “a list of full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular telephone numbers) of all eligible voters.” These obligations, all of which must be satisfied during a now-abbreviated critical period, preoccupy and avert an employer from the exercise of its lawful rights under Section

8(c), and, when viewed as a whole, rendered it unable to effectively respond to a union’s organizing campaign.

The practical impact of these modifications serve to effectively eliminate any meaningful opportunity for an employer to lawfully communicate with its employees concerning campaign issues during the pre-election timeframe the Board has traditionally referred to as the “critical period” – “a period during which the representation choice is imminent and speech bearing on that choice takes on heightened importance.” *See* 79 Fed. Reg. at 74,439-40 & n.591 (Dec. 15, 2015)(dissent) (citing *Goodyear Tire & Rubber Co.*, 138 NLRB 453 (1962); *E.L.C. Elec., Inc.*, 344 NLRB 1200, 1201 n.6 (2005); *NLRB v. Arkema, Inc.*, 710 F.3d 308, 323 n.16 (5th Cir. 2013); *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 987 (4th Cir; 2012); *NLRB v. Curwood Inc.*, 397 F.3d 548, 553 (7th Cir. 2005). Such a result is not only contrary to the spirit and intent of the Act, but contravene the express rights granted to both an employer and its employees by the Act.

b. The Final Rule Improperly Compels Employer Speech.

Additionally, the unfairly shortened “critical period” contemplated by the Final Rule, and the administrative obligations imposed upon the employer during that time, effectively compels it to address the issue of unionization prior to the filing of a petition in violation of Section 8(c) and the Constitution. The time between the filing of a petition and the conduct of the election has long been referenced as the “critical period” for a reason. As noted in the dissent to the Final Rule, the critical period is the point in time during which “the representation choice is imminent and speech bearing on that choice takes on heightened importance.” *See* 79 Fed. Reg. at 74,439-40 & n.591 (Dec. 15, 2015)(dissent) (citing *Goodyear Tire & Rubber Co.*, 138 NLRB 453 (1962); *E.L.C. Elec., Inc.*, 344 NLRB 1200, 1201 n.6 (2005); *NLRB v. Arkema, Inc.*, 710 F.3d

308, 323 n.16 (5th Cir. 2013); *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 987 (4th Cir. 2012); *NLRB v. Curwood Inc.*, 397 F.3d 548, 553 (7th Cir. 2005)).

For this reason alone, an employer's ability to make general, pre-petition statements concerning its position on unionization, based on general observations at a time when no organizing efforts are taking place, is no substitute for post-petition speech. The benefit of the critical period is that it permits an employer to identify and understand the issues fueling the organizing effort and address them in a specific manner during the campaign, while at the same time lawfully educating its workforce on the lawful changes that would necessarily take place in the event of unionization, such as the collective bargaining process and the impact it might have on their terms and conditions of employment. The artificially abbreviated critical period imposed by the Final Rule's modifications severely and unreasonably restrict the employer's ability to respond to union campaign efforts or to provide a lawful, management-sided perspective on the changes that could result from representation.

In reality, the unfairly shortened critical period contemplated by the Final Rule, and the administrative obligations imposed upon the employer during that time, effectively *compel* an employer to address the issue of unionization *prior* to the filing of a petition – and quite possibly prior to the onset of any organizing efforts – for fear that it will not have adequate opportunity to do so once a petition is filed. The danger inherent in such compelled speech is obvious. While there undoubtedly are circumstances where preemptive, pre-petition discussions with employees will serve to further an employer's position with respect to unionization, it is also likely that, by addressing the issue of unionization prior to the filing of a petition, and at a time when organizing efforts may not yet have occurred, an employer will scatter a seed it does not intend to sow. Employers were not forced to make that choice prior to the implementation of the Final

Rule. The First Amendment, which protects “both the right to speak freely and the right to refrain from speaking at all,” *see Wooley v. Maynard*, 430 U.S. 705, 714 (1977), preserves the employer’s right to decide when and how to address the issue of unionization with its employees, or to refrain from doing so at all. An employer’s right to refrain from such speech is directly, and prejudicially, implicated by the Final Rule.

3. The Final Rule Also Hinders Employees in the Full Exercise of the Rights Guaranteed Them Under Section 7 of the Act.

Finally, the Final Rule severely restricts an employer’s rights under Section 8(c) by eliminating any meaningful opportunity to lawfully communicate with employees concerning the issues raised by a union campaign *during* the pre-election timeframe. These Section 8(c) violations necessarily result in the frustration of the rights of those employees participating in the election. Indeed, as Board Members Miscimarra and Johnson noted in their dissent to the Final Rule: “[T]he inescapable impression created by the Final Rule’s overriding emphasis on speed is to *require employees to vote as quickly as possible* – at the time determined exclusively by the petitioning union – *at the expense of employees and employers who predictably will have insufficient time to understand and address relevant issues.*” 79 Fed. Reg. 74,460 (emphasis added).

The harm identified in the dissent’s analysis of the Final Rule’s emphasis on the unfairly abbreviated critical period is precisely the harm that must be avoided here. The Board’s newly-enacted election process permits the Union to act at its leisure (and in secret) in disseminating information to employees in support of its organizing efforts, and to file its petition at a time when it is confident it has secured sufficient support to prevail in the election (or, as here, at a time when the Company is materially prejudiced due to significant seasonal operational obligations). The prior election processes provided an employer – even one with no previous

notice of the union’s efforts – with an opportunity to address the relevant issues with its workforce and to meaningfully communicate its response to the union’s efforts. The Final Rule, however, unreasonably restricts the Company’s opportunity *to respond*. The undesirable, but likely, result is an election decided by uninformed voters.

Such a result flies directly in the face of rights the Act was intended to protect. By its terms, Section 7 of the Act provides: “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 of such activities . . .*” 29 U.S.C. §157 (emphasis added). But, the right to refrain is only meaningful if the employees have full access to information concerning the consequences of representation before the election. The modifications to the election process imposed by the Board’s adoption of the Final Rule ensure that they do not.

4. Conclusion.

Based on the foregoing, there are compelling reasons for the Board to reconsider the application of the Final Rule in this proceeding, and in all others. The procedural modifications imposed by the new Rule severely hinder an employer’s ability and opportunity to investigate all issues related to the petition, burden any employer with onerous administrative tasks upon pain of waiver, all but eliminate formal consideration of issues integral to the conduct of the election, such as voter eligibility and appropriate inclusion in the proposed unit, and prejudice an employer’s ability to respond to a union’s organizing campaign in violation of the United States Constitution and Section 8(c) of the Act. Additionally, the unfairly shortened “critical period” contemplated by the Final Rule, and the administrative obligations imposed upon the employer during that time, effectively compel an employer to address the issue of unionization prior to the

filing of a petition in violation of Section 8(c) and the Constitution. Finally, the Final Rule hinders employees in the full exercise of the rights guaranteed them under Section 7 of the Act. For these reasons, and others set forth in the filings included in Exhibit D, the Company respectfully requests that the Board grant review for the purpose of reconsidering application of the Final Rule.

E. Board Review Is Appropriate Because There Are Compelling Reasons for Reconsideration of General Counsel Memorandum 15-06.

Compelling reasons also exist for the Board to reconsider application of General Counsel Memorandum 15-06, entitled “Guidance Memorandum on Representation Case Procedure Changes.” The application of certain principles in that memorandum even further restrict and interfere with an employer’s right to fully investigate and respond to a union’s petitioned-for representation. For example, the memorandum allows a Regional Director to decline to hold a pre-election hearing on subjects crucial to the viability to the union’s petitioned-for unit, including whether supervisory participation in union organizing tainted the showing of interest (an objection the Company raised throughout this matter) despite its acknowledgement that “a petition filed by a supervisor cannot raise a valid question concerning representation.” See GC Memorandum 15-06 at 18. (emphasis added). GC Memo 15-06 was intended to describe “the changes made by the final rule and provide guidance to Agency personnel, parties, practitioners, and other stakeholders on how the final rule will impact representation case processing from the initial processing through certification.” *Id.*, at 2. Thus, UPS Freight incorporates by reference the grounds set forth in Section A, *supra*, in support of this request.

V. CONCLUSION

Based on the foregoing, compelling reasons exist for Board review of the issues raised by the Company herein. Accordingly, the Company respectfully requests that the Board grant this

request, and requests that the Union's petition be dismissed and the election be overturned as a result of the Region's denial of the due process guaranteed the Company under both the Act and the U.S. Constitution, supervisory taint by Frank Cappetta, and the Region's improper determination with respect to the appropriate scope of the voting unit.

Furthermore, to the extent the Board determines that remand of this matter is appropriate for any reason, including but not limited to the investigation and determination of Mr. Cappetta's supervisory status, the existence of supervisory taint, and the exclusion of the dispatcher and/or certified safety instructor position from the voting unit, among other issues raised herein, or for the purpose of revisiting any of the pre-election processes or conducting a re-run election, the Company requests that this proceeding be referred to a different Region to begin anew in another Region that is not tainted by the conflict of interest and other evidence of a lack of impartiality alleged at Region. As explained in this request, the Company maintains that the entirety of this proceeding has been tainted. Any further processing of this matter at the regional level on remand should be conducted by another Region.

Respectfully submitted,

UPS GROUND FREIGHT, INC.

 /s/ Kurt G. Larkin

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Corrected Special Appeal and Request for Review was served by electronic mail this 5th day of April, 2016 on the following:

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EXHIBIT A



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NLRB Regional Director In Philly Suspended For 30 Days

By **Matt Fair**

Law360, Philadelphia (March 28, 2016, 6:59 PM ET) -- The National Labor Relations Board confirmed Monday that its regional director in Philadelphia, who has faced criticism for his ties to the pro-union Peggy Browning Fund, was suspended without pay for 30 days at the end of December.

NLRB spokeswoman Jessica Kahanek told Law360 that Dennis Walsh, who was named as Region 4 director in January 2013, was suspended beginning Dec. 13, but she declined to comment on the circumstances that led to the agency's action.

Walsh did not immediately return a message seeking comment.

Walsh faced criticism in July from employment lawyer Wally Zimolong, the head of the Philadelphia-based Zimolong LLC, for his dual roles as director of the NLRB and chair of the Peggy Browning Fund, whose mission, according to its website, is "to educate and inspire the next generation of law students to become advocates for workplace justice."

Zimolong raised concerns in a letter to members of Pennsylvania's congressional delegation that Walsh's potential to solicit donations from unions having business before the NLRB was "at best an implicit conflict of interest that shakes the public trust, and at worst a violation of federal laws."

He cited an annual workers' rights conference put together by the group with workshops aimed at helping to organize low-wage workers.

"In short, Mr. Walsh is the chairman of a union activist organization whose stated goal is to organize workers, and at the same time [he is] asked to be a neutral investigator of labor unions that violate labor laws and employers that allegedly violate union rights," Zimolong's letter said.

He also pointed to the fact that other members of the group's board included the general counsel for the United Steelworkers of America and an associate general counsel for the American Federation of State, County, and Municipal Employees.

He said that Walsh's role with the Peggy Browning Fund could be viewed as a violation of the Hatch Act barring employees of executive agencies from taking an active role in soliciting political contributions.

"The [fund] has a clear political purpose," Zimolong's letter said.

Zimolong told Law360 on Monday that he had no information about any potential action

that may have been sparked by his letter.

While news releases cite Walsh as the fund's chair as recently as June, the group's website currently lists Richard Brean, United Steelworkers general counsel, as chair.

Officials with the fund did not immediately return messages seeking comment on Monday.

--Editing by Kelly Duncan.

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▼

[Denver to Host 2016 RedState Gathering...click here for more information and to](#) **NLRB Official's Conflict of Interest And Possible Illegal Conduct Exposed In Letter**

By: [WorkPlaceReport \(Diary\)](#) | June 17th, 2015 at 10:00 PM |

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In what seems to be more evidence of the National Labor Relations Board's pro-union leanings, a [recent letter](#) to members of Pennsylvania's congressional delegation details what appears to be certain conflicts of interest by the regional director of the National Labor Relations Board (NLRB) office in Philadelphia, including fundraising from unions and pro-union law firms.

As a long-time union advocate, former NLRB member Dennis Walsh [was appointed](#) to head the NLRB's Philadelphia office as regional director in 2013.



As director of the NLRB's Region 4, Walsh and his office are "responsible for enforcement of the nation's primary labor law covering private sector employees in the jurisdiction of Region 4, which serves 22 counties in eastern Pennsylvania, 8 counties in southern New Jersey, and 1 county in Delaware."

In spite of his role with the NLRB, however, Walsh's service as chairman of the pro-union Peggy Browning Fund (PBF) is what raises questions about his "impartiality," according to Philadelphia labor lawyer Wally Zimolong.

Mr. Walsh's role as chairman of a union funded pro-union/worker's rights organization known as the Peggy Browning Fund ("PBF") and his potential solicitation of donations from labor organizations having business before the NLRB Region 4 is at best an implicit conflict of interest that shakes the public trust and at worst a violation of federal laws, 5 U.S.C. § 7321, et. seq. (the "Hatch Act") and 26 C.F.R. Part 2635.

According to its website, the "mission of the Peggy Browning Fund (PBF) is to educate and inspire the next generation of law students to become advocates for workplace justice."

"THE PBF is a union activist organization funded solely with donations from organized labor," writes Zimolong. "Indeed, the PBF website's 'Latest News' section includes a headline stating 'United Steelworkers and Peggy Browning Fund – A Close Relationship.' The PBF's signature event is a 'Worker's Rights Conference.' One of the stated goals of the Conference is 'organizing low wage workers.'"

In addition to Walsh, who serves as the PBF's chairman, the PBF's board of directors includes union presidents and is advised by union staffers from the AFL-CIO, AFSCME and others.

As Walsh and his agency hears cases involving labor unions, "Mr. Walsh has been involved with hundreds of matters involving unions that he has a relationship with through PBF," notes Zimolong.

Moreover, Mr. Walsh's mere affiliation with a partisan organization, like the PBF, raises questions regarding his impartiality. Mr. Walsh's affiliation with the PBF fails squarely within the type of relationship that Section 502 states is impermissible. However, it does not appear that Mr. Walsh has every notified the NLRB ethics officer about this conflict of interest, has ever recused himself from any matters involving unions that he maintains a relationship with through the PBF, and appears to be acting in blatant violation of federal law.

The revelations about Walsh and his seeming conflicts of interest come at a time when the House Appropriations Committee is considering decreasing the NLRB's 2016 budget by 27 percent.

Letter Regarding NLRB Regional Director Dennis Walsh



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June 4, 2015

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8th Congressional District of Pennsylvania
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Congressman Ryan Costello
United States House of Representatives
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21 West Market Street, Suite 105
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Re: National Labor Relations Board, Region 4, Director Dennis P. Walsh

Dear Senator Toomey, Representatives Fitzpatrick, Meehan, and Costello:

As an attorney that represents small businesses through Southeastern Pennsylvania that are subject to the National Labor Relations Act (the "NLRA") and investigation and prosecution by the National Labor Relations Board (the "NLRB"), I write with grave concern about the impartiality of NLRB Region 4 Director Dennis P. Walsh. Mr. Walsh's role as chairman of a union funded pro-union/worker's rights organization known as the Peggy Browning Fund ("PBF") and his potential solicitation of donations from labor organizations having business before the NLRB Region 4 is at best an implicit conflict of interest that shakes the public trust and at worst a violation of federal laws, 5 U.S.C. § 7321, et. seq. (the "Hatch Act") and 26 C.F.R. Part 2635.

A. The Role of the NLRB

The NLRB has a profound impact on almost any private industry employer in Southeastern Pennsylvania. The NLRB is charged with enforcing federal labor law embodied in the NLRA. The law applies equally to both unions and employers. The NLRB describes itself as "is an independent federal agency created to enforce the National Labor Relations Act. Headquartered in Washington DC, it has regional offices across the country where employees, employers and unions can file charges alleging illegal behavior or file petitions seeking an election rerun/line

"Truth isn't mean. It's truth."
Andrew Breitbart (1969-2012)

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EXHIBIT B



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June 4, 2015

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A. The Role of the NLRB

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union representation." <http://www.nlr.gov/resources/faq/nlr/what-national-labor-relations-boards-role>

NLRB Region 4, based in Philadelphia, has jurisdiction over labor law matters occurring in Eastern Pennsylvania - including the counties of Philadelphia, Berks, Bucks, Chester, Delaware, Montgomery, and Lehigh - and Southern New Jersey. Among other things, the NLRB Regional offices investigate and prosecute unfair labor practices committed by unions and employers and conducts elections that determine whether a private employer will become unionized. Thus, the NLRB is charged with investigating things, such as, threats made by labor unions against private employers, coercive tactics against employers by labor unions, and coercive and threatening tactics labor unions use to pressure an employee to vote in favor of union representation.

Each NLRB Regional Director exercises substantial quasi-judicial and quasi-prosecutorial powers delegated to them by Congress. 29 U.S.C. § 159. Those powers include having the final say regarding whether to charge a union with an unfair labor practice, conducting fair union representation elections, and certifying the results of a union election. Accordingly, NLRB Regional Directors hold great power over private industry employers.

B. Region 4 Director Dennis P. Walsh's Role as Chairman of the PBF.

The NLRB Region 4 Director is Dennis P. Walsh. However, in addition to acting as the Region 4 Director, he serves as the chairman of the PBF. <https://www.peggybrowningfund.org/about-us/board-of-directors>

THE PBF is a union activist organization funded solely with donations from organized labor. Indeed, the PBF website's "Latest News" section includes a headline stating "United Steelworkers and Peggy Browning Fund – A Close Relationship." The PBF's signature event is a "Worker's Rights Conference." One of the stated goals of the Conference is "organizing low wage workers." The conference discusses "the plight of low wage workers in America" and includes a working session on organizing workers in the fast food industry. The Conference also includes workshops on organizing "janitors, healthcare workers, taxi drivers, and a broad range of skilled professionals." Finally, the Conference has a workshop aimed at "the types of attacks that *conservative legislatures and governors* have undertaken against public sector unions. . . [t]he workshop will highlight the litigation strategies and efforts to fight back against these attacks." A complete syllabus of the Conference can be found at <https://www.peggybrowningfund.org/workers-rights-conference/at-the-conference>. In short, Mr. Walsh is the Chairman of a union activist organization whose stated goal is to organize workers and at the same time is he asked to be a neutral investigator of labor unions that violate labor law and employers that allegedly violate union rights. He is also charged with conducting fair and impartial elections involving employers that unions seek to unionize.

Moreover, Mr. Walsh's fellow Board Members are representatives of labor unions that bring cases before the NLRB. Fellow Board Members include:

- General Counsel for the United Steelworkers of America;



- Associate General Counsel for the American Federation of State, County, and Municipal Employees ("AFSCME");
- General Counsel of Change to Win (an organization headed by James Hoffa);
- General Counsel to the AFL-CIO; and
- Members of the SEIU's legal department.

A full list of the PBF's Board members is available at <https://www.peggybrowningfund.org/about-us/board-of-directors>

Finally, in March 2014, Mr. Walsh served on the host committee for the PBF's Philadelphia Awards Reception that honored International Brotherhood of Electrical Workers Local Union 98's ("Local 98") general counsel Pasquale Bianculli, Esquire, and where Local 98 was the lead sponsor, other sponsors included Laborers' Local Union 57, the Pennsylvania AFL-CIO, Plumbers Local 690, SEIU Healthcare PA, UFCW Local 1776, and USW District 10. In March 2015, Mr. Walsh again served on the host committee for the PBF's Philadelphia Awards Reception that honored Plumbers Local 690's business manager John Kane. Local 98 also acted as the chief sponsor for that event. Local 98 and Local 690 have dozens of matters pending before NLRB Region 4 and, thus, Mr. Walsh is called upon to investigate the conduct of Local 98 and Local 690.

C. Mr. Walsh's Chairmanship with the PBF Raises Ethical Questions.

1. Mr. Walsh's chairmanship requires disclosure to the NLRB.

5 C.F.R. § 2635.502 requires Mr. Walsh to refrain from participating in any matters involving, at a minimum, Local Union 98, Plumbers Local 690, the United Steelworkers, and the SEIU. 5 C.F.R. § 2635.502 states:

- (a) Consideration of appearances by the employee. Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or *knows that a person with whom he has a covered relationship is or represents a party to such matter*, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.

(1) In considering whether a relationship would cause a reasonable person to question his impartiality, an employee may seek the assistance of his supervisor, an agency ethics official or the agency designee.

(2) An employee who is concerned that circumstances other than those specifically described in this section would raise a question regarding his impartiality should use the process described in this section to determine whether he should or should not participate in a particular matter.



Section 502 defines a “covered relationship” to include:

(v) An organization, other than a political party described in 26 U.S.C. 527(e), in which the employee is an active participant. Participation is active if, for example, it involves service as an official of the organization or in a capacity similar to that of a committee or subcommittee chairperson or spokesperson, or participation in directing the activities of the organization. In other cases, significant time devoted to promoting specific programs of the organization, including coordination of fundraising efforts, is an indication of active participation. Payment of dues or the donation or solicitation of financial support does not, in itself, constitute active participation.

Finally, Section 502 provides the following example of what would be a relationship preventing an executive agency employee from participating in certain matters.

Example 5: An employee of the Internal Revenue Service is a member of a private organization whose purpose is to restore a Victorian-era railroad station and she chairs its annual fundraising drive. Under the circumstances, the employee would be correct in concluding that her active membership in the organization would be likely to cause a reasonable person to question her impartiality if she were to participate in an IRS determination regarding the tax-exempt status of the organization.

Mr. Walsh has served as Region 4 Chairman since 2013. Upon information and belief, Mr. Walsh has been involved with hundreds of matters involving unions that he has a relationship with through PBF. Moreover, Mr. Walsh’s mere affiliation with a partisan organization, like the PBF, raises questions regarding his impartiality. Mr. Walsh’s affiliation with the PBF fails squarely within the type of relationship that Section 502 states is impermissible. However, it does not appear that Mr. Walsh has ever notified the NLRB ethics officer about this conflict of interest, has ever recused himself from any matters involving unions that he maintains a relationship with through the PBF, and appears to be acting in blatant violation of federal law.

2. Mr. Walsh’s chairmanship is a potential violation of the Hatch Act.

Under the Hatch Act, executive agency employees, like Mr. Walsh, are prohibited from taking an active role in soliciting political contributions. 5 U.S.C. § 7323(a)(2). The Hatch Act defines “political contributions” to include “any gift, subscription, loan, advance, or deposit of money or anything of value, **for any political purpose.**” The PFB has a clear political purpose. Indeed, its signature event includes a seminar on how to combat “attacks that **conservative legislatures and governors** have undertaken against public sector unions.” Accordingly, if Mr. Walsh solicits contributions to the PBF it potentially is a violation of the Hatch Act.

Maintaining integrity and fairness in government is of the utmost importance. Employers throughout Southeastern Pennsylvania need to know that they are receiving just, fair, and impartial treatment by NLRB Region 4. However, Mr. Walsh’s relationship with the PFB raises serious questions as to whether Southeastern Pennsylvania employers can receive the treatment they deserve. Accordingly, we ask that your respective offices work to assure that Southeastern Pennsylvania employers receive fair, just, and impartial treatment when appearing before the NLRB Region 4.



Sincerely,

ZIMOLONG, LLC

A handwritten signature in black ink, appearing to read "Wally Zimolong", is written over a horizontal line. The signature is stylized and includes a large flourish at the end.

Wally Zimolong, Esquire

cc: National Labor Relations Board, Office of Inspector General (*via email*)

EXHIBIT C



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FILE NO: 22749.001962

January 7, 2016

Mr. Harold A. Maier
Acting Regional Director, Region Four
National Labor Relations Board
615 Chestnut Street, Suite 710
Philadelphia, PA 19106-4413

Re: UPS Ground Freight, Inc., Case 04-RC-165805

Dear Mr. Maier:

This letter is a follow up to our conference call held with you, Kathleen O'Neill and another staff member this afternoon at 3:30 p.m. During the call, UPS Ground Freight, Inc. (the "Company") made a revised proposal for conducting a manual ballot. The Company proposes a single polling time at the Advance Auto Parts Kutztown, PA distribution center, from 2:00 a.m. to 8:00 a.m. on a Wednesday to be determined in the Regional Director's discretion. The Company represents that all employees in the bargaining unit scheduled to work on election day will be present in the facility during the proposed period. The Company will delay all dispatch times on election day so that the starting times of eligible voters will begin during that period. In other words, employees would vote before they leave the facility to begin their shift.¹

The Company's proposal eliminates any concern that the voting group would be "scattered" within the meaning of Board precedent. Under *San Diego Gas & Elec.*, 325 NLRB 1143 (1998), the Board considers employees to be scattered where, among other factors not present here: (i) they work over a wide geographic area, or (ii) their work schedules vary

¹ In response to an inquiry from one of your colleagues as to whether a continuous six-hour polling period would be uncomfortable for the Board agent conducting the election, we assured you that the Company is amenable an intermission of some reasonable length to allow the Board agent an appropriate break during the polling period. Despite our repeated requests, you declined to offer any suggestion regarding how long of a break you thought would be appropriate.

Mr. Harold A. Maier
Acting Regional Director, Region Four
January 7, 2016
Page 2

significantly so that they are not present at a common location at common times. Neither of these circumstances is present under the Company's revised proposal. All of the employees in the unit report to the same facility, so they are not assigned over a wide geographic area. Moreover, since all drivers would be voting before they leave the building, there is no concern they would not be present at a common location at common times. In this circumstance, the only possible reason for denying a manual ballot would be the efficient use of Board resources. However, the Board has made clear that "Regional Directors should not order mail ballot elections based solely on budgetary concerns." *San Diego Gas & Elec.*, 325 NLRB at 1145, n.8 (citing *Willamette Industries*, 322 NLRB 856 (1997)). Thus, the Company asserts that the Region should revise the Decision and Direction of Election and order a manual ballot.

You expressed doubt regarding the Regional Director's authority to revise the election details following issuance of a Decision and Direction of Election. You also intimated that it was too late for the Company to make this proposal now. To the contrary, it is well-within the Regional Director's broad discretion in conducting representation proceedings to revise the election details at any point. The Board has recognized election details may be worked out after the issuance of the Decision and Direction. See NLRB Casehandling Manual ¶11301.3 ("a determination may not be possible until, for example, after a decision and direction of election has issued"). Moreover, the Region is authorized to refuse to allow litigation regarding the facts or circumstances relevant to election details. See NLRB Casehandling Manual ¶11301.4 ("[T]here is no requirement that parties be permitted to litigate the election arrangements in the hearing . . . the arrangements as to the type of election may be resolved administratively and the parties so notified by letter separate from the decision and direction of election").

Accordingly, we disagree that the close of a pre-election evidentiary hearing is the last point at which a party may make a proposal regarding election details. Frankly, any refusal by the Region to consider this proposal now would be because it simply does not want to consider it, not because it is precluded from doing so. In this regard, we respectfully suggest the rapidly approaching deadline for dispatching the mail ballots is not sufficient justification for refusing to revise the election details, particularly where the compressed timeframe is of the Board's own making and the mail ballot decision was the Region's decision.

At the conclusion of our call, you indicated the Region was not inclined to change the election details. We would note the Board employs an abuse of discretion standard in determining whether to overturn the decision to conduct a mail ballot, and the standard "encompasses whether the Regional Director acted within the guidelines that [the Board has] outlined in directing a mail ballot election." *San Diego Gas & Elec.*, 325 NLRB at 1144, n.4. The Company's current proposal eliminates any reasonable contention the voting group is

Mr. Harold A. Maier
Acting Regional Director, Region Four
January 7, 2016
Page 3

“scattered” under Board precedent. Thus, proceeding with a mail ballot at this point would run afoul of the guidelines set forth in *San Diego Gas*.

The Company asks that you promptly reconsider your decision, accept the Company’s revised proposal, order that a manual ballot be conducted at the Kutztown facility between 2:00 a.m. and 8:00 a.m. on a Wednesday of the Region’s choosing, and amend the Decision and Direction of Election to reflect the same.

Respectfully Submitted,

/s/ Kurt G. Larkin

Kurt G. Larkin

Counsel for UPS Ground Freight, Inc.

cc. Dennis P. Walsh
Kathleen O’Neill
Jeremy Meyer, Esq.
James P. Naughton, Esq.

Johnson, Hilary

From: Larkin, Kurt G.
Sent: Monday, January 11, 2016 10:31 AM
To: Hunter, Diane
Subject: FW: 04-RC-165805-Letter

From: NLRBRegion4@nlr.gov [<mailto:e-Service@nlr.gov>]
Sent: Thursday, January 07, 2016 5:01 PM
To: Larkin, Kurt G.
Subject: RE: 04-RC-165805-Letter

Confirmation Number: 1000047388

You have successfully accomplished the steps for E-Filing document(s) with NLRB Region 04, Philadelphia, Pennsylvania. This E-mail notes the official date and time of the receipt of your submission. Please save this E-mail for future reference.

Date Submitted: 1/7/2016 4:54:53 PM (GMT-05:00) Eastern Time (US & Canada)
Regional, Subregional Or Resident Office: Region 04, Philadelphia, Pennsylvania
Case Name: UPS Ground Freight, Inc.
Case Number: 04-RC-165805
Filing Party: Employer
Name: Larkin, Kurt G
Email: klarkin@hunton.com
Address: Hunton & Williams LLP
951 East Byrd Street
Richmond, VA 23219
Telephone: (804) 788-8776
Fax: (804) 788-8218
Attachments: Letter: Larkin Letter to Region 4 (Case 4-RC-165805).pdf

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DO NOT REPLY TO THIS MESSAGE. THIS IS A POST-ONLY NOTIFICATION.
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EXHIBIT D

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS**

ASSOCIATED BUILDERS AND CONTRACTORS)
OF TEXAS, INC.)
823 Congress, Suite 230)
Austin, TX 78701,)

ASSOCIATED BUILDERS AND CONTRACTORS, INC.)
CENTRAL TEXAS CHAPTER)
2600 Longhorn Blvd., Suite 105)
Austin, TX 78758,)

and)

NATIONAL FEDERATION OF INDEPENDENT)
BUSINESS/ TEXAS)
400 W. 15TH St., #804)
Austin, TX 78701)

Plaintiffs,)

v.)

NATIONAL LABOR RELATIONS BOARD,)
1099 14th St., N.W.)
Washington, D.C. 20570)

Defendant.)

Case No. 1:15-cv-00026

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

1. Plaintiffs ASSOCIATED BUILDERS AND CONTRACTORS OF TEXAS, INC. (“ABC OF TEXAS”), ASSOCIATED BUILDERS AND CONTRACTORS, INC., CENTRAL TEXAS CHAPTER (“ABC CENTRAL TEXAS”) and NATIONAL FEDERATION OF INDEPENDENT BUSINESS/TEXAS (“NFIB/TEXAS”) (collectively “THE PLAINTIFFS”), seek declaratory and injunctive relief against the Defendant NATIONAL LABOR RELATIONS BOARD (“DEFENDANT” OR “THE BOARD”), for violating Federal law.

2. This civil action seeks judicial review of the Board's issuance of a new rule entitled "Representation – Case Procedures; Final Rule," 29 C.F.R. Parts 101 102, and 103, 79 Fed. Reg. 74308 (Dec. 15, 2014) (hereafter the "new Rule") (attached hereto). The new Rule revises and supersedes longstanding regulations implementing Section 9 of the National Labor Relations Act, as amended (the "Act"), pursuant to which the Board conducts union representation elections among employees of employers covered by the Act.

3. As further explained below, the new Rule makes sweeping changes in pre-election and post-election procedures that depart from the plain language and legislative history of the Act and exceed the Board's statutory authority. The evident purpose of the changes is to achieve the impermissible pro-union objective of accelerating the election process to such an extent that employers will be unable to respond effectively to union organizing campaigns. The new Rule achieves this result by preventing employers in most cases from exercising their statutory rights to appropriate hearings regarding voting eligibility, and by shortening the election period so that employers have no meaningful opportunity to lawfully communicate with affected employees about their electoral rights. As stated in the strongly dissenting opinion of Board Members Miscimarra and Johnson: "[T]he inescapable impression created by the Final Rule's overriding emphasis on speed is to require employees to vote as quickly as possible – at the time determined exclusively by the petitioning union – at the expense of employees and employers who predictably will have insufficient time to understand and address relevant issues." 79 Fed. Reg. 74,460.

4. The Board also has provided no adequate justification for overruling many decades of Board and judicial precedent that preserved a careful balance of employer, employee, and union rights in the election process. The Board's failure to provide an adequate justification

supported by substantial evidence in the record renders the new rule arbitrary and capricious and an abuse of discretion, all in violation of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

5. The new Rule will have a deeply destabilizing and harmful impact on many of Plaintiffs' member employers and their employees in Texas (and elsewhere). If the Board's new rule is allowed to go into effect as scheduled on April 14, 2015, Plaintiffs' member employers will be deprived of their rights to appropriate hearings and due process relating to the conduct of pre-election and post-election proceedings. Plaintiffs' members will also lose their statutorily protected rights to communicate with their own workers on union-election-related issues.

6. Absent judicial intervention, the new Rule is scheduled to go into effect on April 14, 2015. For the reasons more fully set forth below, the Rule should be declared unlawful and set aside prior to its effective date.

JURISDICTION AND VENUE

7. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §1331 (Federal question jurisdiction) and the Administrative Procedure Act, 5 U.S.C. § 702 (“[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof”).

8. Venue is proper in this Court under 28 U.S.C. § 1391(e) because ABC of Texas and ABC Central Texas are corporations residing within the Western District of Texas. In addition, all of the Plaintiffs have members that are incorporated and reside in this District, and the new Rule will adversely impact Plaintiffs and their members in this District. This Court is authorized to grant declaratory and injunctive relief under 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief), and 5 U.S.C. §§ 701-706, for violations of, *inter alia*, the APA, 5 U.S.C. § 706.

PARTIES

9. Plaintiff ABC of Texas, a Texas corporation headquartered in Austin, is a trade association representing seven chapters and more than 1500 member construction contractors and related employers in Texas. ABC of Texas advocates on behalf of its chapters and members in support of free enterprise and the Merit Shop philosophy, which holds that work in the construction industry should be awarded and performed on the basis of merit, regardless of labor affiliation. ABC Central Texas, a Texas corporation headquartered in Austin, is one of the chapter members of ABC of Texas and itself represents more than 200 merit shop construction contractors and related employers in Texas. Plaintiffs are affiliated with Associated Builders and Contractors, Inc., a national trade association representing more than 21,000 chapter members. ABC and many of its members filed comments opposing the new Rule prior to its issuance.

10. Plaintiff NFIB/Texas represents approximately 24,000 Texas employers from its office located in Austin. NFIB Texas is the state's leading small business advocacy organization. NFIB nationally is the leading advocate of small business owners representing hundreds of thousands of small business owners throughout the country. NFIB and many of its members filed comments opposing the new Rule prior to its issuance.

11. Plaintiffs have standing to pursue this action on behalf of their members under the three-part test of *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), because (1) Plaintiffs' members would otherwise have standing to sue in their own right; (2) the interests at stake in this case are germane to Plaintiffs' organizational purposes; and (3)

neither the claims asserted nor the relief requested requires the participation of Plaintiffs' individual members.

12. Plaintiffs' members would otherwise have standing to sue in their own right because they will suffer imminent harm under the new Rule, both legal and practical, unless the Rule is declared unlawful and enjoined by this Court. *Inter alia*, Plaintiffs' members will be required to spend many hours and many dollars in efforts to prepare in advance for union petitions, and will be compelled to participate in an invalid administrative process, because they will not have sufficient time or opportunity to respond to such petitions under the new Rule.

13. The interests at stake are germane to Plaintiffs' principles, which include the mission of protecting the rights of their members to freedom from unlawful government interference with the operation of their businesses and to communicate with their employees regarding their rights to refrain from supporting unionization.

14. The claims asserted and relief requested by Plaintiffs do not require participation of Plaintiffs' members, because Plaintiffs' Complaint is a facial challenge to the new Rule based upon the Rule's unlawful departure from the statutory authority delegated by Congress under the Act. The Complaint also challenges the arbitrary and capricious nature of the new Rule, based upon the absence of substantial evidence supporting the Rule in the Administrative Record and the failure of the Department to provide adequate explanation of its reversal of four decades of policy implementing the Act's requirements. The Complaint is entirely based on principles of law and the Administrative Record and thus requires no individual employer participation.

15. The Defendant Board is an independent federal agency charged with administration and enforcement of the Act. The Board has been delegated rulemaking authority

to carry out these functions, but is required to exercise such rulemaking authority in a manner consistent with the Act and is subject to suit and judicial review under the provisions of the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* (the “APA”).

STATUTORY AND REGULATORY FRAMEWORK PRIOR TO THE NEW RULE

16. In Section 9 of the Act, 29 U.S.C. 159, Congress spelled out the means by which employees of private sector employers should be allowed to designate unions as their exclusive collective bargaining representatives or to refrain from that action.

17. Section 9(a) allows unions to represent employees in collective bargaining provided that they are “designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes....” Section 9(b) provides that it is the Board’s obligation to “decide in each case” the “unit appropriate for purposes of collective bargaining, “in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act.” Section 9(c) provides that when a petition for a representation election is filed, the Board must investigate the petition and “shall provide for an appropriate hearing upon due notice” before the election is held. This provision also states that “[s]uch hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto.”

18. Congress amended the Act in 1947 (the “Taft-Hartley amendments”) because of concerns that the Board had adopted election procedures that were not sufficiently neutral to preserve employee freedom of choice with regard to union representation, including an early attempt by the Board to eliminate pre-election hearings. See S. Rep. 80-105, 80th Cong. at 3, reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act, 1947.

19. One of the Taft-Hartley Amendments was the enactment of Section 8(c) of the Act, which protects the right of employers to engage in protected speech prior to an election. The Supreme Court has characterized Section 8(c) as reflecting a “policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide-open debate in labor disputes.” *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2009).

20. Congress further amended the Act in the Labor Management Reporting and Disclosure Act (“LMRDA”) of 1959. At that time, Congress rejected legislative efforts to shorten the time period for holding elections, and specifically rejected a bill that would have deferred voter eligibility issues to post-election hearings. Senator John F. Kennedy, then-chair of the Conference Committee, repeatedly stated that at least 30 days were required between the petition’s filing and the election in order to “safeguard against rushing employees into an election where they are unfamiliar with the issues.” 105 Cong. Rec. 5361 (1959), reprinted in 2 LMRDA Hist. 1024.

21. Pursuant to the foregoing statutory requirements, the Board has for decades adhered to a balanced set of pre-election procedures that have allowed employers sufficient time and opportunity to raise issues affecting the conduct of elections in appropriate pre-election hearings. *See* 29 C.F.R. 102.60, *et seq.* Such issues have included questions regarding the appropriateness of the requested bargaining unit as well as the eligibility of certain categories of employees to vote in the election. *Id.* at 102.66. Following such hearings, employers have been allowed 25 days to request review of regional director decisions by the Board prior to any tally of ballots in an election. *Id.* at 102.67.

22. The foregoing procedures of the Board have worked effectively and in a timely but balanced manner to allow the full exercise of free choice by employees with regard to

unionization, while at the same time preserving employer due process and free speech rights, consistent with the protections of the Act. Thus, the Board has consistently met or improved upon its time targets to conduct elections over the last decade: elections have been conducted within a median of 38 days from the filing of union petitions, bettering the Board's time targets of 42 days from petition to election. In addition, more than 90% of all petitions do not currently require pre-election litigation under the Board's procedures but are resolved by agreement of the parties. Unions are not prejudiced by the operation of the current procedures, as they have won a substantial majority of elections conducted under the Board's current rules.

THE BOARD'S NEW RULE

23. The Board's new Rule is "[m]assive in scale and unforgiving in its effect." 79 Fed. Reg. at 74430 (dissenting opinion). The Rule's primary purpose and effect are to accelerate the timetable of union representation elections, in particular by shortening the time allowed for employers to contest the appropriateness of the petition in pre-election hearings, and in some instances disallowing such hearings altogether on such fundamental questions as who is eligible to vote.

24. Specific provisions of the new Rule that Plaintiffs contend below violate the Act and/or the APA include the following:

a. The new Rule improperly shortens the time between the filing of the union petition and the first day of a hearing, except for cases shown to be sufficiently "complex" as to be delayed for a limited additional time period under undefined "special circumstances" and/or "extraordinary circumstances." See Section 102.63(a) of the new Rule.

b. The new Rule imposes an unprecedented new requirement that employers must first file a written "statement of position" providing a long list of burdensome information prior to exercising their statutory right to a pre-election hearing. Section 102.63(b). Such information must for the first time include, *inter alia*, a list of all employees, work location, shifts, and job classifications of all individuals in the petitioned-for unit, as well as a second list of all such employees (together with the above described additional information) for all individuals in any alternative unit contended for by the employer; and a third list of all such employees (together

with the above described additional information) for all individuals who the employer contends should be excluded from the petitioned-for unit. *Id.*

c. The above required statement of position must also for the first time state in writing, *inter alia*, the basis for any employer contention that the petitioned-for unit is inappropriate, the basis for any employer contention for excluding any individual employees from the petitioned-for unit, and the basis for all other issues the employer intends to raise at the hearing. *Id.* See also Section 102.66(d). No comparable requirement is imposed on union petitioners. All of the above information must be provided, upon risk of waiving employers' legal rights to contest such issues at the hearing, in a length of time that is inadequate for many employers to meaningfully understand and exercise their legal rights.

d. The new Rule improperly limits the purpose of a hearing conducted under Section 9(c) of the Act as being solely "to determine if a question of representation exists." See Section 102.64(a). For the first time, the Rule asserts that "disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted." *Id.*

e. The new Rule also for the first time limits the right of parties in such hearings to introduce into the record evidence to that which is "relevant to the existence of a question of representation" thereby excluding other issues contemplated by Section 9(c) of the Act. See Section 102.66(a).

f. The new Rule also for the first time requires parties to make "offers of proof" at the outset of any hearing, and authorizes Regional Directors to bar the parties from entering evidence into the record if such offers of proof are deemed to be insufficient to sustain the proponent's position. Section 102.66(c). Employers are further precluded from introducing evidence into the record that is not previously encompassed by various aspects of the newly required Statement of Position. *Id.*

g. The new Rule for the first time denies employers the opportunity to present post-hearing briefs and to review a hearing transcript prior to stating their post-hearing positions on the record, except upon special permission of the Regional Director and addressing only subjects permitted by the Regional Director. Section 102.66(h).

h. The new Rule requires employers to disclose to unions unprecedented personal and private information pertaining to employees, including home phone numbers and personal email addresses. See Section 102.67(l). The Rule drastically shortens the time in which such information must be prepared and provided by employers and requires such personal disclosures even as to employees whose eligibility to vote has been contested and not yet determined.

i. The new Rule for the first time eliminates the longstanding requirement that election ballots be impounded while any request for review of the Regional Director's decision is pending at the Board and eliminates the previous 25-day waiting period for review filings which previously allowed the Board time to consider such requests for review prior to the vote. See Section 101.21(d), removed and reserved.

j. The new Rule for the first time eliminates the right of employers to obtain mandatory Board review of post-election disputes if they enter into stipulated election agreements prior to the election instead of exercising their right to a pre-election hearing. See Section 102.62(b) and 102.69.

25. Due to the length of the new Rule (182 pages of the Federal Register), the foregoing summary of significant and unprecedented changes which Plaintiffs seek to challenge in this Complaint is necessarily a non-exclusive list.

CLAIMS FOR RELIEF

COUNT I – The New Rule Exceeds The Board’s Statutory Authority Under Section 9 of the Act, In Violation of the APA.

26. Plaintiffs incorporate by reference the allegations contained in Paragraphs 1 through 25 of this Complaint, as though fully set forth below.

27. As noted above, Section 9(b) of the Act, 29 U.S.C. 159(b) requires the Board to “decide in each case ... the unit appropriate for collective bargaining....” Section 9(c) further provides that when a petition for a representation election is filed, the Board must investigate the petition and “shall provide for an appropriate hearing upon due notice” before the election is held. This provision also states “[s]uch hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto.”

28. Legislative history of the Act including rejected amendments to the Act in 1947 and 1959 confirms that the Act requires the Board to allow employers the right to adequately prepare for, present evidence at and otherwise fairly litigate issues of unit appropriateness and voter eligibility in appropriate pre-election hearings, and that the Board must decide “in each case” the unit that is appropriate for the purposes of collective bargaining based on all the evidence submitted. Congress further rejected efforts to expedite the election process in the manner now adopted in the new Rule.

29. The new Rule, by the provisions summarized above and in other ways, violates each of the foregoing statutory provisions and Congressional intent. Specifically, the new Rule impermissibly restricts employers' ability to prepare for, present evidence and fairly litigate issues of unit appropriateness and voter eligibility in petitioned-for bargaining units.

30. The new Rule further vests excessive authority in Hearing Officers and excessively derogates the Board's own decision-making authority, both of which violate the foregoing provisions of the Act and Congressional intent and exceeding statutory authority within the meaning of the Administrative Procedure Act.

COUNT II – The New Rule Violates The Act and The APA By Failing To Assure To Employees The Fullest Freedom In Exercising The Rights Guaranteed By [The] Act.

31. Plaintiffs incorporate by reference the allegations contained in Paragraphs 1 through 30 of this Complaint, as though fully set forth below.

32. As noted above, Section 9(b) of the Act requires the Board to "assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act." The new Rule violates this provision, inter alia, by compelling the invasion of privacy rights of the employees of Plaintiffs' member employers by disclosure of their names and job duties to a petitioning union prior to any determination that the petition is supported by a sufficient showing of interest to proceed to an election in an appropriate bargaining unit.

33. The new Rule further violates the Act and the privacy rights of employees by compelling employers to disclose unprecedented personal information, including personal phone numbers and email addresses, about all employees who are deemed to be part of an appropriate bargaining unit, and additional employees whose status has not been determined prior to a direction of election.

COUNT III – The New Rule Violates The Act And The APA By Interfering With Protected Speech During Representation Election Campaigns.

34. Plaintiffs incorporate by reference the allegations contained in Paragraphs 1 through 33 of this Complaint, as though fully set forth below.

35. Section 8(c) of the Act, 29 U.S.C. 158(c) protects the free speech rights of employees, employers, and unions, consistent with similar guarantees afforded by the First Amendment. As noted above, the Supreme Court has characterized Section 8(c) as favoring uninhibited, robust, and wide-open debate in labor disputes. *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008). This right only has meaning if there is enough time for parties to communicate with employees about their choice of representation.

36. The new Rule interferes with these protected rights because it is intended to, and inevitably will, substantially shorten the time between the filing of a representation petition and the date of the election, thereby curtailing the ability of parties to exercise their rights to engage in protected speech.

COUNT IV – The New Rule Is Arbitrary And Capricious And An Abuse of Agency Discretion Within The Meaning Of The APA

37. Plaintiffs incorporate by reference the allegations contained in Paragraphs 1 through 36 of this Complaint, as though fully set forth below.

38. By reversing decades of policy and precedent without adequate justification, the Defendants have acted in an arbitrary and capricious manner in violation of the APA, and the new Rule should be set aside on this additional ground pursuant to 5 U.S.C. § 706.

PRAYER FOR RELIEF

Wherefore, the Plaintiffs respectfully request this Court to enter judgment in their favor and:

1. Declare that the provisions of the new Rule described above violate the Act and the APA;
2. Vacate and set aside the provisions of the new Rule shown to be unlawful in this Complaint and any related provisions that cannot be lawfully severed therefrom;
3. Declare that the new Rule is arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with law;
4. Issue an injunction vacating the new Rule and barring the Board from enforcing or applying the challenged portions of the Department's new Rule, together with any other provisions of the Rule that incorporate or otherwise rely on the challenged provisions found to be unlawful.
5. Award Plaintiffs their costs of litigation, including reasonable attorneys' fees; and
6. Grant Plaintiffs such other relief as may be necessary and appropriate.

Respectfully submitted,

/s/ Mark Jodon

Maurice Baskin (*pro hac vice* pending)

Mark Jodon (Bar No. 10669400)

Travis Odom (Bar No. 24056063)

Little Mendelson, P.C.

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**BAKER DC, LLC AND SHANNON W.
COTTON, MICHAEL A. MURPHY, AND
JORGE E. GONZALEZ VILLAREAL**
1110 Vermont Avenue, NW
Washington, D.C. 20005,

Plaintiff,

v.

NATIONAL LABOR RELATIONS BOARD
1099 Fourteenth Street, NW
Washington, D.C. 20570,

Defendant.

Case No. 15-cv-00571-ABJ

AMENDED COMPLAINT

1. On April 14, 2015, the National Labor Relations Board (“the Board”) put into effect a new Rule entitled “Representation – Case Procedures; Final Rule,” 29 C.F.R. Parts 101, 102, and 103, 79 Fed. Reg. 74308 (Dec. 15, 2014) (hereafter the “new Rule”).

2. The new Rule went into effect notwithstanding a pending legal challenge filed in this district by a broad coalition of trade associations representing millions of businesses throughout the country, who have alleged that the new Rule violates the National Labor Relations Act (“the Act”) and the Administrative Procedure Act (the “APA”).¹

3. On April 15, 2015, the United Construction Workers Local Union No. 202-Metropolitan Regional Council of Carpenters (“the Union”) filed a petition with the National

¹ See *Chamber of Commerce of the United States of America, et al v. NLRB, Case No. 15-cv-00009-ABJ*. Dispositive cross-motions have been filed in that case and have been fully briefed by the parties.

Labor Relations Board (the "Board") seeking to represent employees of Baker DC, LLC ("Baker") working as carpenters and laborers on construction sites in the Washington, D.C. metropolitan area. The Board has indicated to Baker its intent to process the petition in all respects under the new Rule.

4. Among other dramatic changes to the representation election process, the new Rule:

- a. Requires employers to post a notice of election constituting compelled speech prior to any determination by the Board that the petition has sufficient merit to require an election to be held;
- b. Requires employers to file a burdensome written Statement of Position prior to any hearing being held, upon penalty of precluding employers from presenting evidence at the hearing on any issue not addressed in the Statement, contrary to the rights given to employers to present such evidence in Section 9 of the Act;
- c. Requires employers to disclose to a petitioning union confidential information about employees inside and outside the petitioned-for unit prior to any hearing being held, upon the same unlawful penalty;
- d. Postpones evidence taking and litigation over critical issues of voter eligibility until *after* an election takes place;
- e. Requires employers to turn over employees' highly personal and private information such as personal phone numbers and e-mail addresses to labor organizations within two business days after a decision and direction of election is issued;

- f. Sharply limits the opportunity for employers to seek pre-election Board review, and a stay of the election, by eliminating a 25-day automatic waiting period for such review; and
- g. Eliminates employers' automatic right to post-election Board review (post-election review would now be discretionary).

5. Because the new Rule offends the First and Fifth Amendments of the Constitution of the United States, contravenes clear Congressional requirements, and is arbitrary and capricious, it should be held unlawful and set aside.

JURISDICTION AND VENUE

6. This Court has jurisdiction under 28 U.S.C. § 1331 because this action arises under and concerns provisions of the Act, the Administrative Procedure Act ("the APA"), and the Free Speech Clause of the First Amendment and the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

7. Venue is proper in this Court under 28 U.S.C. § 1391(b) because (i) the Board resides in the District of Columbia; (ii) a substantial part of the events giving rise to this claim including hearings and other actions taken by the Board in promulgating the new Rule—occurred in the District of Columbia; and (iii) Baker is headquartered and does business in the District of Columbia.

PARTIES

8. The Board is an independent federal agency in the Executive Branch and is subject to the APA. The Board's headquarters are located at 1099 Fourteenth Street, NW, Washington, D.C. 20570.

9. Baker is a concrete contractor operating in the greater Washington DC area from its headquarters location at 1100 Vermont Ave., N.W., Washington, D.C. 20005. Baker

specializes in commercial “cast in place” concrete construction, restoration, retrofit, specialty underpinning work, and blast fortification.

10. Baker employs employees who are covered by the Act and are subject to the Board’s rules regarding union organizing, to the extent that such rules are consistent with the Act. Baker’s employees are not currently covered by a union. Plaintiffs Cotton, Murphy, and Gonzalez Villareal are employed by Baker. There are several hundred other employees employed by Baker who are similarly situated. As noted above, the Union filed a petition with the Board on April 15, 2015 seeking to represent Baker’s employees working as carpenters and laborers on construction sites in the Washington, D.C. metropolitan area.

STANDING AND RIPENESS

11. The Board has indicated to Baker its intent to process the petition in all respects under the new Rule. Accordingly, Baker and its co-Plaintiff employees will imminently suffer concrete and substantial injury in fact, including **irreparable harm**, as a result of the new Rule. Such harm includes but is not limited to the following:

- a. Compelled infringement of Plaintiffs’ free speech rights due to the newly required posting of a notice of election on or before April 17, 2015, (two business days after receipt of the Notice of Petition from the Board);
- b. Unprecedented compelled pre-hearing disclosure of the names and locations of Baker’s employees’ to an outside third party (the Union), upon penalty of being precluded from presenting evidence relating to the voting eligibility and appropriate unit of such employees, in direct violation of the Section 9(c)(1) of the Act;
- c. Compelled filing by Baker of a newly required pre-hearing Statement of Position upon penalty of being precluded from presenting evidence relating to any issue not addressed in the Statement, in further violation of Section 9.

- d. Preclusion of Baker from presenting evidence on voter eligibility issues in violation of Congressional intent to allow all such evidence to be presented under the Taft-Hartley Act.
- e. Unprecedented compelled post-hearing disclosure of private and personal phone numbers and e-mail addresses of Baker's employees, within the impracticable deadline of 2 business days following the Board's direction of election.
- f. Infringement of Plaintiffs' free speech rights during the unlawfully abbreviated election campaign.

CLAIMS FOR RELIEF

COUNT I: The New Rule Exceeds The Board's Authority Delegated By Congress By Imposing Unprecedented Disclosure Requirements On Baker, Including Compelled Disclosure Of Confidential, Personal and Private Information Regarding Their Employees.

12. Plaintiffs incorporate by reference each allegation in the above paragraphs as though fully set forth herein and further alleges as follows:

13. Section 7 of the Act gives employees the right to "form, join, or assist" unions; to bargain collectively with their employer; or to refrain from engaging in such activities.

14. Section 9(b) of the Act provides that the Board shall "assure to employees the fullest freedom in exercising the rights guaranteed by" the Act.

15. Section 9(c)(1) of the Act, enacted as one of the Taft-Hartley amendments of 1947, requires that the Board conduct an "appropriate hearing" with regard to all "questions concerning representation." As was made clear by Senator Robert Taft, chief sponsor of the Taft-Hartley Act, Congress intended by this language to require the Board to hold such hearings in order to "decide questions of unit and eligibility to vote." 93 Cong. Rec. 6858, 6860 (June 12, 1947).

16. Nothing in the Act authorizes the Board to require employers to disclose the confidential names and work locations of their employees prior to a determination that a petition merits a direction of election after an appropriate hearing, upon penalty of being precluded from presenting evidence regarding the voting eligibility or unit appropriateness of such employees. Section 102.63(b) of the new Rule nevertheless requires Baker and similarly situated employers to make such a disclosure upon penalty of otherwise being precluded from presenting evidence that Section 9(c)(1) guarantees to employers the right to present.

17. Nothing in the Act authorizes the Board to require employers to disclose the personal and private phone numbers and personal email addresses of their employees within two business days after a direction of election is issued, or at any other time. Section 102.62 of the new Rule nevertheless requires such post-hearing disclosures, exceeding the Board's authority under the Act and constituting a gross invasion of employer and employee privacy contrary to the intent of Congress.

Count II: The New Rule Impermissibly Restricts Baker's Right To Present Evidence On Questions Concerning Representation At An Appropriate Hearing In Violation Of Section 9 and the Fifth Amendment to the U.S. Constitution.

18. Section 9 of the Act states that the Board "shall decide in each case" the unit that is appropriate for the purposes of collective bargaining. 29 U.S.C. § 159(b). Section 9(c) of the Act further provides that, when a petition for a representation election is filed, the Board must investigate that petition and "shall provide for an appropriate hearing upon due notice" before the election is held. 29 U.S.C. § 159(c)(1). The same provision provides that "[s]uch hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto."

19. The new Rule violates the Act's requirement of an "appropriate" pre-election

hearing by restricting Baker's ability to present evidence and litigate issues of voter eligibility or inclusion in the putative bargaining unit. In particular, the requirement that Baker file a written Statement of Position on each and every potential that could arise during a hearing, at a time when no pre-hearing discovery is permissible, upon penalty of precluding Baker from presenting evidence on unit and voter eligibility issues as expressly permitted by the Act, violates Section 9 and Congressional intent.

20. The new Rule also conflicts with Section 9(c)(1)'s requirement that the Board's hearing officers "shall not make any recommendations with respect" to the hearings they conduct. The new Rule effectively vests hearing officers with decision-making authority regarding the evidence that will be admitted and the issues that will be litigated at the pre-election hearing.

21. By authorizing hearing officers to prevent employers from litigating issues as to the eligibility of certain employees to vote in the election, and by limiting the available time for the Baker to communicate about the election and for Plaintiff employees to decide whether to vote for or against union representation, the new Rule fails to assure employees the "fullest freedom" in exercising their rights under Section 7 of the Act and is otherwise contrary to Section 9(b) of the Act.

22. The new Rule also deprives Baker of due process in NLRB representation case proceedings, in violation of the Fifth Amendment, by preventing Baker from litigating issues of voter eligibility and inclusion at the pre-election hearing, and then denying Baker the right to seek any Board review of those issues, whether pre- or post-election, by making all Board review discretionary.

Count III: The New Rule Violates Plaintiffs' First Amendment and Statutory Rights of Free Speech.

23. Section 8(c) of the Act protects an employer's freedom of speech: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisals or force or promise of benefit." 29 U.S.C. § 158(c). Section 8(c) "implements the First Amendment" to the United States Constitution and "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the National Labor Relations Board." *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

24. Notwithstanding these requirements, the new Rule violates Plaintiffs' free speech rights by compelling Baker to engage in certain speech prior to the Board making any determination that an election will be held on the Union petition. Specifically, the new Rule requires Baker to post a new mandatory workplace notice to be posted within two days after the filing of a representation petition. In the present case, because Baker received the Board's Notice of Petition on April 15, 2015, the new Rule unlawfully requires Baker to post the mandatory new notice by April 17, 2015. The new Rule violates the D.C. Circuit's holding in *National Association of Manufacturers v. NLRB*, 717 F. 3d 947, 955 (D.C. Cir. 2013), overruled on other ground by *American Meat Inst. v. U.S. Dept. of Agriculture*, 760 F. 3d 18 (D.C. Cir. 2014) (*en banc*).

25. By enacting Section 8(c), Congress further directed that employers be given sufficient opportunity to meaningfully express their views in the election process. Specifically, Congress determined that employers, such as Baker, must have the opportunity to effectively

communicate with their employees on the subjects of union organizing and collective bargaining. *Chamber of Commerce v. Brown*, *supra*, 554 U.S. at 67–68 (2008) (Section 8(c) reflects a “policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide open debate in labor disputes.” (internal quotation omitted)); *Nat’l Ass’n of Manufacturers v. NLRB*, 717 F.3d 947, 955 (D.C. Cir. 2013) (Section 8(c) “serves a labor law function of allowing employers to present an alternative view and information that a union would not present.” (citation omitted)).

26. The new Rule impermissibly curtails Plaintiffs’ right to communicate with each other by substantially shortening the period between an election petition and the holding of an election, and the new Rule impermissibly limits Plaintiffs’ ability to exercise its rights under Section 8(c) of the Act and the First Amendment.

COUNT IV: The Board’s Actions Are Arbitrary and Capricious

27. Plaintiffs incorporate by reference each allegation in the above paragraphs as though fully set forth herein and further alleges as follows:

28. “The APA commands reviewing courts to ‘hold unlawful and set aside’ agency action that is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (citing 5 U.S.C. § 706(2)(A)). The APA also requires courts to hold unlawful and set aside agency action that is not in accordance with procedure required by law. 5 U.S.C. § 706(2)(D).

29. The new Rule is overly broad in changing election procedures in a manner impacting all cases, as the alleged “problems” identified by the Board to justify the new Rule exist only in a small fraction of cases.

30. The new Rule seeks to arbitrarily expedite the election process, even though the data show that the Board already conducts elections below its established time targets in more

than 90 percent of cases.

31. The new Rule introduces no new time targets for representation elections, further undermining the rational basis for radically altering procedures that have met the Board's established time targets for many years.

32. The new Rule promotes speed in holding elections at the expense of all other statutory goals and requirements, including but not limited to Baker's free speech rights and the opportunity for a full and informed debate before an election.

33. The new Rule also mandates, for the first time in the Board's history, that Baker gives its employees' personal phone numbers and email addresses to labor organizations. The Board acknowledged that "the privacy, identity theft, and other risks may be greater than the Board has estimated," but nonetheless concluded, without adequate justification and concern for employee rights, that these "risks are worth taking." 79 Fed. Reg. at 74,342.

34. The new Rule's elimination of mandatory Board review of post-election disputes, during a period of dramatically reduced case loads, is arbitrary and capricious given the Board's statutory obligation to oversee the election process.

35. The new Rule's elimination of mandatory Board review of post-election disputes, during a period of dramatically reduced case loads, is arbitrary and capricious given the Board's statutory obligation to oversee the election process.

36. The new Rule concludes that it will reduce election-related litigation, despite available evidence that the new Rule's sweeping changes will reduce the high rate of election agreements, and will result in more, not less, litigation overall, including more litigation in federal court. As the dissenting Board Members explained: "An employer will now be forced to litigate in an unfair labor practice case, before the Board and in Federal court, issues that are

currently reviewed by the Board in a post-election appeal as a matter of right. Given the process an employer must go through to have a Federal court of appeals review any disputed issue regarding an election, there is often substantial delay in the final resolution of the representation case.” 79 Fed. Reg. at 74,451.

37. Based on the above, the Board failed to meaningfully consider numerous legal, policy, and economic factors, or to articulate a rational basis for rejecting them.

38. The Board’s actions in adopting the new Rule are arbitrary and capricious, and the new Rule was enacted without observance of the necessary procedures required by law. 5 U.S.C. § 706(2)(A)-(D).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court enter judgment in its favor and:

1. Vacate and set aside the new Rule;
2. Declare that the new Rule is contrary to the First and Fifth Amendments to the Constitution of the United States and to the Act, and in excess of the Board’s statutory jurisdiction and authority;
3. Declare that the Board violated the APA in issuing the new Rule;
4. Declare that the new Rule is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law;
5. Enjoin and restrain the Board, its agents, employees, successors, and all persons acting in concert or participating with the Board from enforcing, applying, or implementing (or requiring others to enforce, apply, or implement) the new Rule;
6. Award Plaintiffs their costs of litigation, including reasonable attorney’s fees; and
7. Grant Plaintiffs such other relief as may be necessary and appropriate or as the Court deems just and proper.

Dated: April 21, 2015

Respectfully submitted,

/s/ Maurice Baskin

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA,
1615 H Street, NW
Washington, D.C. 20062

and

COALITION FOR A DEMOCRATIC
WORKPLACE,
901 7th Street NW, 2nd Floor
Washington, D.C. 20001

and

NATIONAL ASSOCIATION OF
MANUFACTURERS,
733 10th Street NW, Suite 700
Washington, D.C. 20001

and

NATIONAL RETAIL FEDERATION
1101 New York Ave NW
Washington, D.C. 20005

and

SOCIETY FOR HUMAN RESOURCE
MANAGEMENT
1800 Duke Street
Alexandria, VA 22314

Plaintiffs,

v.

NATIONAL LABOR RELATIONS
BOARD
1099 14th Street NW
Washington, D.C. 20570

Defendant.

Case No. 1:15-cv-9

COMPLAINT

INTRODUCTION

1. For nearly 80 years, the National Labor Relations Board (“NLRB” or “Board”) has conducted workplace elections so that workers can decide if they want to be represented by a union for purposes of collective bargaining. Like political elections, representation elections offer all participants in the process—the union, the employer, and the employees—a critical opportunity to engage in protected, lawful speech about how workers should vote in the election.

2. Congress’s overarching “policy judgment . . . favoring uninhibited, robust, and wide-open debate in labor disputes”—including the “freewheeling use of the written and spoken word” (*Chamber of Commerce v. Brown*, 554 U.S. 60, 67–68 (2008))—is so central to the representation election process that Congress expressly guaranteed an employer’s right to engage in speech concerning unionization (so long as that speech, of course, “contains no threat of reprisal or force or promise of benefit”). 29 U.S.C. § 158(c).

3. The Board’s recently issued “ambush” election rule (the “Final Rule”) implements sweeping changes to the NLRB’s representation election process that, as the dissenting Board Members explained, impermissibly “limits the right of all parties to engage in protected speech at precisely the time when their free speech rights are most important.” 79 Fed. Reg. 74,308, 74,439 (Dec. 15, 2014). By rapidly (and needlessly) accelerating the election process, the Final Rule “improperly shortens the time needed for employees to understand relevant issues, compelling them to ‘vote now, understand later.’” *Id.* at 74,430.

4. In doing so, the Final Rule is “contrary to common sense, contrary to the [National Labor Relations] Act and its legislative history, and contrary to other legal requirements directed to the preservation of employee free choice, all of which focus on guaranteeing enough time for making important decisions.” *Id.* at 74,430-31. And the Final

Rule is “fundamentally unfair and will predictably deny parties due process by unreasonably altering long established Board norms for adequate notice and opportunity to introduce relevant evidence and address election-related issues.” *Id.* at 74,431.

5. Although the Final Rule does not provide any guidelines about the time frame in which elections will be conducted, the changes implemented in the Final Rule would allow elections to be held in as little as 14 days after the employer is first notified of the election petition. Under the NLRB’s current procedures, the Board expects that elections will be held within a median of 42 days from the filing of a petition, and that 90 percent of elections will be held within 56 days of the filing of a petition.

6. Among other dramatic changes to the representation election process, the Final Rule:

- a. Postpones evidence taking and litigation over critical issues of voter eligibility until *after* an election takes place;
- b. Sharply limits the opportunity for employers to seek pre-election Board review, and a stay of the election, by eliminating a 25-day automatic waiting period for such review;
- c. Eliminates employers’ automatic right to post-election Board review (post-election review would now be discretionary); and
- d. Requires employers to turn over employees’ highly personal information such as home and cell phone numbers and e-mail addresses to labor organizations to aid unions in their election campaign efforts.

7. Moreover, as the dissenting Board Members point out, the Final Rule “leaves unanswered the most fundamental question regarding any agency rulemaking, which is whether

and why rulemaking is necessary.” 79 Fed. Reg. at 74,431. The Board already handles election requests quickly, with over 95 percent of elections occurring in less than two months (and with over 90 percent of elections generating no pre-election litigation, above the Board’s stated goal of 85 percent). Indeed, for several years, the Board has surpassed its own internal time target for handling elections—a feat its prior General Counsel has described as “outstanding.” And unions already win more than two-thirds of all representation elections—so the Board’s massive modifications to the election process cannot be justified or explained by any legitimate concern about employer “coercion” during the current pre-election period.

8. Because the Final Rule offends the First and Fifth Amendments to the Constitution of the United States, contravenes clear congressional requirements, and is arbitrary and capricious, it should be held unlawful and set aside.

JURISDICTION AND VENUE

9. This Court has jurisdiction under 28 U.S.C. § 1331 because this action arises under and concerns provisions of the National Labor Relations Act (“NLRA”), the Administrative Procedure Act (“APA”), and the Free Speech Clause of the First Amendment and the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

10. Venue is proper in this Court under 28 U.S.C. § 1391(b) because (i) the NLRB resides in the District of Columbia; (ii) a substantial part of the events giving rise to this claim—including hearings and other actions taken by the Board in promulgating the Final Rule—occurred in the District of Columbia; and (iii) the Chamber, CDW, NAM, and NRF are headquartered or maintain offices in the District of Columbia, and SHRM does business in the District of Columbia.

PARTIES

11. Plaintiff Chamber of Commerce of the United States of America (“Chamber”) is a

non-profit organization created and existing under the laws of the District of Columbia. The Chamber's headquarters are located at 1615 H Street, NW, Washington, D.C. The Chamber is the world's largest federation of businesses and associations, directly representing 300,000 members and indirectly representing more than three million U.S. businesses and professional organizations of every size and in every industry sector and geographic region of the country. Of particular relevance here, the Chamber represents the interests of its member-employers in employment and labor-relations matters—including matters arising under the NLRA—before courts, Congress, the Executive Branch, and regulatory agencies of the federal government. The Chamber is authorized to bring this action on behalf of its member companies.

12. Plaintiff Coalition for a Democratic Workplace ("CDW") represents millions of businesses of all sizes. CDW's membership includes hundreds of employer associations, individual employers, and other organizations that together employ tens of millions of individuals working in every industry and every region of the country. CDW is authorized to bring this action on behalf of itself, its members, and its member companies.

13. Plaintiff National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than \$1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. NAM is authorized to bring this action on behalf of itself, its members, and its member companies.

14. Plaintiff National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main

Street merchants, grocers, wholesalers, chain restaurants, and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs—a total of 42 million working Americans. NRF is authorized to bring this action on behalf of itself, its members, and its member companies.

15. Plaintiff Society for Human Resource Management (“SHRM”) is the world's largest membership organization devoted to human resource management. Representing more than 275,000 members in over 90,000 companies, SHRM is the leading provider of resources to serve the needs of human resource professionals and advance the professional practice of human resource management. SHRM members represent their employer companies on a myriad of human resource issues, including labor relations matters. SHRM is authorized to bring this action on behalf of itself and its members.

16. Plaintiffs collectively represent millions of employers and human resource professionals in companies covered by the NLRA and subject to the Final Rule. These employers, in turn, employ millions of employees who are covered by the NLRA and entitled to organize and petition the NLRB to hold a representation election pursuant to the Final Rule's expedited procedures. The vast majority of these employees are not currently represented by a union. There are, however, active union organizing campaigns involving employees of many of the businesses represented by Plaintiffs. The Plaintiffs' members expect that these employees, or the unions that seek to represent them, will file election petitions soon after the Final Rule becomes effective on April 14, 2015, and all subsequent elections will be governed by the Final Rule's expedited procedures.

17. These injuries that the Plaintiffs' members will incur as a result of the Final Rule include less time for employers to communicate with workers about the election, in derogation of

employers' free speech rights under Section 8(c) of the NLRA, the First Amendment, and the clear congressional intent for a full and informed debate before workers cast their votes; less time for employers to investigate whether it is even appropriate for the NLRB to hold an election in the petitioned-for bargaining unit; less time for employers to determine whether other employees should be included or excluded from the petitioned-for bargaining unit; less time for employers to determine whether individuals encompassed by the petition are actually eligible to vote in the election; less time to prepare for a pre-election hearing and file a binding position statement under penalty of issue waiver; and less time for employers to negotiate an election agreement that would obviate the need for a pre-election hearing. Many of Plaintiffs' members will incur additional costs in order to prepare for the shortened, and inadequate, time to respond to an election petition under the Final Rule.

18. In addition, the Final Rule will restrict employers' ability to litigate issues of eligibility and inclusion at the pre-election hearing, even if those issues are timely raised; sharply limit employers' opportunity to seek Board review of a Regional Director's decision before the election; and eliminates mandatory Board review of post-election disputes, making such review discretionary only. In these circumstances, if the union wins the election, the employer may be denied any Board review of the Regional Director's decision and the employer's only recourse for judicial review will be to subject itself to an unfair labor practice proceeding by refusing to bargain with the union.

19. Therefore, in the absence of relief from this Court, many of the Plaintiffs' members will suffer concrete and particularized injuries as a result of the Final Rule soon after it becomes effective.

20. Defendant NLRB is an independent federal agency in the Executive Branch and is

subject to the APA. The NLRB's headquarters are located at 1099 14th Street, NW, Washington, D.C.

21. The Board consists of a Chairman and four Members.
22. Mark G. Pearce, in his official capacity, is Chairman of the Board.
23. Kent Y. Hirozawa, in his official capacity, is a Member of the Board.
24. Philip A. Miscimarra, in his official capacity, is a Member of the Board.
25. Harry I. Johnson III, in his official capacity, is a Member of the Board.
26. Nancy Schiffer, in her previous official capacity, was a Member of the Board

until her term expired on December 16, 2014.

27. Richard F. Griffin, Jr., in his official capacity, is the NLRB's General Counsel.

FACTS

28. For nearly 80 years, the Board has conducted workplace elections so that workers can decide whether they want to be represented by a union for purposes of collective bargaining.

29. In the last ten years, the Board has conducted elections within a median of 38 days from the filing of the petition—well below the Board's time target of 42 days.

30. By comparison, in 1960 the median time from petition to the Board's *direction* of an election was 82 days, with even more time elapsing before the election actually occurred. 76 Fed. Reg. at 36,814, n.16.

31. By 1975, however, the Board had succeeded in reducing the time between petition and election. That year, only 20.1 percent of all elections occurred more than 60 days after a petition was filed—and this percentage later decreased to 16.5 percent by 1985. *Id.* at 36,814, n.19.

32. In the past two years, the Board has beat its own time targets for conducting representation elections, deciding pre-election issues at the regional level, and closing pending

representation cases:

- a. In 2013, 94.3 percent of all elections occurred within a 56-day period after the filing of the petition, which was better than the Board's stated goal of 90 percent. That rate improved to 95.7 percent in 2014, again well above the 90 percent goal.
- b. In 2013, regional directors issued 159 pre-election decisions in a median of 32 days after the petition, below the 45-day target.
- c. In 2014, 88.1 percent of all NLRB representation cases were "closed" within 100 days of the petition being filed. That rate exceeded the agency's stated goal of 85.3 percent for 2014.

33. The speed with which the Board conducted elections in 2013 and 2014 under its existing procedures is consistent with the trend over the past five decades of reducing the time period between the filing of the petition and the election.

34. The number of representation cases processed by the Board has also dropped substantially:

- a. In 1959, there were 9,347 representation case filings, 8,840 case closings, and 2,230 cases pending at the end of the year. The Board itself decided 1,880 cases. 79 Fed. Reg. at 74,450.
- b. In fiscal year 2013, only 1,986 representation petitions were filed, almost the same number as the year before, and reflecting a decline of about 80 percent over the last 50 years. *Id.*

35. As of October 1, 2014, there were only 48 representation cases pending at the Board—well below the caseload 50 years ago. *Id.*

36. In fiscal year 2014, the Board itself decided only 43 representation cases, down

from 1,880 cases in 1959.

37. Under the Board's current election procedures, there is no pre-election litigation in more than 90 percent of representation cases because the parties negotiate and enter into an election agreement. 79 Fed Reg. at 74,387.

38. In 2013, labor organizations won 64.1 percent of the representation elections conducted by the Board.

39. Nonetheless, in June 2011, the Board proposed unprecedented and sweeping changes to its procedures for conducting representation elections designed to further reduce the time between an election petition being filed and the holding of an election. 76 Fed. Reg. 36,812 (June 22, 2011) (Notice of Proposed Rulemaking) ("the Proposed Rule").

40. Less than 30 days after publishing the Proposed Rule, the Board held a two-day hearing at which nearly 70 witnesses testified, with each witness having approximately 5 minutes to speak. Many witnesses testified against the Proposed Rule.

41. When the comment period for the Proposed Rule closed, the Board had received more than 65,000 comments—many of them, like Plaintiffs' comments, opposed to the Proposed Rule.

42. About two months after the comment period closed, the Board announced that it would hold a public meeting less than two weeks later during which the Board's Members would vote on a resolution concerning a modified rule.

43. At the meeting, the Board adopted the resolution it had released only the day before, including certain changes that differed from those set forth in the 2011 Proposed Rule.

44. Sometime the next month—in December 2011—Board Chairman Mark Pearce and then-Member Craig Becker voted to approve the rule as modified. The final rule issued on

December 22, 2011 (“2011 Final Rule”). Then-Member Hayes did not participate in the vote, but subsequently published a dissent.

45. Plaintiffs Chamber and CDW filed a complaint asking this Court to invalidate the 2011 Final Rule.

46. In May 2012, this Court did so on the ground that the Board, with only two Members voting, lacked a statutory quorum when it approved the 2011 Final Rule. *Chamber of Commerce of the U.S. v. NLRB*, 879 F. Supp. 2d 18, 28-30 (D.D.C. 2012). The Court did not “reach—and expresse[d] no opinion on—Plaintiffs’ other procedural and substantive challenges to the rule.” *Id.* at 30.

47. The Board appealed the Court’s decision to the U.S. Court of Appeals for the District of Columbia Circuit, but later voluntarily sought and obtained dismissal of its own appeal. 2013 WL 6801164 (D.C. Cir. 2013).

48. The Board issued a second Notice of Proposed Rulemaking (“2014 Proposed Rule”) on February 6, 2014, under the same docket number as the 2011 Proposed Rule and containing the same proposals on workplace elections. 79 Fed. Reg. 7,318.

49. In doing so, the Board remarked that the 2014 Proposed Rule was “in essence, a reissuance of the proposed rule of June 22, 2011.” *Id.*

50. Except for Chairman Pearce, none of the Members on the Board when it issued the 2014 Proposed Rule served on the Board or otherwise participated in the 2011 rulemaking process.

51. The Board provided for a 60-day comment period for the 2014 Proposed Rule. The Board told commentators that it was not necessary to “resubmit any comment or repeat any argument that has already been made.” *Id.* at 7,319.

52. Plaintiffs all filed comments on the 2014 Proposed Rule.

53. On April 10-11, 2014, the Board held a public hearing on the 2014 Proposed Rule.

54. Plaintiffs CDW, NAM, SHRM, and the Chamber participated, through their respective representatives, at the public hearing.

55. On December 12, 2014, the Board announced that a majority of its Members had voted to adopt a final rule, which would be published in the Federal Register on December 15, 2014 and take effect on April 14, 2015. Members Phillip A. Miscimarra and Harry I. Johnson III dissented.

56. The Final Rule was published in the Federal Register on December 15, 2014. 79 Fed. Reg. 74,308.

57. The Final Rule largely adopted the changes outlined in the 2014 Proposed Rule, with some modifications. Nonetheless, as the dissenting Board members remarked, “the Rule’s primary purpose and effect remain the same: Initial representation elections must occur as soon as possible.” 79 Fed. Reg. at 74,430.

58. The dissenting Board Members expressed concern that “[w]e still do not understand the reason for embarking on the path our colleagues have taken.” 79 Fed. Reg. at 74,434. They wrote that “the Final Rule manifest[s] a relentless zeal for slashing time from every stage of the current pre-election procedure in fulfillment of the requirement that an election be scheduled ‘at the earliest date practicable,’ but the Final Rule’s keystone device to achieve this objective is to have elections occur *before* addressing important election-related issues.” *Id.* at 74,432.

59. “Unfortunately,” the dissenting Board Members explained, “the inescapable

impression created by the Final Rule's overriding emphasis on speed is to require employees to vote as quickly as possible—at the time determined exclusively by the petitioning union—at the expense of employees and employers who predictably will have insufficient time to understand and address relevant issues.” *Id.* at 74,460.

CLAIMS FOR RELIEF

COUNT I

(The Final Rule Is Not in Accordance With the NLRA, Exceeds the Board's Statutory Authority, and Violates the First and Fifth Amendments of the Constitution of the United States)

60. Plaintiffs incorporate by reference each allegation in the above paragraphs as though fully set forth herein and further allege as follows:

61. Section 7 of the NLRA gives employees the right to “form, join, or assist” unions; to bargain collectively with their employer; or to refrain from engaging in such activities.

62. Section 6 of the NLRA authorizes the Board to promulgate “rules and regulations as may be necessary to carry out the provisions of this Act.” 29 U.S.C. § 156.

63. Section 9(b) of the NLRA provides that “in order to assure to employees the fullest freedom in exercising the rights guaranteed by” the NLRA, the Board “shall decide in each case” the unit that is appropriate for the purposes of collective bargaining. 29 U.S.C. § 159(b).

64. Section 9(c) of the NLRA provides that, when a petition for a representation election is filed, the Board must investigate that petition and “shall provide for an appropriate hearing upon due notice” before the election is held. 29 U.S.C. § 159(c)(1). The same provision provides that “[s]uch hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto.”

65. The Final Rule violates the Act's requirement of an “appropriate” pre-election

hearing by restricting the employer's ability to present evidence and litigate issues of voter eligibility or inclusion in the putative bargaining unit.

66. The Final Rule also conflicts with Section 9(c)(1)'s requirement that the Board's hearing officers "shall not make any recommendations with respect" to the hearings they conduct. The Final Rule effectively vests hearing officers with decision-making authority regarding the evidence that will be admitted and the issues that will be litigated at the pre-election hearing.

67. By authorizing hearing officers to prevent employers from litigating issues as to the eligibility of certain employees to vote in the election, and by limiting the available time for the employer to communicate about the election and for employees to decide whether to vote for or against union representation, the Final Rule fails to assure employees the "fullest freedom" in exercising their rights under Section 7 of the NLRA and is otherwise contrary to Section 9(b) of the NLRA.

68. Section 8(c) of the NLRA protects an employer's freedom of speech: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisals or force or promise of benefit." 29 U.S.C. § 158(c). Section 8(c) "merely implements the First Amendment" to the United States Constitution and "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the National Labor Relations Board." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

69. By these provisions, Congress directed that employers would be given sufficient opportunity to meaningfully express their views in the election process. Specifically, Congress

determined that employers must have the opportunity to effectively communicate with their employees on the subjects of union organizing and collective bargaining. *See Chamber of Commerce v. Brown*, 554 U.S. 60, 67–68 (2008) (Section 8(c) reflects a “policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide open debate in labor disputes.” (internal quotation omitted)); *Nat’l Ass’n of Manufacturers v. NLRB*, 717 F.3d 947, 955 (D.C. Cir. 2013) (Section 8(c) “serves a labor law function of allowing employers to present an alternative view and information that a union would not present.” (citation omitted)).

70. The Final Rule impermissibly curtails an employer’s right to communicate with its employees by substantially shortening the period between an election petition and the holding of an election, and the Final Rule impermissibly limits employers’ ability to exercise their rights under Section 8(c) and the First Amendment.

71. The Final Rule further violates the Free Speech Clause of the First Amendment by compelling employers to engage in certain speech during the election process, specifically a new mandatory workplace notice to be posted after the filing of a representation petition.

72. The Final Rule also deprives employers of due process in NLRB representation case proceedings, in violation of the Fifth Amendment, by preventing employers from litigating issues of voter eligibility and inclusion at the pre-election hearing, and then denying the employer the right to seek any Board review of those issues, whether pre- or post-election, by making all Board review discretionary.

73. The Board’s actions are not in accordance with law, contrary to constitutional rights, and in excess of the Board’s statutory jurisdiction and authority and in violation of 5 U.S.C. § 706(2)(A)-(C).

74. Unless vacated, held unlawful, and set aside, the Final Rule will adversely affect

the rights of Plaintiffs and their members.

COUNT II
(The Board's Actions Are Arbitrary and Capricious)

75. Plaintiffs incorporate by reference each allegation in the above paragraphs as though fully set forth herein and further allege as follows:

76. "The APA commands reviewing courts to 'hold unlawful and set aside' agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (citing 5 U.S.C. § 706(2)(A)).

77. The APA also requires courts to hold unlawful and set aside agency action that is not in accordance with procedure required by law. 5 U.S.C. § 706(2)(D).

78. The Final Rule is overly broad in changing election procedures in a manner impacting all cases, as the alleged "problems" identified by the Board to justify the Final Rule exist only in a small fraction of cases.

79. The Final Rule seeks to arbitrarily expedite the election process, even though the data show that the Board already conducts elections below its established time targets in more than 90 percent of cases.

80. The Final Rule introduces no new time targets for representation elections, further undermining the rational basis for radically altering procedures that have met the agency's established time targets for many years.

81. The Final Rule promotes speed in holding elections at the expense of all other statutory goals and requirements, including but not limited to employer free speech rights and the opportunity for a full and informed debate before an election.

82. The Final Rule also mandates, for the first time in the Board's history, that

employers give their employees' personal phone numbers and email addresses to labor organizations. The Board acknowledged that "the privacy, identity theft, and other risks may be greater than the Board has estimated," but nonetheless concluded, without adequate justification and concern for employee rights, that these "risks are worth taking." 79 Fed. Reg. at 74,342.

83. The Final Rule's elimination of mandatory Board review of post-election disputes, during a period of dramatically reduced case loads, is arbitrary and capricious given the Board's statutory obligation to oversee the election process.

84. The Final Rule concludes that it will reduce election-related litigation, despite available evidence that the Final Rule's sweeping changes will reduce the high rate of election agreements, and will result in more, not less, litigation overall, including more litigation in federal court. As the dissenting Board Members explained: "An employer will now be forced to litigate in an unfair labor practice case, before the Board and in Federal court, issues that are currently reviewed by the Board in a post-election appeal as a matter of right. Given the process an employer must go through to have a Federal court of appeals review any disputed issue regarding an election, there is often substantial delay in the final resolution of the representation case." 79 Fed. Reg. at 74,451.

85. Based on the above, the Board failed to meaningfully consider numerous legal, policy, and economic factors, or to articulate a rational basis for rejecting them.

86. The Board's actions in adopting the Final Rule are arbitrary and capricious, and the Final Rule was enacted without observance of procedure required by law. 5 U.S.C. § 706(2)(A)-(D).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request this Court enter judgment in their favor and:

1. Vacate and set aside the Final Rule;
2. Declare that the Final Rule is contrary to the First and Fifth Amendments to the Constitution of the United States and to the NLRA, and in excess of the Board's statutory jurisdiction and authority;
3. Declare that Defendant violated the APA in issuing the Final Rule;
4. Declare that the Final Rule is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law;
5. Enjoin and restrain Defendant, its agents, employees, successors, and all persons acting in concert or participating with Defendant from enforcing, applying, or implementing (or requiring others to enforce, apply, or implement) the Final Rule;
6. Award Plaintiffs their costs of litigation, including reasonable attorney's fees; and
7. Grant Plaintiffs such other relief as may be necessary and appropriate or as the Court deems just and proper.

Dated: January 5, 2015

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

NATIONAL LABOR RELATIONS
BOARD

Defendant.

Case No. 1:15-cv-00009-ABJ
Judge Amy Berman Jackson

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
AND MEMORANDUM IN SUPPORT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiffs Chamber of Commerce of the United States of America, Coalition for a Democratic Workplace, National Association of Manufacturers, National Retail Federation, and Society for Human Resource Management, by and through undersigned counsel, respectfully move this Court to enter summary judgment in Plaintiffs' favor. The grounds for this motion are set forth in the accompanying memorandum of points and authorities. In accordance with Local Civil Rule 7(c), a Proposed Order is attached as Exhibit 1. Plaintiffs also respectfully request oral argument.

Dated: February 4, 2015

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FOR THE DISTRICT OF COLUMBIA**

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

NATIONAL LABOR RELATIONS
BOARD

Defendant.

Case No. 1:15-cv-00009-ABJ
Judge Amy Berman Jackson

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

For nearly 80 years, the National Labor Relations Board has conducted workplace elections for union representation. Union elections provide all participants in the process—the union, the employer, and the employees—a critical opportunity to engage in protected speech. Congress’s overarching “policy judgment . . . favoring uninhibited, robust, and wide-open debate in labor disputes”—including the “freewheeling use of the written and spoken word,” *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008)—is so central to the union election process that Congress expressly guaranteed an employer’s right to engage in speech concerning unionization, 29 U.S.C. § 158(c) (so long as that speech, of course, “contains no threat of reprisal or force or promise of benefit”).

The Board’s “ambush” or “quickie” election rule (the “Final Rule”) makes sweeping changes to the election process that, as the dissenting Board Members put it, impermissibly “limit[] the right of all parties to engage in protected speech at precisely the time when their free speech rights are most important.” Representation—Case Procedures, 79 Fed. Reg. 74,308, 74,439 (Dec. 15, 2014) (Members Miscimarra & Johnson, dissenting (“dissent”)). It “improperly shortens the time needed for employees to understand relevant issues, compelling them to ‘vote now, understand later.’” *Id.* at 74,430.

It also sharply curtails the statutorily mandated pre-election review of issues critical to the election process—as well as limits the taking of evidence necessary for meaningful post-election review. In these ways and others, the Final Rule is “contrary to the [National Labor Relations] Act and its legislative history, and contrary to other legal requirements directed to the preservation of employee free choice, all of which focus on guaranteeing enough time for making important decisions.” *Id.* at 74,430-31.

Even if the Board's choices were permissible under the National Labor Relations Act ("NLRA"), which they are not, they are invalid under the Administrative Procedure Act ("APA"). The administrative record demonstrates a gaping disconnect between the problem the Board purported to address and the solution it adopted. The vast majority of elections go forward with no "delay" at all—and the Final Rule "does not even identify, much less eliminate, the reasons responsible for those few cases that have excessive delays." *Id.* at 74,431. Although the Board's goal of eliminating "unnecessary" litigation may be laudable, the available evidence demonstrates that the Final Rule will have the opposite effect. *Id.* at 74,449-50. And the Board declined to adopt—without a reasoned explanation—common-sense protections against the invasion of employee privacy threatened by new mandatory disclosures of personal information.

In addition to violating the NLRA and the APA, the Final Rule also runs afoul of the First Amendment's prohibition against compelled speech by impermissibly co-opting employers to deliver the government's own preferred message. The Board's mandatory disclosures on behalf of those filing petitions do not involve commercial speech but, instead, serve the interests of those seeking union representation. Such compulsion is unconstitutional.

For all these reasons, summary judgment should be granted to plaintiffs and the Final Rule vacated and set aside.

BACKGROUND

Congress has authorized the Board to conduct workplace elections regarding union representation provided certain conditions are satisfied. Section 6 of the NLRA authorizes the Board to promulgate "rules and regulations as may be necessary to carry out the provisions of this Act." 29 U.S.C. § 156. The Board's regulations setting forth the election procedures at

issue in this case—the Final Rule—consume, in total, almost 200 pages in the Federal Register and are codified at 29 C.F.R. part 102, subpart C.¹

I. Plaintiffs

The Chamber of Commerce of the United States of America (“Chamber”) is the world’s largest federation of businesses and associations, directly representing 300,000 members and indirectly representing more than three million U.S. businesses and professional organizations of every size and in every industry sector and geographic region of the country.

The Coalition for a Democratic Workplace (“CDW”) represents millions of businesses of all sizes. Its membership includes hundreds of employer associations, individual employers, and other organizations that together employ tens of millions of individuals working in every industry and every region of the country.

The National Association of Manufacturers (“NAM”) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women throughout the country.

The National Retail Federation (“NRF”) is the world’s largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and Internet retailers from the United States and more than 45 countries. Retail is the nation’s largest private sector employer, supporting one in four U.S. jobs—a total of 42 million working Americans.

¹ Because this case is governed by Local Civil Rule 7(h)(2), such that any facts will be derived solely from the administrative record (and from judicial notice), Plaintiffs are not required to submit a Rule 7(h)(1) Statement of Material Facts As To Which There Is No Genuine Dispute. Because the Board has not yet filed the administrative record, Plaintiffs have attached for the Court’s convenience, as Exhibits 2-11, their comments, which are part of the administrative record.

The Society for Human Resource Management (“SHRM”) is the world’s largest membership organization devoted to human resource management, representing more than 275,000 members in over 90,000 companies.

Plaintiffs collectively represent millions of employers and human resource professionals in companies covered by the NLRA and subject to the Final Rule. *See* Exhibit 2 (Chamber 2011 comments) at 1; Exhibit 3 (CDW 2011 comments) at 2; Exhibit 4 (NAM 2011 comments) at 1-2; Exhibit 5 (NRF 2011 comments) at 1; Exhibit 6 (SHRM 2011 comments) at 13-14. These employers, in turn, employ millions of employees who are not currently represented by a union but are covered by the NLRA and thus entitled to petition the Board to hold a representation election in accordance with the Final Rule’s expedited procedures. *Id.* Unions have, in recent years, filed petitions for elections involving employees at many of the businesses represented by plaintiffs.² Particularly given the recent history of union election petitions involving many of the plaintiffs’ member companies, it is likely that election petitions will be filed involving employees at many of these companies once the Final Rule becomes effective on April 14, 2015.

As a result of the forthcoming application of the Board’s Final Rule to these petitions and elections, Plaintiffs’ members will suffer the following injuries, among others:

- Less time for employers to communicate with workers about the election, in derogation of employers’ free speech rights under § 8(c) of the NLRA, the First Amendment, and the clear congressional intent for a full and informed debate before workers cast their votes, 79 Fed. Reg. at 74,318-19 (citing Chamber, NAM, NRF, and SHRM comments);
- Less time for employers to investigate whether it is even appropriate for the NLRB to hold an election in the petitioned-for bargaining unit, *id.* at 74,369-73;

² Monthly reports of elections are publicly available on the NLRB’s website. *See* NLRB, Election Reports, <http://www.nlr.gov/reports-guidance/reports/election-reports> (last visited Feb. 4, 2015).

- Less time for employers to determine whether other employees should be included or excluded from the petitioned-for bargaining unit, and whether they are even eligible to vote, *id.*;
- Less time to prepare for a pre-election hearing and file a binding position statement under penalty of issue waiver, *id.*; and
- Less time for employers to negotiate a stipulated election agreement that would obviate the need for a pre-election hearing. *Id.* at 74,375 (citing CDW comments).

Plaintiffs' members also will incur economic costs before election petitions are filed because of the shortened, and inadequate, time to respond once an election petition is filed under the Final Rule. *See* Exhibit 2 (Chamber 2011 comments) at 56-57 (noting economic costs); Exhibit 4 (NAM 2011 Comments) at 24 (same); Exhibit 5 (NRF 2011 Comments) at 1-2 (same). The Board, in the Final Rule, recognized and estimated that employers will incur additional post-petition costs as well, including the new notice of petition, statement of position, voter lists, and costs related to the expedited timeline for the election process. 79 Fed. Reg. at 74,461-66.

II. Representation Election Procedures

Under long-established procedures—outlined by Board rules and regulations in 29 C.F.R. Parts 101, 102, and 103—the election process begins when an employee, union, or employer files a petition for an election with the Board. 29 C.F.R. § 101.17. The petition is filed with one of the Board's many regional offices throughout the country. *Id.* To conduct an election (and certify the results thereof), the Board, through its regional offices, initially assigns the petition to a regional staff member for a preliminary investigation. *Id.* § 101.18(a). If the petition presents reasonable cause to believe that a “question of representation” exists—that is, the regional director finds a sufficient basis to spend taxpayer resources to consider holding an election—the

regional office will proceed to hold an “appropriate” hearing concerning the petition. 29 U.S.C. § 159(c)(1). The hearing provides an opportunity for the parties to present evidence on issues that will affect the election, such as whether the employees are covered by the NLRA, whether the collective bargaining unit defined in the petition is an appropriate one, and whether certain individuals or groups of individuals would be eligible to vote in the election, or be included in the putative bargaining unit, or both. 29 C.F.R. §§ 102.64(a) & 102.66(a).

This pre-election hearing, which usually occurs within 7 to 14 days after the petition is filed, is conducted “before a hearing officer who normally is an attorney or field examiner attached to the Regional Office.” *Id.* § 101.20(c). The hearing officer does not have authority to make “any recommendations” with respect to the issues presented in the hearing. 29 U.S.C. § 159(c)(1). The hearing officer only “insure[s] that the record contains a full statement of the pertinent facts as may be necessary for determination of the case.” 29 C.F.R. § 101.20(c). All parties “are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions.” *Id.* The record developed at the hearing is the basis for all subsequent decision-making on these issues. *Id.* § 101.21(b).

When the hearing concludes, the hearing officer does not render any decision or make any recommendations. The evidentiary record is presented to the regional director, who decides the issues in dispute before the election occurs. *Id.* The parties may file post-hearing briefs with the regional director on these issues. *Id.*

Although § 3(b) of the Act authorizes the Board “to delegate to its regional directors its powers” to “investigate and provide for hearings,” to “determine whether a question of representation exists,” and to “direct an election” and “certify the results thereof,” it also provides an opportunity to request Board review (before the election is held) of any action taken

by regional directors. 29 U.S.C. § 153(b). Therefore, if the regional director decides to hold an election based on the evidence introduced at the pre-election hearing, the election is set for a date at least 25 to 30 days after the regional director's decision, to allow the Board sufficient time to consider a party's request to review that decision. 29 C.F.R. § 101.21(d).

After the election is held as scheduled by the regional director, the election results will be certified only after any post-election hearing and resolution of challenges and objections. *Id.* § 102.69(b)-(h). The parties are entitled to seek post-election Board review of the resolution of challenges and objections, unless restricted in some manner by an election agreement. *Id.* § 102.69(c), (e), (f). If the union wins the majority of valid votes cast in the election, the employer is obligated to engage in collective bargaining with the union over wages, hours, and other terms and conditions of employment for the employees in the bargaining unit. *See* 29 U.S.C. § 158(a)(5).

Over the last ten years, under the procedures described above, elections have occurred within a median of 38 days from the filing of the petition—below the Board's internal target of 42 days.³ In 2013, nearly 95 percent of all elections occurred within 56 days from the filing of the petition—better than the Board's internal target of 90 percent.⁴ That rate improved to 95.7 percent in 2014.⁵ And the vast majority of elections—90 percent—go forward without any pre-election litigation at all because the parties negotiate some form of election agreement. 79 Fed. Reg. at 74,375.

³ NLRB, Summary of Operations, 2002-2012 Reports, <http://www.nlr.gov/reports-guidance/reports/summary-operations> (last visited Feb. 4, 2015).

⁴ NLRB, FY 2013 Performance & Accountability Report, <http://www.nlr.gov/sites/default/files/attachments/basic-page/node-1674/NLRB2013par.pdf>, at 38 (last visited Feb. 4, 2015).

⁵ NLRB, Summary of Operations, FY2014 Performance and Accountability Report, <http://www.nlr.gov/sites/default/files/attachments/basic-page/node-1674/13682%20NLRB%202014%20PAR%20v5%20-%20508.pdf>, at 41 (last visited Feb. 4, 2015).

Historically, a majority of elections result in union representation. For example, unions won 71 percent of about 1,600 elections in 2011, 59 percent of about 1,550 elections in 2012, 60 percent of about 1,450 elections in 2013, and 63 percent of about 1,450 elections in 2014.⁶

III. In 2011, The Board Made Changes To The Election Rules, Which Were Set Aside By This Court

In 2011, the Board proposed sweeping changes to the election process intended to drastically reduce the time between petition and election. Representation—Case Procedures, 76 Fed. Reg. 36,812, 36,812-47 (June 22, 2011). Dissenting Member Hayes criticized the changes as not rationally related to any systemic problem of procedural delay, and criticized the Board for engaging in an illicit attempt to enshrine by “administrative fiat in lieu of Congressional action . . . organized labor’s much sought-after ‘quickie election,’ a procedure under which elections will be held in 10 to 21 days from the filing of the petition.” *Id.* at 36,831 (Member Hayes, dissenting). In the dissent’s view, “the principal purpose for this radical manipulation of our election process [wa]s to minimize, or rather, to effectively eviscerate an employer’s legitimate opportunity to express its views about collective bargaining.” *Id.*

Less than a month after publishing the proposed rule, the Board held a two-day hearing at which nearly 70 witnesses testified (with each witness having about 5 minutes to speak). Representation—Case Procedures, 76 Fed. Reg. 80,142 (Dec. 22, 2011). Many witnesses testified against the proposed rule. *Id.* When the comment period closed, the Board had received more than 65,000 comments—many of them, like those submitted by plaintiffs here, opposed the proposed rule and offered alternatives for the Board to consider. *Id.* at 80,140.

On November 18, 2011, the Board announced that it would hold a public meeting on November 30, 2011, during which the Board would vote on a resolution concerning a modified

⁶ NLRB, Election Reports, <http://www.nlr.gov/reports-guidance/reports/election-reports> (last visited Feb. 4, 2015).

rule.⁷ The Board issued the resolution the day before the hearing. Board Resolution No. 2011-1.⁸ At the meeting, the Board adopted the resolution, including changes (immaterial to the instant litigation) to the proposed rule. *Chamber of Commerce of the United States v. NLRB*, 879 F. Supp. 2d 18, 22-23 (D.D.C. 2012). At some point within the next month, Board Chairman Pearce and then-Member Becker voted to approve the rule as modified. *Id.* at 23-24. The final rule issued on December 22, 2011 (“2011 Final Rule”). 76 Fed. Reg. at 80,138. Then-Member Hayes did not participate in the vote, but subsequently published a dissent. *Chamber of Commerce*, 879 F. Supp. 2d at 23-24; *see also* Representation, Case Procedures, 77 Fed. Reg. 25,548-75 (Apr. 30, 2012) (Member Hayes, dissenting).

Two of the plaintiffs in the instant litigation, Chamber and CDW, challenged the 2011 Final Rule in this Court. *Chamber of Commerce*, 879 F. Supp. 2d at 21. In May 2012, the Court set aside the 2011 Final Rule on the ground that the Board lacked a statutory quorum when it approved the rule. *Id.* at 28-30. The Court did not “reach—and expresse[d] no opinion on—Plaintiffs’ other procedural and substantive challenges to the rule.” *Id.* at 30. The Board appealed the decision, but subsequently sought and obtained voluntary dismissal of its own appeal. *Chamber of Commerce of the United States v. NLRB*, No. 12-5250, 2013 WL 6801164, at *1 (D.C. Cir. Dec. 9, 2013).

IV. In 2014, The Board Issued The Final Election Rule Challenged Here

In February 2014, the Board issued a second Notice of Proposed Rulemaking (“2014 Proposed Rule”) under the same docket number as the 2011 Proposed Rule and containing the same proposals on elections. Representation—Case Procedures, 79 Fed. Reg. 7318 (Feb. 6,

⁷ NLRB, NLRB Sets Vote on Portions of Proposed Election Rule (Nov. 18, 2011), <http://www.nlr.gov/news-outreach/news-story/nlr-sets-vote-portions-proposed-election-rule> (last visited Feb. 4, 2015).

⁸ NLRB, Board Chairman Releases Details of Election Proposal for Wednesday Vote (Nov. 29, 2011), <http://www.nlr.gov/news-outreach/news-story/board-chairman-releases-details-election-proposal-wednesday-vote> (last visited Feb. 4, 2015).

2014). In doing so, the Board remarked that the 2014 Proposed Rule was “in essence, a reissuance of the proposed rule of June 22, 2011.” *Id.*

Among other changes, the Board proposed:

- To require employers to post a workplace notice immediately after a petition is filed;
- To require employers to disclose to unions the personal information of employees including personal telephone numbers and email addresses;
- To severely limit the scope of pre-election hearings to focus solely on whether there is a “question of representation,” meaning:
 - Hearing officers could exclude evidence unrelated to the basic question of whether the Board should hold an election; and
 - The parties would not have the right to present evidence on important issues affecting the election, such as whether certain employees or groups of employees are eligible to vote in the election;
- To eliminate the mandatory 25-30 day period between the regional director’s decision to hold an election and the election itself; and
- To eliminate post-election Board review as a matter of right and make it solely at the Board’s discretion.

Id. at 7318-37.

The Board provided for a 60-day comment period and informed commenters that it was not necessary to “resubmit any comment or repeat any argument that has already been made.”

Id. at 7319. To ensure that the Board understood the ramifications of its proposed actions, however, many commenters who previously submitted comments (like plaintiffs) did so again, highlighting the disconnect between the proposed changes and the Board’s election-handling

performance in recent years, and recommending that the Board focus instead on the small subset of cases actually delayed under current procedures. *See, e.g.*, 79 Fed. Reg. at 74,315-17, 74,419; *see also* Exhibits 2-11 (copies of plaintiffs' 2011 & 2014 comments). Commenters asserted that the proposed changes conflict with the NLRA, particularly with §§ 3, 8(c), and 9. *Id.* at 74,318-19, 74,385-86, 74,395. Commenters expressed further concern that the proposed changes, contrary to the Board's stated goal of reducing election-related litigation, would actually increase it by reducing the time and incentives to enter election agreements. *Id.* at 74,324, 74,334, 74,388, 74,408-09. Under the Board's current procedures, there is no pre-election litigation in more than 90 percent of cases because the parties enter into an election agreement. *Id.* at 74,375.

Commenters offered various alternatives to the changes proposed by the Board. To address privacy concerns raised by the mandatory release of employee personal information, commenters proposed offering employees an opt-out procedure (an "unsubscribe" option for election-related texts and emails), imposing penalties for misuse of the information, and requiring the lists containing the information to be destroyed after the election. *Id.* at 74,341-42, 74,346, 74,358-60.

The Board announced its adoption of the Final Rule on December 12, 2014, and published it in the Federal Register three days later.⁹ Members Miscimarra and Johnson submitted a lengthy dissent highlighting the numerous, serious flaws they perceived in the Final Rule. *Id.* at 74,430 (dissent). Expressing regret that the Board declined to pursue a more targeted approach that could have garnered broad, bipartisan support without creating a conflict with the Board's statutory mandate, the dissent argued that the Rule's "election now, hearing later" and "vote now, understand later" approach violates both the NLRA and the APA. *Id.*

⁹ NLRB, NLRB Issues Final Rule to Modernize Representation-Case Procedures (Dec. 12, 2014), <http://www.nlr.gov/news-outreach/news-story/nlr-issues-final-rule-modernize-representation-case-procedures> (last visited Feb. 4, 2015).

Specifically, the dissent identified conflicts with the NLRA that are created by the Final Rule's quest for "quickie elections"; curtailment of robust debate and free speech; limitations on the scope of pre-election hearings and the type of evidence that may be taken in those hearings; allowance of *ultra vires* decision-making and recommendations by hearing officers; and imposition of unequal burdens on employers. The dissent further argued that even if the Final Rule did not conflict with the NLRA, it was still arbitrary and capricious under the APA given the lack of a coherent rationale; the conflict between the Board's determinations and the actual evidence before it; and the Board's failure to meaningfully address evidence that reducing the opportunity for pre-election and post-election Board review would result in more litigation, not less, and jeopardize the stipulated-election agreements that govern 90 percent of Board-conducted elections. *Id.* at 74,434-52.

The dissent further argued that the Final Rule implicates serious constitutional concerns by infringing on protected speech and raising due process concerns. *Id.* at 74,431-36. The dissent noted the "great care" the Board has taken in the past "to avoid interpreting and applying [NLRA § 8(c)] in a manner that raises serious constitutional concerns regarding free speech infringement." *Id.* at 74,440 (citing *Carpenters Local 1506 (Eliaison & Knuth of Arizona, Inc.)*, 355 NLRB 797, 807-11 (2010)). The dissent echoed the employee-privacy concerns raised by the commenters, *id.* at 74,452-55, and lamented that the Board's insistence on pursuing the course adopted in the Final Rule made consensus impossible on reforms the dissenting members might also have embraced. *Id.* at 74,431. In the dissent's view, the Final Rule was so flawed in so many respects that they "must dissent from the Final Rule including all its parts." *Id.*

The Rule is set to take effect on April 14, 2015. *Id.* at 74,308.

STANDARD OF REVIEW

The Final Rule is agency action subject to judicial review under the APA, 5 U.S.C. § 706. Under § 706, a reviewing court must “‘hold unlawful and set aside’ agency action that is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting 5 U.S.C. § 706(2)(A)). A court must also invalidate any agency action that is “contrary to constitutional right,” 5 U.S.C. § 706(2)(B), “in excess of statutory jurisdiction, authority, or limitations,” *id.* § 706(2)(C), or that fails to “observ[e] ... procedures required by law,” *id.* § 706(2)(D).

“[W]hen a party seeks review of agency action under the APA . . . [t]he ‘entire case’ on review is a question of law” and may be resolved on a motion for summary judgment. *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001). The Court’s review is generally confined to the administrative record before the Board when it issued the Final Rule. *See, e.g., Brodie v. U.S. Dep’t of Health & Human Servs.*, 796 F. Supp. 2d 145, 150 (D.D.C. 2011). “Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review.” *Id.* Where a plaintiff prevails on its APA challenge, vacating the agency action and remanding to the agency is the standard remedy. *See, e.g., Am. Bioscience, Inc.*, 269 F.3d at 1084; *Greater Yellowstone Coal. v. Bosworth*, 209 F. Supp. 2d 156, 163 (D.D.C. 2002) (“As a general matter, an agency action that violates the APA must be set aside.”).

ARGUMENT

I. The Final Rule Is Contrary To §§ 3, 8, And 9 Of The NLRA.

Where, as here, an APA challenge “involves an agency’s interpretation of its governing statute, *Chevron’s* familiar framework applies.” *Nat’l Cable & Telecomm. Ass’n v. FCC*, 567

F.3d 659, 663 (D.C. Cir. 2009) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). Under that framework a reviewing court first asks if the statute itself resolves the issue—and if so, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842-43 (footnote omitted). An agency interpretation fails that standard if it “runs counter to the unambiguously expressed intent of Congress” as expressed through the Act’s “text, legislative history, and structure as well as its purpose.” *Shays v. FEC*, 414 F.3d 76, 96, 105 (D.C. Cir. 2005). If the statute is ambiguous—that is, if the congressional mandate is susceptible of more than one interpretation—then a reviewing court considers whether the agency’s interpretation of the statute is a reasonable one. *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1049 (D.C. Cir. 1997).

Under *Chevron*, a reviewing court has “a duty to conduct an ‘independent examination’ of the statute in question looking not only ‘to the particular statutory language at issue,’ but also to ‘the language and design of the statute as a whole.’” *Ne. Hosp. Corp. v. Sebelius*, 657 F.3d-1, 9 n.4 (D.C. Cir. 2011) (quoting *Martini v. Fed. Nat’l Mortg. Ass’n*, 178 F.3d 1336, 1345-46 (D.C. Cir. 1999)). “For this purpose the court ‘must first exhaust the traditional tools of statutory construction.’” *Office of Commc’n, Inc. of United Church of Christ v. FCC*, 327 F.3d 1222, 1224 (D.C. Cir. 2003) (quoting *Bell Atl.*, 131 F.3d at 1047). “The traditional tools include examination of the statute’s text, legislative history, and structure, as well as its purpose.” *Bell Atl.*, 131 F.3d at 1047 (internal citations omitted); see also *Hammontree v. NLRB*, 894 F.2d 438, 444 (D.C. Cir. 1990). It is a cardinal principle of statutory interpretation that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly

contrary to the intent of Congress.” *Edward J. DeBartolo Corp. v. Fl. Gulf Coast Build. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

In this case, the Final Rule fails the *Chevron* analysis because it creates a process for handing representation elections that is irreconcilable with §§ 3, 8, and 9 of the Act. First, the Final Rule improperly limits pre-election hearings by allowing hearing officers to exclude evidence regarding fundamental issues affecting the election, such as whether certain employees or groups of employees are eligible to vote in the election. The exclusion of this evidence prevents effective pre-election consideration of those issues by the regional director or the Board in violation of §§ 3(b) and 9(c)(1) of the NLRA, and undermines effective post-election review of any sort as well.

Most fundamentally, the Final Rule violates § 9(c)(1)’s requirement of an “appropriate” pre-election hearing by creating a “quickie election” process that resembles legislative proposals Congress considered and rejected in amending the Act in 1947 and 1959. The Rule’s operative premise—speed at all costs—is squarely contradicted by legislative history indicating that Congress believed that there should be a period of at least 30 days between the petition and the election in order to ensure that employees are adequately informed before they cast their votes. In all events, an “appropriate hearing” must be one that conforms with the Fifth Amendment’s guarantee of due process, and the system left in place by the Final Rule fails on that score.

Second, the Final Rule improperly truncates informed debate regarding union representation, contrary to §§ 8(c) and 9(b) of the Act—statutory text that reflects a “policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide-open debate in labor disputes.” *Brown*, 554 U.S. at 67-68 (internal quotation marks and citation omitted). Depriving the parties of adequate time for that debate, the new Rule rushes them into

an uninformed election. Indeed, the Final Rule subverts the Act's primary purpose—to permit sufficient time and information to “assure . . . the *fullest* freedom in exercising the rights guaranteed by [the] Act,” 29 U.S.C. § 159(b) (emphasis added)—and improperly interferes with the free speech rights protected under § 8(c) of the Act, 29 U.S.C. § 158(c), and guaranteed by the First Amendment. At a minimum, the agency's interpretation of its statutory mandate is constitutionally suspect and should thus be avoided.

A. The Final Rule Violates The NLRA By Undermining The Statutorily Guaranteed “Appropriate Hearing.”

The Final Rule severely restricts the scope of the pre-election hearing required by the NLRA. Under the Final Rule, the hearing officers who preside over pre-election hearings are advised to exclude evidence on fundamental issues affecting the election, including supervisory status and other issues of voter eligibility or inclusion. *See* 29 C.F.R. § 102.64(a) (“Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted.”); *id.* § 102.66(a) (a party's indisputable right to introduce at the pre-election hearing is now limited to “the existence of a question of representation”). This contradicts the fundamental understanding—recognized by the Supreme Court, Congress, and the Board itself—that Congress required an “appropriate hearing” to give interested parties a full and adequate opportunity to present their evidence on *all* substantial issues. By allowing the exclusion of evidence on important election issues of voter eligibility, inclusion, and supervisory status, the Final Rule fails to provide an “appropriate” pre-election hearing for all employers as required under § 9(c)(1) of the NLRA, thus precluding the creation of an adequate record for decision-making or subsequent review.

1. Congress has already spoken to the issue of an “appropriate” pre-election hearing.

Section 9(c)(1) establishes the process that must be followed after a representation petition is filed, including the requirement of an “appropriate” pre-election hearing and an adequate “record of such hearing” to permit resolution by the Board of election-related issues:

Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board . . . 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 thereto.

29 U.S.C. § 159(c)(1) (emphases added). Section 9(c)(1) necessarily requires “an appropriate hearing upon due notice” *before* an election, because the hearing provides the basis for the Board to determine whether and how an election shall occur. *Id.* The right to a pre-election hearing is reinforced by § 9(c)(4), which only permits “the waiving of hearings by stipulation.” *Id.* § 159(c)(4).

Congress further intended that hearing officers who preside over pre-election hearings perform only an evidence-gathering function, not a decision-making function. Under §§ 4(a) and 9(c)(1) of the NLRA, Board members (or, under the delegation authority set forth in § 3(b), regional directors) are exclusively responsible for all decision-making in representation cases. Indeed, § 9(c)(1) prohibits hearing officers from having *any* decision-making authority—they cannot even make “any recommendations.” *Id.* § 159(c)(1). Moreover, “[t]he Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts.”

29 U.S.C. § 154(a). The Act thus vests all decision-making authority on election-related issues exclusively in Board members (or regional directors by delegation).

What is more, the pre-election hearing record provides the sole basis for the following key decisions (among others):

- Whether the Board’s jurisdictional standards and other prerequisites for an election are satisfied;
- What constitutes the “appropriate bargaining unit” for purposes of the election; and
- Whether particular individuals are eligible to vote, whether such issues require resolution before any election, and if so how they should be resolved.

29 U.S.C. §§ 153(b), 159(c)(1).

And the NLRA requires that “any interested person” have a *pre-election* opportunity to seek Board review of “*any action* of a regional director” delegated under § 3(b). 29 U.S.C. § 153(b) (emphasis added). This pre-election review is the only mechanism for the Board to order a “stay of *any action* taken by the regional director.” *Id.* For the Board to review “any action” of a regional director and decide whether to issue a stay of the election, there necessarily must be record evidence on the issues that are subject to review—in particular, issues of voter eligibility, inclusion, and supervisory status. Even if the regional director decides to defer a decision on voter eligibility issues until after the election, there still must be an evidentiary record concerning those issues for the Board to consider in reviewing the propriety of the regional director’s decision to defer resolution of those issues—a decision that may well affect the validity of the entire election. *See Barre-Nat’l, Inc.*, 316 NLRB 877, 878 n.9 (1995) (noting that the right to present evidence at a pre-election hearing is distinct from the issue whether the regional director or Board makes a pre-election decision based on that evidence).

The statutory conflict between the NLRA and the Final Rule is further evidenced by the Rule rendering superfluous a provision of the statute that authorizes an expedited election procedure. *See* 29 U.S.C. § 158(b)(7)(C). The § 8(b)(7) exception applies when a union engages in so-called “recognitional picketing”—picketing intended to force the employer to recognize a union as the bargaining representative of its employees—and an employer files an unfair labor practice charge as a result. *Id.* Under the Board’s implementing regulations for that statutory provision, where there is recognitional picketing “the Director may, *without a prior hearing*, direct that an election be held in an appropriate unit of employees” and “fix[] the basis of eligibility of voters” 29 C.F.R. § 101.23(b) (emphasis added). Section 8(b)(7)(C) was “designed to shield employers and employees from the adverse effects of prolonged recognitional or organizational picketing and to provide a procedure whereby the representation issue that gave rise to the picketing could be resolved as quickly as possible.” *Teamsters Local Union No. 115 (Vila-Barr Co.)*, 157 NLRB 588, 589 (1966).

But as the Board has explained, when Congress created that expedited election procedure, it also “rejected efforts . . . to dispense generally with preelection hearings” in all other representation cases. *Int’l Hod Carriers Bldg. & Common Laborers Union of Am.*, 135 NLRB 1153, 1154, 1157 (1962) (“The expedited election procedure is applicable, of course, only in a Section 8(b)(7)(C) proceeding.”). The Final Rule would effectively implement an expedited procedure for *all* § 9(c) cases—rendering superfluous the statutorily provided expedited process in cases of recognitional picketing.

The history of amendments to the NLRA’s text further confirms the importance, and required scope, of the pre-election hearing. From the beginning, Congress attached importance to the development of an adequate record in election hearings, including evidence pertaining to

election issues generally. *See, e.g.*, 79 Fed. Reg. at 7343 n.100 (citing S. Rep. No. 74-573, at 14 (1935), reprinted in 2 NLRB, Legislative History of the NLRA, 1935, at 2314 (hereinafter “NLRA Hist.”)) (in representation cases the “entire election procedure becomes part of the record,” providing a “guarantee against arbitrary action by the Board” (internal quotation marks omitted)); H.R. Rep. No. 74-1147, at 23 (1935), reprinted in 2 NLRA Hist. at 3073 (“The hearing required to be held in any [representation] investigation provides an appropriate safeguard and opportunity to be heard.”). But as the Supreme Court explained, the NLRA as originally enacted in 1935 did not require the Board to hold elections at all, much less to hold pre-election hearings. *Inland Empire Dist. Council v. Millis*, 325 U.S. 697, 707 (1945). The Board thus held a number of “prehearing elections”—*i.e.*, elections conducted before a hearing was held to determine the scope of the bargaining unit and the eligibility of certain employees to vote in the election.¹⁰ The Board’s rules and regulations in effect at the time entitled parties to a pre-election hearing only if “substantial issues” were raised. *See NLRB v. S. W. Evans & Son*, 181 F.2d 427, 430 (3d Cir. 1950). Such issues concerned the “[bargaining] unit, eligibility to vote, and timeliness of the election.” *Id.* at 430.

In 1947, Congress amended the Act to make pre-election hearings mandatory by adding §§ 9(c)(1) and (4) to the Act. 29 U.S.C. §§ 159(c)(1) & (4). These require the Board to conduct the “appropriate hearing” *before* any election, and permit “the waiving of hearings” *only* “by stipulation” of all parties. *Id.*; *see also S. W. Evans*, 181 F.2d at 429 (noting that the amended Act now makes mandatory a pre-election hearing”); *Utica Mut. Ins. Co. v. Vincent*, 375 F.2d

¹⁰ *See, e.g.*, H.R. Rep. No. 86-741, at 24 (1959), reprinted in 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 782 (1974) (hereinafter “LMRDA Hist.”) (“During the last 19 months of the Wagner Act . . . a form of prehearing election was used by the NLRB.”); S. Rep. No. 86-187, at 30 (1959), reprinted in 1 LMRDA Hist. 426 (the practice of holding prehearing elections “was tried in the last year and a half prior to passage of the Taft-Hartley Act, but it was eliminated in that [A]ct”).

129, 133-34 (2d Cir. 1967) (noting that “under the amendment the hearing must invariably precede the election”).

The purpose of pre-election hearings, as reflected in the legislative history of the 1947 amendments, is to collect evidence concerning all of the issues relevant to the election—including the eligibility of employees to vote in the election:

Obviously, *there can be no choice of representatives and no bargaining unless units for such purposes are first determined.* And employees themselves cannot choose these units, because *the units must be determined before it can be known what employees are eligible to participate in a choice of any kind.*

This provision is similar to section 2 of 1934 amendments to the Railway Labor Act (48 Stat. 1185), which states that—In the conduct of any election for the purpose herein indicated the Board shall designate *who may participate in the election* and establish the rules to govern the election.

S. Rep. No. 74-573, at 14 (1935), *reprinted in* 2 NLRA Hist. 2313 (emphases added); *see also* 76 Fed. Reg. at 80,165 n.116 (citing 93 Cong. Rec. 7002 (1947), *reprinted in* 2 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 1625 (supplemental analysis of LMRA by Senator Taft—the principal sponsor of the 1947 amendments)) (noting that the House rejected a provision authorizing pre-election hearings). Congress thus intended that issues of voter eligibility and inclusion would *not* be litigated separately (and post-election) from issues concerning the appropriateness of the bargaining unit.

When it amended the Act again in 1959, Congress once more rejected proposals to permit the Board to conduct elections with no pre-election hearing. *See* H.R. Rep. No. 86-741, at 24-25 (1959), *reprinted in* 1 LMRDA Hist. 782-83. Conference Committee members who opposed the proposals for pre-hearing elections regarded them as improperly effectuating “quickie elections,” and insisted on leaving unchanged the conventional role played by pre-election hearings. 105 Cong. Rec. A8062 (1959) (conf. report), *reprinted in* 2 LMRDA Hist. 1813 (opposing “pre-

hearing or so-called quickie election” and stating that the “right to a hearing is a sacred right”). As an alternative to scaling back pre-election hearings, Congress adopted the language in § 3(b) of the Act authorizing the Board to delegate its election responsibilities to regional directors, subject to each party’s right to seek pre-election Board review regarding “any action” by regional directors, including the right to seek a Board-ordered “stay” of any election. 29 U.S.C. § 153(b). The ranking House conferee, Chairman Barden, described the approach as follows:

The conferees adopted a provision that there should be some consideration given to expediting the handling of some of the representation cases. Therefore, the Board is authorized, but not commanded, to delegate to the regional directors certain powers which it has under section 9 of the act.

Upon an appeal to the Board by any interested party the Board would have the authority to review and stay any action of a regional director, delegated to him under section 9. But the hearings have not been dispensed with. *There is not any such thing as reinstating authority or procedure for a quicky election. Some were disturbed over that and the possibility of that is out.* The right to a formal hearing before an election can be directed is preserved without limitation or qualification.

105 Cong. Rec. 16,629 (1959), *reprinted in* 2 LMRDA Hist. 1714 (emphasis added), *describing* H.R. Rep. No. 86-1147, at 1 (1959) (conf. report), *reprinted in* 1 LMRDA Hist. 934. Chairman Barden expressed opposition to any “so-called quicky election,” again stating that “[t]he right to a hearing is a sacred right” 105 Cong. Rec. A8062 (1959) (conf. report), *reprinted in* 2 LMRDA Hist. 1813.

The failure of the proposed reform underscores the conflict between the Final Rule and congressional intent concerning the election process. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 846 (1986) (“It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the ‘congressional failure to revise or repeal the agency’s interpretation is persuasive evidence that the interpretation is the one intended by Congress.’” (quoting *NLRB v. Bell Aerospace Co.*, 416

U.S. 267, 275 (1974))). The Board is attempting to implement, through rulemaking, the very type of expedited election process that Congress rejected. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137-39 (2000). This attempt cannot survive *Chevron* scrutiny.

2. The Final Rule deprives employers of an appropriate hearing, as the Board has previously recognized.

The Final Rule should be set aside because it eviscerates the pre-election hearing and takes numerous steps to slash the time between the petition and election—thereby adopting the very type of expedited election system that Congress has repeatedly rejected. By authorizing regional directors and hearing officers to reject evidence on the scope of the bargaining unit for voter eligibility and inclusion purposes, the Final Rule makes the taking of evidence useless for all of the decision-making required under §§ 3 and 9 (except on the narrow issue whether an election of some kind is required under the Act). Significantly, the Final Rule suggests that evidence pertaining to voter eligibility should be excluded from the pre-election hearing even if the relevant issues affect a substantial portion of the bargaining unit. 29 C.F.R. § 102.64(a).

This approach is “not in accordance” with the Act, 5 U.S.C. § 706(2)(A), since it is contrary to the requirement in § 9(c)(1) that in all cases, absent stipulation otherwise, an “appropriate hearing” must be conducted before the election. Congress provided that an “appropriate hearing” must include the “full and adequate opportunity” to present evidence on *all* issues related to the election and disputed by the parties: “We think the statutory purpose . . . is to provide for a hearing in which interested parties shall have full and adequate opportunity to present their objections.” *Inland Empire*, 325 U.S. at 708; *see also S. W. Evans*, 181 F.2d at 430 (parties entitled to pre-election hearing to present substantial issues related to the election). And when the pre-election hearing is bypassed, the foreseeable result will be more post-election

litigation and more elections set aside after the fact. *See* 79 Fed. Reg. at 74,445 (dissent); *see also infra* 33-40.

The Final Rule's shortcoming here is confirmed by its rejection of over 60 years of agency practice under the § 9(c)(1) framework adopted by Congress in 1947. The Board reaffirmed, during the Clinton Administration and with all members agreeing, that § 9(c) limits its authority to narrow the scope of pre-election hearings. Specifically, the Board recognized that § 9(c) provides a *statutory* right to introduce evidence on issues of voter eligibility and inclusion at the pre-election hearing. *See Barre-Nat'l, Inc.*, 316 NLRB 877; *see also N. Manchester Foundry, Inc.*, 328 NLRB 372 (1999) (affirming requirement to allow evidence-taking at pre-election hearing). All of the participating Board members held that § 9(c) of the Act itself—not just the Board's then-existing regulations—require the Board to permit parties to present evidence in support of their positions at a pre-election hearing.

For example, in *Barre-National*, the regional director instructed the hearing officer to refuse to allow the employer to present evidence at a hearing regarding the supervisory status of a group of employees that constituted eight to nine percent of the potential bargaining unit. 316 NLRB at 877. Instead, the regional director permitted only an offer of proof by the employer and—similar to what the Final Rule would accomplish—permitted the employees to vote subject to challenge, leaving the evidence gathering and resolution of the supervisory issue to the post-election challenge procedure.

The Board held that the regional director erred by refusing to allow the employer to present this evidence. According to the Board, the pre-election hearing “did not meet the requirements *of the Act* and the Board's Rules and Statements of Procedure.” *Id.* at 878 (emphasis added); *see also N. Manchester Foundry*, 328 NLRB at 372-73 (holding that pre-

election hearing “did not meet the requirements *of the Act*, or of the Board’s Rules” because the hearing officer “precluded the employer from presenting witnesses and introducing evidence in support of its contention that certain individuals were not eligible voters” (emphasis added).

The Board cannot discharge its § 3(b) authority over all representation cases—to effectively decide whether issues of voter eligibility require pre-election resolution, how they should be resolved, or whether there should be a stay of the election pending resolution of such matters—without an adequate hearing record at the regional office level, including all evidence that reasonably bears on those issues. And if the Board’s delegate admits evidence only on, for example, *whether* an appropriate bargaining unit exists, but excludes evidence of *who* may be in the bargaining unit or eligible to vote in the election, the review promised by statute becomes illusory and the election results themselves suspect.

Even if Congress left the definition of an “appropriate hearing” to the Board’s unfettered discretion—which it did not—avoiding due process concerns would supply an additional reason to reject the Board’s interpretation of the NLRA to permit the evisceration of the pre-election hearing that must take place absent an election agreement. *Cf. NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979) (“[I]n the absence of a clear expression of Congress’ intent . . . we decline to construe the [NLRA] in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.”).

The Fifth Amendment precludes government decisions that would otherwise deprive a party of liberty or property and “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Here, as the dissent

explains, the “private interests affected by this extraordinary government action are substantial” and include “the potential deprivation in every election proceeding of the statutorily assured right of parties to full pre-hearing litigation [and] the fundamental right of an employer . . . to ensure that a certified union truly represents a majority of employees in an appropriate bargaining unit.” 79 Fed. Reg. at 74,451 (dissent). At the least, the hearing left in place by the Final Rule—a hearing that allows exclusion of evidence on important questions before an election—raises serious constitutional questions and should therefore be rejected.

For these reasons, the Final Rule is irreconcilable with the statutory scheme established by Congress and should be vacated.

B. The Final Rule Conflicts With The NLRA By Impermissibly Limiting Robust Debate And Depriving Employees Of An Informed Election.

The Final Rule also conflicts with § 8(c) of the NLRA, a critical piece of the NLRA’s election scheme. Section 8(c) protects the “expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form,” provided there is no “threat of reprisal or force or promise of benefit.” 29 U.S.C. § 158(c). The § 8(c) free-speech guarantee reflects a “policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide-open debate in labor disputes.” *Brown*, 554 U.S. at 67-68 (internal quotation marks and citation omitted). Robust debate is thus indispensable to the procedure for free and fair elections established by the NLRA.

Consistent with § 8(c), “an employer’s free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). The time during the critical pre-election “campaign” period is when employers can provide information to their employees regarding the election and the consequences of unionization. *Nat’l Ass’n of Mfrs. v. NLRB*, 717 F.3d 947, 955

(D.C. Cir. 2013) (hereinafter “*NAM*”), *overruled on other ground by Am. Meat Inst. v. United States, Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc) (noting that § 8(c) “serves a labor law function of allowing employers to present an alternative view and information that a union would not present.” (internal quotation marks and citation omitted)).

The Act does not just protect the free speech rights of employers. The NLRA also gives employees the right “to bargain collectively through representatives of their own choosing . . . and to refrain from . . . such activit[y] . . .” 29 U.S.C. § 157. Section 9(b) provides that “[t]he Board shall decide in each case whether, in order to assure *to employees the fullest freedom* in exercising the rights guaranteed by [the Act], the unit appropriate for the purposes of collective bargaining.” 29 U.S.C. § 159(b) (emphases added). The “fullest freedom” requirement is reinforced by the protection of free speech rights in § 8(c). *Gissel Packing Co.*, 395 U.S. at 617.

But these rights are meaningful only if the parties have sufficient time to engage in free speech *before* an election. *See* 79 Fed. Reg. at 74,438 (dissent) (“[The right to engage in protected speech before an election] only has meaning if there is sufficient time for the parties to communicate with employees about the choice of representation.”); *cf. Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976), *superseded by statute on other ground as stated in McConnell v. FEC*, 124 S. Ct. 619 (2003) (“Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates’ personal qualities and their positions on vital public issues before choosing among them on election day.”). An election can affect workers for years to come. This is exactly why Congress and the courts guarantee, and protect, employer free speech rights in the labor relations setting. *NAM*, 717 F.3d at 955.

It is impossible to square Congress's policy judgment in favor of *robust* debate with the Board's directive that regional directors schedule elections *as quickly as possible*, regardless of other statutory objectives and requirements that do not support the fastest possible NLRA elections. When elections can take place in as little as two weeks from the filing of the petition, parties "will have too little time[,] measured by any reasonable standard," for robust debate to occur. 79 Fed. Reg. at 74,439 (dissent).

The Board's curtailment of debate mirrors the sort that courts have routinely rejected when applied to political electioneering. *Id.* at 74,439 n.588 (dissent) (citing *Mills v. Alabama*, 384 U.S. 214 (1966) (invalidating state ban on election-day newspaper editorials); *Emineth v. Jaeger*, 901 F. Supp. 2d 1138 (D. N.D. 2012) (enjoining state ban on all electioneering on election day); *Curry v. Prince George's Cnty., Md.*, 33 F. Supp. 2d 447, 454-55 (D. Md. 1999) (invalidating county ban on display of political signage for all but 45 days before and 10 days after a political election)). This is especially true where, as (regrettably) here, the government seeks to privilege some speech based on its content. *See* 79 Fed. Reg. at 74,440 (dissent) ("It is apparent from the statements of numerous commentators supporting the Rule that . . . the Final Rule will specifically disadvantage anti-union speech more than pro-union speech," by depriving employers of sufficient time to express their views against unionization, "and will correspondingly enhance a petitioning union's chances of electoral success."). The Board was never meant to have the power to suppress debate, much less to the advantage of one side.

The Board's stated justification for impinging on § 8(c) rights revolves around the idea that employers still have time to speak, either before an election petition is filed or during the limited time between the filing of the petition and the election. *Id.* at 74,319. This explanation does not withstand scrutiny. An employer's ability to make general, pre-petition observations

about unions is no substitute for post-petition speech. It is the filing of the petition that “initiates what the Board and the courts consider the ‘critical period’ prior to the election, a period during which the representation choice is imminent and speech bearing on that choice takes on heightened importance.” *Id.* at 74,439-40 & n.591 (dissent) (citing *Goodyear Tire & Rubber Co.*, 138 NLRB 453 (1962); *E.L.C. Elec., Inc.*, 344 NLRB 1200, 1201 n.6 (2005); *NLRB v. Arkema, Inc.*, 710 F.3d 308, 323 n.16 (5th Cir. 2013); *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 987 (4th Cir. 2012); *NLRB v. Curwood Inc.*, 397 F.3d 548, 553 (7th Cir. 2005)).

Moreover, the legislative history of the 1959 amendments demonstrates that Congress believed that at least 30 days between petition and election was necessary to adequately assure employees the statutorily guaranteed “fullest freedom” in choosing whether to be represented by a union. As explained by then Senator John F. Kennedy, Jr., who chaired the Conference Committee, a 30-day period before an election is a necessary “safeguard against rushing employees into an election where they are unfamiliar with the issues.” 105 Cong. Rec. 5361 (1959), *reprinted in* 2 LMRDA Hist. 1024 (emphasis added). Senator Kennedy stated “there should be at least a 30-day interval between the request for an election and the holding of the election,” and he opposed an amendment that failed to provide “at least 30 days in which both parties can present their viewpoints.” *Id.* at 5770, *reprinted in* 2 LMRDA Hist. 1085; *see also* H.R. Rep. No. 86-741, at 25 (1959), *reprinted in* 1 LMRDA Hist. 783 (30-day period was designed to “guard[] against ‘quickie’ elections”).

Notably, until now, the Board’s own procedures, consistent with congressional intent, have required the interval between petition and election to be longer than 30 days (absent stipulation by the parties). Under those procedures, at least 7 days were required before the pre-

election hearing, 76 Fed. Reg. at 80,139; an additional 7 days elapsed before the filing of post-hearing briefs, *id.* at 80,140; and regional directors were instructed not to schedule an election sooner than 25-30 days after directing an election. *Id.* These rules resulted in a pre-election period of at least 39 days from the filing of a petition (again, excluding situations where the parties voluntarily agreed to a shorter pre-election period).

Congress's rejection of pre-hearing election proposals based on opposition to "quickie elections" demonstrates that Congress believed a minimum period of 30 days after the filing of a petition was necessary for employers and employees to enjoy the "fullest freedom" in connection with representation elections. Indeed, Congress specifically rejected proposals to expedite the Board's pre-election procedures based on concerns that elections would take place *too quickly* to satisfy the Act's objective of giving employees (and employers) "the fullest freedom in exercising the rights guaranteed by [the] Act." 29 U.S.C. § 159(b); *see* 105 Cong. Rec. 16,629 (1959), *reprinted in* 2 LMRDA Hist. 1714, *describing* H.R. Rep. No. 86-741, at 1 (1959), *reprinted in* 1 LMRDA Hist. 934 ("There is not any such thing as reinstating authority or procedure for a quicky election. Some were disturbed over that and the possibility of that is out."). The Final Rule's deliberate attempt to reduce the time for free speech and debate to much less than 30 days—potentially cutting that minimum time in half—thus contravenes clear congressional intent. The Board does not have "general authority to define national labor policy by balancing the competing interests of labor and management." *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965); *see Hammontree*, 894 F.2d at 441 (rejecting the Board's argument that in light of "competing" objectives it has discretion to disregard one of Congress' goals).

As the dissent explains, the Board's rationale for limiting the opportunity for free speech is "the hallmark characteristic associated with *every* infringement on free speech: the government

simply determines the speech is not necessary.” 79 Fed. Reg. at 74,440 (dissent). But Congress has already made a specific, contrary policy judgment in favor of robust debate. The Final Rule cannot be reconciled with—and, indeed, thwarts—that legislative judgment. Furthermore, the Rule’s impingement on free speech unacceptably creates “serious constitutional difficulties” with the First Amendment that cannot stand. *See AFL-CIO v. FEC*, 333 F.3d 168, 175-79 (D.C. Cir. 2003). For these reasons, too, the Final Rule conflicts with the NLRA and should be set aside.

II. The Final Rule Is Arbitrary And Capricious In Violation Of The APA.

Even if the Final Rule were consistent with the NLRA, which it is not, it would still violate the APA because it is arbitrary and capricious. Agency action is arbitrary and capricious when the agency has not engaged in “reasoned decision-making”—that is, the agency “has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to . . . the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Moreover, the “agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Sorenson Commc’ns Inc. v. FCC*, 755 F.3d 702, 707 (D.C. Cir. 2014).

The hundreds of pages in the Board’s Final Rule contain remarkably little logic or sound explanation for the sweeping changes made by the Final Rule—which “leaves unanswered the most fundamental question regarding any agency rulemaking, which is whether and why rulemaking is necessary.” 79 Fed. Reg. at 74,431 (dissent).

All available evidence indicates that the vast majority of election cases go forward with no “delay” at all—and the Final Rule “does not even identify, much less eliminate, the reasons responsible for those few cases that have excessive delays.” *Id.* As for the Board’s goal of

eliminating “unnecessary” litigation in the representation-election process, the available evidence demonstrates instead that the Final Rule will have the opposite effect. *Id.* at 74,449-50 (dissent). As the dissent sums up, “the available data do not provide a rational basis for the Final Rule’s wholesale reformulation of election procedures.” *Id.* at 74,434. Indeed, the record squarely contradicts the purported reasons for the Final Rule. Because the Board has thus “offered an explanation for its decision that runs counter to the evidence,” *State Farm*, 463 U.S. at 43, the Final Rule must be set aside. *See Chevron*, 467 U.S. at 842-43; *Sorenson*, 755 F.3d at 709-10.

A. The Final Rule Unnecessarily Abandons Established Procedures For Unexplained Reasons, Despite The Board’s Undisputed Success In Timely Conducting Elections.

In light of all available objective data regarding the Board’s election-related performance measures, the Final Rule is best characterized as a “solution in search of a problem.” 79 Fed. Reg. at 74,449 (dissent). Most glaringly, the Board did not find the “problem”—significant delays, characterized as more than 56 days from petition to election—in more than a fraction of all cases. To the contrary, the evidence shows that significant delays occur in less than 6 percent of elections. *Id.* at 74,434. And only about one-tenth of those elections, or 0.6 percent of all elections, involve delays related to the procedures the Rule eviscerates: the pre-election hearing or regional director decision-making before the election. 79 Fed. Reg. at 7349 (Members Miscimarra & Johnson, dissenting from Notice of Proposed Rulemaking). As the dissent from the Final Rule put it, “[t]hese relatively few cases do not provide a rational basis for rewriting the procedures governing *all* elections.” 79 Fed. Reg. at 74,456 (dissent).

Recent D.C. Circuit precedent demonstrates why the Board acted arbitrarily and capriciously here. In *Sorenson*, the FCC sought to implement a new rule mandating sales charges on phones manufactured for the hearing impaired. 755 F.3d at 707. According to the FCC, the new rule was intended to deter fraudulent acquisition and use of the equipment—fraud

that could artificially drain the fund created to finance use of the devices. *Id.* The problem was that “the agency offer[ed] no evidence suggesting there [wa]s fraud to deter.” *Id.* Insofar as the agency could point only to a speculative problem it sought to resolve, actions taken to remedy that problem were arbitrary and capricious. *Id.* at 709. So too here, the Final Rule is a solution in search of problem that cannot withstand even deferential reasonableness review. In the D.C. Circuit’s words, the Board cannot create a rule to “defeat a bogeyman whose existence was never verified.” *Id.* at 710.

There is simply no rational connection between the Board’s massive overhaul of the entire election process for *all* cases and the narrow subset of election cases in which a significant delay occurs. The Final Rule thus epitomizes arbitrary and capricious agency action. This Court should vacate it.

B. Contrary To The Board’s Stated Goals, The Final Rule Will Trigger *More* Election-Related Litigation.

Worse still, the available evidence here actually contradicts the Board’s stated rationale for its action. *See State Farm*, 463 U.S. at 43 (“Normally, the agency rule would be arbitrary and capricious if the agency has . . . offered an explanation for its decision that runs counter to the evidence before the agency.”). The lone tangible goal articulated by the Final Rule is that “[d]uplicative and unnecessary litigation is eliminated.” 79 Fed. Reg. at 74,308. But even if *some* litigation is eliminated, the Board failed to consider that the *total amount* of election-related litigation will only increase under the Final Rule. *See id.* at 74,435 (dissent) (“our colleagues do not adequately address the likelihood that the *overall* time needed to resolve post-election issues *will increase*, as will the number of rerun elections”). That is because (1) the Final Rule sharply reduces the ability of and incentives for parties to enter into stipulated or consent election agreements, and (2) the Final Rule’s elimination of the 25 to 30-day waiting

period for the Board to grant pre-election review of a regional director's decision, together with the elimination of mandatory post-election review and the exclusion of relevant evidence necessary for any meaningful review, will lead to an increase federal-court litigation that can take years to resolve.

1. The Final Rule undermines the incentive for the parties to negotiate election agreements, a critical litigation-reducing component of representation elections.

Under the election procedures that the Final Rule would displace, there is no pre-election litigation in 90 percent of cases because the parties negotiate an election agreement. *Id.* at 74,375. The high number of stipulated elections, in turn, has enabled the Board to conduct elections within a median of 38 days after the petition. *Id.* at 74,341 (dissent). That is likely why the Board's own Casehandling Manual directs Board agents to make every effort to secure an election agreement as early as possible in the process.¹¹

The Board admits that existing procedures lead to election agreements in an overwhelming majority of cases. *Id.* at 74,318. And the Board acknowledges that "the bargaining units and election details agreed upon in the more than 90 percent of representation elections that are currently conducted without pre-election litigation are unquestionably influenced by the parties' expectations concerning what would transpire if either side insisted upon pre-election litigation." *Id.* at 74,387. But the Final Rule eliminates the very incentives and expectations that drive the parties toward election agreements.

¹¹ See, e.g., Casehandling Manual, Part Two, § 11008 (Noting, as part of the Board's initial communication, "it should be emphasized that it is the Agency's policy to make every effort to secure an election agreement . . ."); *id.* § 11084.2 ("[E]fforts to dispose of a case by agreement should begin during the first contacts with the parties, and continue at all stages thereafter . . ."); see also Report of Best Practices Committee: Representation Cases (December 1997) at 8 ("[T]he Committee concludes that the best practice is to keep the lines of communication open with the parties . . . and be tenacious in pursuing an agreement, as well as in narrowing the issues in the event a hearing is necessary . . .").

For example, the Final Rule provides no guidance on when an election will be scheduled if an employer enters into an election agreement with the union, despite many calls from commenters for the Board to provide this guidance. *Id.* at 74,324. This information is essential in negotiating an election agreement. Under existing procedures, the time target for an election is well known and clearly communicated to all parties and the general public.¹² Employers are well aware of the 42-day target for holding an election and are routinely told that, if they enter into an election agreement, there is discretion to negotiate an election date anywhere within that 42-day period. The ability to negotiate a mutually acceptable date, within that known time target, is a significant incentive to enter into an election agreement.

Furthermore, without the failsafe of mandatory post-election review, employers will be more reluctant to enter into binding election agreements. *See id.* at 74,450 (“[M]aking Board review of post-election disputes discretionary is likely to discourage parties from entering into stipulated election agreements, *the principal mechanism for shortening the pre-election timeline*, thereby resulting in an increase in pre- and post-election litigation.” (emphasis added)).

The Board acknowledges as much, but speculates that “[a]ny short term difficulties in reaching election agreements[] should dissipate quickly, as they have in the past when prior time targets have been adjusted.” *Id.* at 74,324. Changes effected by the Final Rule, however, are so sweeping and unprecedented that the Board’s reliance on the “past” rings hollow. *See id.* at 74,450 (dissent) (“It [is] natural that the elimination of the right to agree to mandatory post-election Board review will adversely affect the parties’ willingness to compromise on pre-election issues.”). The Board is introducing a scheme that fundamentally changes the hearing process envisioned by Congress. And whatever deference may be due to some predictive

¹² *See, e.g.*, GC Mem. 11-09, at 18-19 (Mar. 16, 2011); GC Mem. 07-04, at 10 (Apr. 4, 2007); GC Mem. 06-04, at 8 (Mar. 21, 2006); GC Mem. 04-02, at 2 (Apr. 22, 2004).

judgments of agencies, courts are required to step in when those predictions defy logic and the available evidence. *Sorenson*, 755 F.3d at 710 (“But unlike its counterpart, the [agency’s new] Rule did not want for evidence; instead, there was contrary evidence questioning its efficacy and necessity. The Commission left these serious concerns unaddressed. Accordingly, its decision to implement the [new] Rule was arbitrary and capricious.”). Removing an essential litigation-reducing tool will necessarily cause pre- and post-election litigation increases in these cases—an arbitrary and capricious result that this Court should refuse to countenance. *Id.*

The Board’s failure to adequately address these concerns, especially given the contradictions between the stated objectives of the Final Rule and the actual evidence before the Board, underscores the conflict between the agency’s action and the outcome.

2. The Final Rule will increase federal-court litigation.

In severely curtailing the opportunity for Board review—*i.e.*, by removing the 25-30 day waiting period (thus shrinking the time for pre-election review) and by making mandatory post-election review discretionary—the Final Rule will force more employers to turn to the federal courts for the review that is denied by the Board. To be clear, the NLRA does not permit direct judicial review of representation decisions. *AFL v. NLRB*, 308 U.S. 401, 405, 409-11 (1940). As a consequence, an employer may seek judicial review only indirectly—after an election has been held and the results certified—by refusing to bargain with the union, at which point the Board can prosecute an unfair labor practice complaint that will result in a final, appealable Board order. *See, e.g., NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 709 (2001). In seeking review of that order in a court of appeals, the employer can then challenge the Board’s (or regional director’s) determinations in the underlying representation case.

Under the Board’s current election system, “in only very few cases do employers refuse to bargain in order to test the validity of the certification. From FY 2008 to FY 2013, between 8

and 13 test of certification cases were filed each year in the U.S. Circuit Courts of Appeals.” 79 Fed. Reg. at 74,344 n.176. That is not surprising, given the opportunities for Board review under the current system. But the Final Rule’s severe curtailment of those opportunities likely will lead to an increase in “test of certification” cases in federal court—and even a slight increase in these cases will necessarily trigger more litigation, as the dissent explains. *Id.* at 74,451 (dissent) (“The elimination of mandatory post-election Board review is also likely to cause an increase in ‘test of certification’ cases where employers engage in post-certification refusals to bargain as the only means of obtaining review of the Board’s certification.”).

In *Public Citizen v. FMCSA*, 374 F.3d 1209 (D.C. Cir. 2004), the D.C. Circuit made clear that an agency acts arbitrarily and capriciously if it counts the benefits of a rule without accounting for the offsetting costs. *Id.* at 1217-19 (“That analysis, then, assumes away the exact effect that the agency attempted to use it to justify. The agency’s reliance on the cost-benefit analysis to justify this increase is therefore circular, and the rationality of that explanation is correspondingly doubtful.”). The D.C. Circuit reaffirmed that same precept in *Chamber of Commerce v. SEC*, 412 F.3d 133, 142-44 (D.C. Cir. 2005) (“And, as we have just seen, uncertainty may limit what the Commission can do, but it does not excuse the Commission from its statutory obligation to do what it can to apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation before it decides whether to adopt the measure.”). Here, the Final Rule pursues quicker elections at all costs, including the likelihood of increased post-election litigation that will delay the resolution of the ultimate question in an election: whether the union properly represents a particular group of employees. That selective focus on purported benefits while ignoring offsetting costs is arbitrary and capricious. *See Pub. Citizen*, 374 F.3d at 1217-19.

3. The potential to moot litigation involving some voter eligibility issues cannot justify increasing litigation concerning the validity of the election itself.

According to the Board, a party that, under the current system, would have litigated a supervisory status issue before an election may decide not to litigate that issue post-election under the Final Rule if the margin of victory for the union makes those voters irrelevant to the outcome. 79 Fed. Reg. at 74,387. In this light, the Board advocates that under its “vote now, hearing later” model for voter eligibility and inclusion disputes—including supervisory status—only 15 percent of deferred issues “will ever have to be addressed.” *Id.* at 74,387 n.370. But that proposition fails to consider that deferring voter eligibility and inclusion issues can taint the entire election, no matter how the vote tally comes out.

For example, as commenters explained, employees whose supervisory status is in doubt may engage in conduct that will later require overturning the election.¹³ *Id.* at 74,388, 74,408. There is no shortage of cases in which the Board has ruled that objectionable conduct by low-level or first-line supervisors materially affected an election.¹⁴ Thus, deferring resolution of issues of supervisory status will not serve to reduce litigation, as the Final Rule purportedly seeks to do. It will result in the Board having to set aside more elections. And there is little point to reducing pre-election litigation if the results of the election must ultimately be set aside.

¹³ See *SNE Enters.*, 348 NLRB 1041, 1043-44 (2006) (setting aside election result even though supervisors who engaged in pro-union conduct had been eligible voters in three prior Board elections, stating that it does not matter “that the supervisors here engaged in the conduct prior to the time when they were adjudicated to be supervisors”); *Harborside Healthcare, Inc.*, 343 NLRB 906, 911(2004) (“The essential point . . . is that employees should be free from coercive or interfering tactics by individuals who are supervisors, even if the employer or union believes that the individual is not a supervisor.”).

¹⁴ See *Harborside Healthcare*, 343 NLRB at 911-14 (comments by first-level supervisor encouraging nursing assistants to vote for the union and solicitation of union authorization cards interfered with the nursing assistants’ free choice and materially affected the outcome of the election); *Barton Nelson, Inc.*, 318 NLRB 712, 712-13 (1995) (personal distribution of anti-union hats by shift supervisors directly to large number of employees in the petitioned-for unit was objectionable conduct requiring setting aside an election); *Cnty. Action Comm’n of Fayette Cnty., Inc.*, 338 NLRB 664, 667 (2002) (setting aside an election where a supervisor responded to an employee’s question about rumors that she would not get her job back after the annual summer layoff by stating that if the union won she might not have a job).

Indeed, the Final Rule would put employers “on the horns of a difficult dilemma.” See *Barre-Nat’l, Inc.*, 316 NLRB at 880 (Member Cohen, dissenting). As the dissent here points out, “[m]any employers will be placed in an untenable situation regarding such individuals based on uncertainty about whether they could speak as agents of the employer or whether their individual actions—though not directed by the employer—could later become grounds for overturning the election.” 79 Fed. Reg. at 74,438 n.581 (dissent). Furthermore, “[w]here employees are led to believe that they are voting on a particular bargaining unit and that bargaining unit is subsequently modified post-election, such that the bargaining unit, as modified, is fundamentally different in scope or character from the proposed bargaining unit, the employees have effectively been denied the right to make an informed choice in the representation election.” *NLRB v. Beverly Health & Rehab. Servs., Inc.*, 120 F.3d 262, 1997 WL 457524, at *4 (4th Cir. Aug. 12, 1997) (unpublished table decision).¹⁵

Thus, the Final Rule would not only shift litigation from the pre-election phase to the post-election phase, it also would transfer the litigation from the Board to the federal courts, by making the circuitous path of a “certification test” case the only guaranteed opportunity for review of a regional director’s decision. Worse still, the chances that a new election will need to be held, months or years after the first, will also increase if crucial issues of eligibility and inclusion are deferred until after the election. For these reasons, the Final Rule is entirely counter-productive. The Board’s elaborate efforts to shirk its statutory obligations to conduct an “appropriate” pre-election hearing and to review the decisions of its regional directors will not

¹⁵ See also *NLRB v. Parsons Sch. of Design*, 793 F.2d 503, 507-08 (2d Cir. 1986) (finding a post-election change in unit size of about 10 percent denied employees the right to an informed vote); *NLRB v. Lorimar Prods., Inc.*, 771 F.2d 1294, 1302 (9th Cir. 1985) (holding that a unit reduction from 17 employees in two classifications to 11 employees in one classification required a new election); *Hamilton Test Sys., New York, Inc. v. NLRB*, 743 F.2d 136, 140-41 (2d Cir. 1984) (ruling that reduction of unit by 50 percent and removal of two classifications rendered election results void).

reduce litigation; it will only move it to federal court and delay the ultimate resolution of the representation case. Where, as here, an agency's explanation of facts runs counter to the actual evidence before it and cannot answer the comments raised during the rulemaking process, the agency's action should be set aside. *See State Farm*, 463 U.S. at 43; *Sorenson*, 755 F.3d at 710.

C. The Final Rule's Mandatory Disclosures of Employees' Personal Information Is Arbitrary and Disregards Substantial Privacy Concerns.

The Final Rule mandates disclosure of all potential voters' personal telephone numbers and email addresses. The Rule accomplishes that result by requiring employers to provide labor organizations "a list of full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular ('cell') telephone numbers) of all eligible voters." 29 C.F.R. §§ 102.62(d) & 102.67(l). Not only has the Board imposed these new and intrusive disclosure obligations, it has also failed to provide any "opt-out" procedure for employees, 79 Fed. Reg. at 74,346, 74,453 (dissent), and failed to provide any meaningful penalty for misuse of the personal information.

Under the existing system, employers are required to provide unions only with employees' home addresses per the Board's 1966 decision in *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1939-40 (1966). The Board points to technological developments in support of its expanded disclosure requirements, but does not explain why those requirements are necessary. Though commenters pointed out the privacy danger of disclosing email addresses, 79 Fed. Reg. at 74,341-42, the Board's only response was that disclosing home addresses is even more dangerous.¹⁶ But no one can reasonably question that technology brings greater risks when employees' personal data is compromised.

¹⁶ The Board also discounted the point that home phone numbers are not required under *Excelsior* even though they existed at the time of that decision. 79 Fed. Reg. at 74,338-39.

Even worse, while acknowledging that “the privacy, identity theft, and other risks may be greater than the Board has estimated,” the Board nonetheless asserted—without any reasoning or analysis—that those “risks are worth taking.” 79 Fed. Reg. at 74,341-42. That conclusory statement is insufficient to satisfy the reasoned decision-making requirement of the APA. *See Pub. Citizen*, 374 F.3d at 1217 (“The agency may of course think that [the] effects [of its Rule] are not problematic (or are outweighed by other considerations, like cost), but if so it was incumbent on it to say so in the rule *and to explain why*.” (emphasis added)); *cf. Comcast Corp. v. FCC*, 579 F.3d 1, 7 (D.C. Cir. 2009) (“That a problem is difficult may indicate a need to make some simplifying assumptions, but it does not justify ignoring altogether a variable so clearly relevant and likely to affect” the agency’s rule. (citation omitted)). At the same time, the Board inexplicably declined to put in place common-sense privacy protections—like those suggested by the National Association of Manufacturers and the Chamber—that would require unions to destroy the personal contact information after a period of time. 79 Fed. Reg. at 74,360.

The Board gave those concerns even shorter shrift by declining to announce penalties for misusing the information. Although the Final Rule provides that “[p]arties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters,” the Rule stops short of announcing a penalty, saying only that “should such misuse of the list occur, the Board will provide an appropriate remedy.” *Id.* at 74,344. The APA’s reasoned-analysis standard—though a deferential one—requires more than an agency’s *ipse dixit* assurances that its decision is for the best, especially in the face of serious privacy and safety concerns. *See Sorenson*, 755 F.3d at 709; *Pub. Citizen*, 374 F.3d at 1217. The Rule should be set aside for that reason, too.

III. The Final Rule Unconstitutionally Compels Employer Speech.

Quite apart from the conflict discussed above with § 8(c)'s free-speech guarantees, the Final Rule also violates the First Amendment by compelling employer speech through a mandatory post-petition notice that must be posted in the employer's workplace within two business days after the employer receives notice that a petition has been filed. 79 Fed. Reg. at 74,309 (dissent). In essence, the Board is commandeering employers to disseminate a message the employer may not support or agree with, simply because someone filed a petition with the government—a petition that may not even provide a valid basis to proceed to an election.

The First Amendment protects “both the right to speak freely and the right to refrain from speaking at all.” *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). This principle applies to individuals and corporations alike; thus, “[f]or corporations as for individuals, the choice to speak includes within it the choice of what not to say.” *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Ca.*, 475 U.S. 1, 16 (1986) (plurality opinion). A regulation compelling speech is therefore generally subject to strict scrutiny, and can survive only if it is a “narrowly tailored means of serving a compelling state interest.” *Id.* at 19.

Here, the Rule compels employers to post workplace notices after a petition is filed with the Board, but before the Board has even determined that an election should occur. 79 Fed. Reg. at 74,309 (“When a petition is filed, the employer must post and distribute to employees a Board notice about the petition and the potential for an election to follow.”). By forcing employers to post a notice that facilitates a union's organizing campaign, the Rule conscripts employers in speech that they may not want to make. That compelled speech implicates employers' First Amendment rights just as surely as a law requiring the employer to post notices of political campaign meetings.

Nor can it be argued that the government may compel employers' speech as a form of commercial speech regulation. Under the commercial speech doctrine, the government's "power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is 'linked inextricably' to those transactions." 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 499 (1996) (citation omitted). The Supreme Court has thus held that the government can require commercial speech to "appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). And under Supreme Court precedent, it can include compelled disclosures about the efficacy, safety, and quality of the advertiser's product. See, e.g., *Zauderer v. Office of Disciplinary Council for Supreme Court of Ohio*, 471 U.S. 626, 637-40 (1985); *Am. Meat Inst.*, 760 F.3d at 22.

But the Final Rule's mandate that employers must post workplace notices after a petition is filed with the Board has nothing to do with regulating a commercial transaction. Under *Zauderer* and its progeny, compelled disclosure may be permissible to convey "purely factual and uncontroversial" information—but such disclosures may be required only if they regulate commercial messages. See *Zauderer*, 471 U.S. at 651; *Milavetz, Gallop & Milavetz, P.A. v. United States*, 59 U.S. 229, 249-50 (2010).

Where, as here, the government seeks to co-opt a speaker's message not to regulate a commercial transaction but, rather, to assist a union in its campaign to organize employees, the regulation is presumptively unconstitutional. Indeed, this case is all but controlled by *Pacific Gas & Elec. Co.* In that case, the challenged law required a commercial actor (a power company), in a commercial setting (the posting of its bills to consumers), to disseminate the message of other groups with competing policy goals. *Pac. Gas & Elec. Co.*, 475 U.S. at 4-7.

The Supreme Court held that the law could not survive strict scrutiny without once suggesting that a different standard should apply merely because the speech of a commercial actor was being regulated. *Id.* at 19-21; *see also Wooley*, 430 U.S. at 714-16 (prohibiting government from compelling speech when the message favored another party). The *Zauderer* exception is thus just as inapplicable here as it would be in other First Amendment contexts. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-42 (1994).

Indeed, while the D.C. Circuit did not have occasion to address directly the validity of the Final Rule's election-notice requirement in *NAM*, 717 F.3d at 959 n.19, it did hold in that case that *Zauderer* was inapplicable in a materially indistinguishable context. Specifically, the Board in *NAM* argued that it could compel employers to post a notice of employee rights, notwithstanding NLRA § 8(c), because the notice was a compelled commercial disclosure, subject to less scrutiny under *Zauderer*. *Id.* at n.18. The D.C. Circuit rejected that argument, however, because there was no suggestion that the notice was intended or needed to regulate a commercial transaction. *Id.*¹⁷

Because the Final Rule's notice requirement is not a regulation of a commercial transaction, and instead compels speech in support of a union's organizing campaign, it is subject to strict scrutiny—a burden it cannot satisfy.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment to plaintiffs and vacate the Final Rule.

¹⁷ Although the en banc D.C. Circuit recently abrogated *NAM* to the extent that it held that *Zauderer* applied only to disclosure requirements intended to prevent customer deception, the Court did not attempt to expand *Zauderer* beyond the context of commercial transactions. *See Am. Meat Inst.*, 760 F.3d at 20-22 (noting that the Court was addressing "commercial speech" and merely holding *Zauderer* is not limited to cases where the government is seeking to prevent deception in commercial transactions).

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