

**Nos. 15-1178, 15-1201**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**LIFESOURCE**

**Petitioner/Cross-Respondent**

v.

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certifies the following:

**A. Parties and Amici**

LifeSource is petitioner before the Court and was respondent before the Board. The Board is respondent before the Court; its General Counsel was a party before the Board. There are no amici.

**B. Rulings Under Review**

This case is before the Court on LifeSource’s petition to review a Board Order issued on June 5, 2015, and reported at 362 NLRB No. 107. The Board

seeks enforcement of that Order against LifeSource. The Decision and Certification of Representative in the underlying representation case issued on December 16, 2014, and is reported at 361 NLRB No. 136.

### **C. Related Cases**

The case on review was previously before the United States Court of Appeals for the Seventh Circuit in *LifeSource v. NLRB*, 7th Cir. Case Nos. 13-1806, 13-1162, which was remanded upon the Board's motion. The case was not previously before this Court, and Board counsel is unaware of any related cases pending in this Court or any other court.

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Dated at Washington, DC  
this 23rd day of November, 2015

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of LifeSource to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order issued on June 5, 2015, and reported at 362 NLRB No. 107. The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”). 29 U.S.C. § 160(a). The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act, 29

U.S.C. § 160(e) and (f), which provides that petitions for review of final Board orders may be filed in this Court and allows the Board, in that circumstance, to cross-apply for enforcement. The petition and application were both timely, as the Act provides no time limits for such filings.

Because the Board's unfair-labor-practice order is based partly on findings made in the underlying representation proceeding, the record in that case (Board Case No. 13-RC-74795) is also before the Court pursuant to Section 9(d) of the Act. 29 U.S.C. § 159(d); *Boire v. Greyhound Corp.*, 376 U.S. 473, 477 (1964). Section 9(d) authorizes judicial review of the Board's actions in a representation proceeding solely for the purpose of "enforcing, modifying, or setting aside in whole or in part the [unfair-labor-practice] order of the Board." 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the representation case in a manner consistent with the Court's ruling in the unfair-labor-practice case. *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

### **STATEMENT OF THE ISSUE**

The ultimate issue in this case is whether substantial evidence supports the Board's finding that LifeSource violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the certified representative of its employees.

That question turns on the following subsidiary issue from the underlying representation proceeding:

Did the Board abuse its discretion in rejecting LifeSource’s election objections and determining that LifeSource was not entitled to a hearing on those objections?

## **RELEVANT STATUTORY PROVISIONS**

Relevant statutory provisions appear in the Addendum to LifeSource’s brief.

## **STATEMENT OF THE CASE**

### **I. PROCEDURAL HISTORY**

Acting on an unfair-labor-practice charge filed by Local 881, United Food and Commercial Workers (“Local 881”), the Board’s General Counsel issued a complaint alleging that LifeSource violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by refusing to bargain with Local 881 as the certified collective-bargaining representative of its employees. The Board granted the General Counsel’s motion for summary judgment and found a violation as alleged.

### **II. THE BOARD’S FINDINGS OF FACT**

#### **A. The Representation Proceeding: LifeSource Employees Vote for Union Representation, and LifeSource Files Election Objections**

LifeSource provides services related to whole and processed blood products, including blood-donor recruitment and donation collection, testing, and distribution, in the Chicago area. On February 17, 2012, Local 881 filed a petition

with the Board to represent the full-time and part-time Account Managers and Team Account Managers in the Recruitment department at LifeSource's Rosemont, Illinois facility. On March 30, the Board held a representation election at LifeSource's offices, with polls open from 9 am to 1 pm. LifeSource and Local 881 each selected one employee to serve as its election observer. (JA 15-18.)<sup>1</sup>

Local 881 won the election 11 to 9. Twenty-one of the twenty-two eligible voters cast ballots, with one void ballot; there were no challenged ballots. (JA 19.) LifeSource filed objections to the election with the Board's Regional Director for Region 13, claiming that the Board Agent overseeing the election "fail[ed] to maintain the integrity of the voting area, by, *inter alia*, (1) permitting the Observers to leave the voting place without securing or taping the ballot box, (2) allowing voters to view the Excelsior list to see who voted; and (3) leaving the voting place herself without securing the ballots." (JA 20-21.)<sup>2</sup>

The Regional Director invited the parties to submit relevant evidence regarding the objections. (JA 23.) In support, LifeSource submitted an affidavit

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<sup>1</sup> Citations to "JA" are to the Joint Appendix. Where applicable, cites preceding a semicolon are to the Board's findings; cites following a semicolon are to supporting evidence. "Br." cites are to LifeSource's opening brief to the Court.

<sup>2</sup> Observers represent their respective parties, monitor the election process, identify voters, challenge voters and ballots, and assist the Board Agent in the conduct of the election. Form NLRB-722 (reproduced at page 3 of the Addendum to LifeSource's brief). The "Excelsior list" is the list of eligible voters. *See Excelsior Underwear Inc.*, 156 NLRB 1236, 1239-40 (1966).

from its election observer, who stated that she and Local 881's observer left the voting area together on two occasions—for ten minutes to visit the cafeteria and for five minutes to go to the restroom—and that, on a separate occasion, the Board Agent left for ten minutes. As to the latter, LifeSource's observer stated that the Board Agent took the sealed ballot box, and that she did not notice if the Agent also took the unmarked ballots. She also stated that the *Excelsior* list was on the table between the two observers during the election. (JA 54-55.)

After an investigation, the Regional Director issued a report recommending that the Board overrule the objections and certify Local 881. (JA 23-27.) On September 19, the Board (Chairman Pearce; Members Griffin and Block) adopted the Regional Director's findings and recommendations, and issued a Certification of Representative. (JA 1-2.)

**B. The Unfair-Labor-Practice Proceeding: LifeSource Refuses to Bargain**

On October 3, Local 881 asked LifeSource to bargain. Two weeks later, LifeSource refused, contending that Local 881's certification was invalid. (JA 12; JA 113, 122.) The Board's Acting General Counsel issued an unfair-labor-practice complaint based on LifeSource's refusal to bargain, and moved for summary judgment. (JA 69-72, 81-85.) LifeSource's opposition again challenged the validity of Local 881's certification, reiterating its representation-case arguments. (JA 87-104.)

On December 21, the Board (Chairman Pearce; Members Griffin and Block) issued a Decision and Order finding that LifeSource violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with Local 881. (JA 3-5.) LifeSource subsequently petitioned for review of the Board's Order in the Seventh Circuit. *LifeSource v. NLRB*, 7th Cir. No. 13-1162. While the case was pending, the Supreme Court decided *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which invalidated the recess appointments of Members Griffin and Block. The Seventh Circuit granted the Board's motion to remand the case in light of *Noel Canning*. (JA 6-7.)

Thereafter, on December 16, 2014, a properly constituted panel of the Board (Chairman Pearce; Members Hirozawa and Schiffer) considered the consolidated representation proceeding and unfair-labor-practice proceeding. The Board adopted the Regional Director's conclusions and recommendations and certified Local 881 as the collective-bargaining representative of LifeSource's account managers. In light of the possibility of changed circumstances, the Board issued a notice to show cause why it should not grant the outstanding motion for summary judgment. (JA 8-9.) LifeSource filed a response in which it again repeated its representation-case arguments. (JA 11; JA 129-53.)

### **III. THE BOARD'S CONCLUSIONS AND ORDER**

On June 5, 2015, the Board (Chairman Pearce; Members Hirozawa and McFerran) issued a Decision and Order finding that LifeSource violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with Local 881. The Order directs LifeSource to cease and desist from that unfair labor practice. Affirmatively, the Order requires LifeSource to bargain with Local 881 on request, embody any understanding that the parties reach in a written agreement, and post a remedial notice. (JA 11-14.)

#### **STANDARD OF REVIEW**

In cases involving representation elections, “the Board enjoys broad discretion.” *Kwik Care Ltd. v. NLRB*, 82 F.3d 1122, 1126 (D.C. Cir. 1996). Accordingly, “[t]he scope of [the Court’s] review of the Board’s rulings regarding the election is ‘extremely limited.’” *NLRB v. Downtown BID Servs. Corp.*, 682 F.3d 109, 112 (D.C. Cir. 2012) (quoting *Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1564 (D.C. Cir. 1984)). In such cases, “the case for deference is strong[], as Congress has charged the Board, a special and expert body, with the duty of judging the tendency of electoral flaws to distort the employees’ ability to make a free choice.” *C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 885 (D.C. Cir. 1988) (internal quotations omitted).

The Court reviews the Board's overruling of election objections for an abuse of discretion, *Hard Rock Holdings, LLC v. NLRB*, 672 F.3d 1117, 1120 (D.C. Cir. 2012), and "may not disturb" a Board decision that is "consistent with [Board] precedent and supported by substantial evidence in the record," *Downtown BID Servs. Corp.*, 682 F.3d at 112. The Court likewise reviews the Board's decision not to hold a hearing on election objections for an abuse of discretion. *Majestic Star Casino, LLC v. NLRB*, 373 F.3d 1345, 1350 (D.C. Cir. 2004); *Amalgamated Clothing Workers v. NLRB*, 424 F.2d 818, 829 (D.C. Cir. 1970). The Board's findings of fact "shall be conclusive" if they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e).

### **SUMMARY OF ARGUMENT**

LifeSource unlawfully refused to recognize and bargain with Local 881 on the basis of unfounded election objections. Rather than proffering any evidence that the election was compromised, LifeSource posits that improprieties such as vote tampering and coercion conceivably could have occurred. Such unsubstantiated and unrealistic speculation does not satisfy LifeSource's heavy burden of proving the election invalid. Moreover, the closeness of the election and any cumulative effect do not transform LifeSource's otherwise insubstantial objections into grounds for a new election. The Board accordingly did not abuse its discretion in overruling those objections.

LifeSource likewise fails to prove that the Board should have held an evidentiary hearing or granted it access to compulsory process on its objections. The Board and the Court have long held that, as here, objections based on conjecture do not warrant a hearing. LifeSource's objections presented no substantial questions of fact or credibility issues, as LifeSource provided no evidence that its imagined improprieties actually occurred. Because it was not entitled to a hearing in the first place, LifeSource's contention that the passage of time could prevent it from receiving a fair hearing now is beside the point. Furthermore, it is well settled that the passage of time and the possibility of employee turnover are not, by themselves, grounds for a new election.

### **ARGUMENT**

#### **The Board Did Not Abuse Its Discretion in Overruling LifeSource's Election Objections and Declining To Hold a Hearing, and LifeSource Therefore Unlawfully Refused To Bargain**

Disappointed in the results of an election in which its employees chose to be represented by Local 881, LifeSource filed three objections based on unsubstantiated and unrealistic speculation that improprieties could have occurred during the election. Because of the speculative nature of its objections, LifeSource has not satisfied its heavy burden of showing that the election should be overturned or that it was entitled to a hearing.

LifeSource admits that it refused to bargain with Local 881 based on those objections. Because an employer violates Section 8(a)(5) of the Act by “refus[ing] to bargain collectively with the representatives of [its] employees,” 29 U.S.C. § 158(a)(5), the Board is entitled to enforcement of its Order if the election and the Board’s certification of Local 881 were valid. *Antelope Valley Bus Co. v. NLRB*, 275 F.3d 1089, 1091, 1096 (D.C. Cir. 2002).<sup>3</sup>

**A. The Objecting Party Bears the Heavy Burden of Proving That an Election Should Be Overturned**

Representation elections “are not lightly set aside.” *Affiliated Computer Servs., Inc.*, 355 NLRB 899, 900 (2010). The party challenging a Board-certified election bears the “heavy burden of showing the election’s invalidity.” *Antelope Valley Bus Co.*, 275 F.3d at 1095 (internal quotations omitted). In order to overturn an election on the basis of Board Agent conduct, the objecting party must present “evidence that raises a reasonable doubt as to the fairness and validity of the election” as a result of that conduct. *Physicians & Surgeons Ambulance Serv., Inc.*, 356 NLRB No. 42, 2010 WL 4929682, at \*1 (2010) (internal quotations omitted), *affirmed*, 477 F. App’x 743 (D.C. Cir. 2012). Accordingly, a party alleging that the Board Agent deviated from typical election procedures “must show that such a deviation had a material effect on the election such as an impact

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<sup>3</sup> A refusal to bargain in violation of Section 8(a)(5) also derivatively violates Section 8(a)(1). *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

on an individual vote.” *Hard Rock Holdings*, 672 F.3d at 1123. If they do not rise to that standard, “minor (and sometimes major, but realistically harmless) infractions” do not necessitate overturning the election. *Serv. Corp. Int’l v. NLRB*, 495 F.3d 681, 684 (D.C. Cir. 2007); accord *Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257, 263 (4th Cir. 2000).

The party challenging an election does not meet its burden by presenting the mere possibility that the vote was compromised. Accordingly, “speculation about the possibility of irregularity . . . do[es] not raise a reasonable doubt as to the fairness and validity of the election.” *Sawyer Lumber Co.*, 326 NLRB 1331, 1332 (1998), *affirmed*, 225 F.3d 659 (6th Cir. 2000) (Table); *see also Trico Prods. Corp.*, 238 NLRB 380, 381 (1978) (“It is not every conceivable possibility of irregularity which requires setting an election aside but only reasonable possibilities.”). Indeed, “[i]f speculation on conceivable irregularities were unfettered, few election results would be certified.” *Polymers, Inc. v. NLRB*, 414 F.2d 999, 1004 (2d Cir. 1969). In *Sawyer Lumber*, for example, the Board rejected as “little more than speculation” the employer’s objections based on the Board Agent’s allowing the election observers to leave the voting area four times and not sealing the ballot box, and possibly leaving unmarked ballots with the observers when he took a restroom break. 326 NLRB at 1331-32. The Board found that the employer had provided no evidence that anyone tampered with the box or ballots

during those periods, as they were never unattended and the number of votes cast matched the number of voters that the observers had marked on the eligibility list.

*Id.*

The standard for overturning an election is demanding because ordering a rerun election poses its own danger to the effectuation of employee free choice. *Amalgamated Clothing & Textile Workers*, 736 F.2d at 1563-64. As the Court has recognized, the delay inherent in holding a second election after employees have voted for union representation “almost inevitably works to the benefit of the employer and may frustrate the majority’s right to choose to be represented by a union,” such that “forcing a rerun election may play into the hands of employers who capitalize on the delay to frustrate their employees’ rights to organize.” *Id.* at 1563. Based on its experience overseeing representation elections, the Board will balance any defects in the original election with the risks of a rerun and determine which alternative will best serve the goal of vindicating employee choice—a determination to which the Court generally defers. *Id.* at 1564.

**B. LifeSource Failed To Meet Its Heavy Burden of Producing Evidence Sufficient To Overturn the Election**

LifeSource’s three election objections are unfounded. Without supporting evidence, LifeSource hypothesizes that vote tampering or other improprieties could have occurred because (1) the two election observers visited the cafeteria for ten minutes and the restroom for five minutes without the Board Agent’s sealing the

ballot box, (2) the *Excelsior* list was visible to voters, and (3) the Board Agent went to the restroom for ten minutes, without securing the unmarked ballots. Such conjecture displays a healthy imagination, but an anemic evidentiary foundation. Accordingly, the Board did not abuse its discretion in finding that LifeSource failed to meet the “heavy burden” to overturn a representation election. *Antelope Valley Bus Co.*, 275 F.3d at 1095.

**1. LifeSource Presents No Evidence That the Election Observers’ Five- and Ten-Minute Breaks Resulted in Any Impropriety**

LifeSource’s objection that the election was compromised because the Board Agent allowed the two observers to leave the voting area together without sealing the ballot box is premised on unreasonable speculation, and the Board acted well within its discretion in finding that objection insufficient to overturn the election. The observers were gone for ten minutes to visit the cafeteria and for five minutes to go to the restroom in the course of a four-hour election, and, as the Board explained (JA 24), “[n]o evidence was offered or received that any irregularities occurred during these two times.”<sup>4</sup> Instead of meeting its burden of providing evidence of impropriety, LifeSource speculates as to what conceivably could have happened while the observers were momentarily away, claiming (Br. 22) that “no

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<sup>4</sup> LifeSource’s statement in its brief (Br. 21) that the observers twice were gone for ten minutes is incorrect. As LifeSource’s own election observer stated in her affidavit, the restroom break took only five minutes. (JA 54.)

one can predict with certainty what occurred or did not occur during those absences.” In the same vein, LifeSource posits (Br. 22-23) that “it is unknown” or “[i]t cannot be determined” whether anything improper occurred during those periods. As in *Sawyer Lumber*, 326 NLRB at 1332, without evidence that anyone tampered with the ballot box, LifeSource’s objection is “little more than speculation about the possibility of irregularity,” and does not support overturning the election.<sup>5</sup>

Moreover, LifeSource’s conjecture is not only unfounded, but unrealistic. Its contention that employees may have voted while the observers were away (Br. 23-24) is undermined by the fact that the number of votes cast matched the number of voters that the observers marked off on the voting list. *Sawyer Lumber*, 326 NLRB at 1332; *T.K. Harvin & Sons, Inc.*, 316 NLRB 510, 537 (1995); *Queen Kapiolani Hotel*, 316 NLRB 655, 655, 669 (1995).<sup>6</sup> In addition, LifeSource’s

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<sup>5</sup> Moreover, in the absence of any evidence of tampering, the Board has held that “a Board agent’s failure to tape a ballot box is not objectionable when . . . the ballot box was never left wholly unattended.” *Sawyer Lumber*, 326 NLRB at 1332 n.8; *see also Cadillac Steel Prods. Corp.*, 149 NLRB 1045, 1050-51 (1964) (ballot box left with Board Agent while observers were away), *enforced*, 355 F.2d 191 (9th Cir. 1966). LifeSource cites (Br. 25) *Austill Waxed Paper Co.*, 169 NLRB 1109, 1109-10 (1968), but the ballot box in that case was completely unattended for several minutes. Contrary to LifeSource’s repeated assertion (Br. 8, 20), the Board thus did not “expressly admit[] that proper election procedures were not followed” (emphasis deleted) by noting that the observers took two short breaks.

<sup>6</sup> Because no one voted while the observers were absent, there also was not, as LifeSource contends (Br. 22), any inconsistency with the instruction in the Board’s

suggestion (Br. 22-23) that voters may have been turned away, ballots may have been removed from the box, or impermissible electioneering may have occurred depends upon the unfounded assumption that the Board Agent would have permitted such significant improprieties to occur while she was in the voting area with the ballot box.<sup>7</sup> LifeSource does not raise a “reasonable doubt” as to the validity of the election by positing such unrealistic scenarios. *Physicians & Surgeons Ambulance Serv.*, 2010 WL 4929682, at \*1. In each instance, LifeSource’s objection has not moved the required distance from the merely conceivable to the reasonably possible to warrant overturning the election. *Polymers*, 414 F.2d at 1004; *Sawyer Lumber*, 326 NLRB at 1332.

Finally, LifeSource subverts the well-established burden of proof by repeatedly asserting that the Board had “no basis or evidence” for concluding that LifeSource presented no evidence of impropriety, and that the Board’s decision was “wholly speculative.” (Br. 22, 28.) It is LifeSource’s burden to prove that the election was compromised, not the Board’s burden to prove that it was not. *See*

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Form 722 that observers “[s]ee that each voter deposits the ballot in the ballot box” and “leaves the voting area immediately after depositing the ballot.”

<sup>7</sup> LifeSource further impugns the integrity of the Board Agent by insinuating (Br. 42) that—if the Agent gave evidence in the investigation of LifeSource’s objections—she would have “‘temper[ed]’ her testimony” so as to avoid blame, and thus undermine the investigation out of self-interest. Such personal attacks do not advance LifeSource’s cause.

*Antelope Valley Bus Co.*, 275 F.3d at 1095 (“[I]t is not the Board that bears the burden of demonstrating the validity of an election; rather, it is the party challenging the results of a Board-certified election [that] carries a heavy burden of showing the election’s invalidity.” (internal quotations omitted)); *NLRB v. Schwartz Bros., Inc.*, 475 F.2d 926, 930 (D.C. Cir. 1973) (same). To reject LifeSource’s objections, the Board needed only to show, as it did, the lack of evidence to support LifeSource’s position.

**2. LifeSource Has Not Shown That the Visibility of the *Excelsior* List to Voters Affected the Election**

The Board did not abuse its discretion in rejecting LifeSource’s claim that the election was compromised because voters could see the *Excelsior* list of eligible voters, as that objection is unfounded and misapprehends policy and precedent. As with LifeSource’s first objection, the Board found (JA 25-26) that “there is no evidence” that the list’s visibility “did, or could have, compromised or interfered with the election.” In addition to failing to present evidence that the visibility of the *Excelsior* list affected voters, LifeSource has no support for its contention (Br. 27) that anyone “stud[ied]” or otherwise meaningfully “interact[ed]” with the list. And contrary to LifeSource’s assertion (Br. 27), the Board did not “admit[]” that any such conduct occurred, but noted simply that some voters pointed to their names on the list for the observers, who checked off their names when they came to vote (JA 25).

As the Board found (JA 25), the Board Agent’s actions regarding the *Excelsior* list were “consistent with the procedure outlined in [the Board’s] Casehandling Manual.” Section 11322.1 of the Casehandling Manual provides that election observers sit at the checking table with a voting list “[b]efore them,” on which they mark the name of each employee who votes. NLRB Casehandling Manual, Part II: Representation Proceedings § 11322.1 (2014) (reproduced at page 2 of the Addendum to LifeSource’s Brief). LifeSource’s suggestion (Br. 26-27) that leaving the *Excelsior* list where voters could see it was inconsistent with the Manual is neither correct nor dispositive. LifeSource invokes (Br. 26) Section 11322.1, but that provision does not prohibit leaving the *Excelsior* list in view of voters. In any event, the Manual simply “provides nonbinding guidance,” and is “not intended to be and should not be viewed as binding procedural rules.” *Kwik Care*, 82 F.3d at 1126 (quoting NLRB Casehandling Manual, Part II: Representation Proceedings, “Purpose of the Manual”); *see also Sawyer Lumber*, 326 NLRB at 1332 n.8 (“Mere failure to strictly follow the Manual’s guidelines is not objectionable conduct.”).

LifeSource contends (Br. 28-29) that voters’ viewing the *Excelsior* list was somehow equivalent to keeping a prohibited unofficial list of who had voted. But LifeSource presents no evidence that anyone made such a list. It cites *Sound Refining, Inc.*, 267 NLRB 1301 (1983), but that case does not stand for the

proposition (Br. 29) that an election should be overturned simply because “a list of voters could be kept.” Unlike here, it was uncontested in *Sound Refining* that an unofficial list of who had voted actually *was* kept. 267 NLRB at 1301-02.

Further, even actual list-keeping is not objectionable if no employees knew about the list. *Id.* at 1302 & n.8; *see also Avante at Boca Raton, Inc.*, 323 NLRB 555, 557 (1997) (“List keeping is a basis for a new election *only* when it can be shown or inferred from the circumstances that the employees *knew* that their names were being recorded.” (internal quotations omitted)), *affirmed mem.*, 54 F. App’x 502 (D.C. Cir. 2002). Because LifeSource has not shown that a list was kept, it obviously cannot be shown or inferred that employees knew that a list was kept.<sup>8</sup>

### **3. LifeSource Fails To Show That The Board Agent’s Ten-Minute Absence From the Voting Area Warrants Overturning the Election**

The Board acted well within its discretion in finding LifeSource’s objection to the Board Agent’s restroom break unavailing, as LifeSource failed to show that the Agent’s ten-minute absence from the voting area resulted in any impropriety.

LifeSource claims that the Agent left “without securing the ballots” (Br. 29)—

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<sup>8</sup> LifeSource again ignores its burden when it characterizes the Board’s finding of no evidence that the election was compromised by the placement of the *Excelsior* list as “pure surmise.” (Br. 27.) Immediately after leveling that accusation, LifeSource engages in its own speculation (Br. 27-28) that voters could memorize the eligibility list and coerce employees who had not yet voted. Hypothetical coercion is not grounds for overturning an election. *Sawyer Lumber*, 326 NLRB at 1332.

either by leaving the unmarked ballots in the voting area with the observers or taking the ballots with her while she was away. Yet, under either scenario, LifeSource provided no evidence that anyone improperly handled any unmarked ballots. Indeed, both observers were present in the voting area while the Board Agent was gone, neither observer handled the ballots, and no one else entered the voting area during that period. Moreover, the ballot box was sealed and in the Board Agent's possession for the entire time that she was away. (JA 26, 55.)<sup>9</sup>

Absent evidence that the ballots were handled or tampered with, the Board Agent's leaving the unmarked ballots with the observers would not be grounds for overturning the election. Indeed, the Board frequently has upheld elections under such circumstances. *See Sawyer Lumber*, 326 NLRB at 1332 (Board Agent may have left blank ballots in the voting area with the observers during a restroom break); *Benavent & Fournier, Inc.*, 208 NLRB 636, 636 & n.2 (1974) (Board Agent left unmarked ballots with the observers during a restroom break); *Gen.*

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<sup>9</sup> LifeSource incorrectly asserts (Br. 29) that the Board "admit[ted]" that the ballots "were out of the Board Agent's control and scrutiny" during the Agent's ten-minute restroom break. The Board noted only that LifeSource's election observer "does not recall if the Board Agent took the unmarked ballots with her." (JA 26.) That statement accurately represents the observer's affidavit, in which she stated that she "did not notice [the Board Agent] take the ballots themselves with her." (JA 55.) Similarly, no evidence supports LifeSource's contention (Br. 30) that "no one can account for the whereabouts of the ballots"; the Board simply stated (JA 26) that LifeSource's objection had no merit "[r]egardless of the location of the unmarked ballots."

*Elec. Co.*, 119 NLRB 944, 945 (1957) (blank ballots remained with observers during Board Agent’s absence); *cf. Elizabethtown Gas*, 212 F.3d at 267-68 (Board Agent left ballot box with observers during a restroom break).<sup>10</sup>

LifeSource’s alternative suggestion—that the Board Agent took the unmarked ballots with her—no more supports overturning the election. In that circumstance, LifeSource hypothesizes (Br. 31) that “*if* the ballots left with the Board Agent, and the Board Agent inadvertently set one or more ballots down somewhere, the *possibility* of real or perceived chain voting exists” (emphases added).<sup>11</sup> That theory calls for multiple layers of speculation: (1) the Board Agent may have left the voting area with unmarked ballots; (2) the Board Agent may have misplaced those ballots while away from the voting area; (3) someone may have tampered with those ballots while they were misplaced; and (4) the tampered

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<sup>10</sup> Even though the Board acknowledged (JA 26) that the preferred practice is for the Board Agent to retain custody of unmarked ballots, LifeSource has not shown that any departure from that practice “had a material effect on the election,” *Hard Rock Holdings*, 672 F.3d at 1123, or was anything more than a “realistically harmless . . . infraction[.]” *Serv. Corp. Int’l*, 495 F.3d at 684.

<sup>11</sup> LifeSource makes several oblique references to “chain voting” (Br. 30-31)—a complicated vote-rigging scheme in which a series of voters submit pre-marked ballots. *See generally Farrell-Cheek Steel Co.*, 115 NLRB 926, 927 n.3 (1956). Its unfounded claim that chain voting “possibly occurred” (Br. 30) is insufficient to overturn the election. *See Roadbuilders, Inc. of Tenn.*, 244 NLRB 293, 294 (1979) (explaining that, with “no facts and no supporting evidence,” an employer’s “argument on the possibility for chain voting . . . do[es] not . . . add up to a reasonable likelihood that chain voting occurred” (internal quotations omitted)), *enforced mem.* 633 F.2d 579 (5th Cir. 1980).

ballots may have been cast. Even assuming that the first three hypotheticals occurred, the possibility that the fourth also occurred is undermined by the uncontested facts that the ballot box was never unattended and the number of votes cast matched the number of voters that the observers marked off on the *Excelsior* list. *Sawyer Lumber*, 326 NLRB at 1332; *Queen Kapiolani Hotel*, 316 NLRB at 655, 669. Like LifeSource’s speculations regarding the ballot box and the *Excelsior* list, its final objection is doomed by lack of evidence.<sup>12</sup>

**4. LifeSource’s Insubstantial Objections No More Warrant a New Election in the Aggregate or Because the Election Was Close**

LifeSource attempts to distract from the lack of evidence supporting any of its objections by averring that those otherwise insubstantial claims transform into grounds for overturning the election in their “combined effect” (Br. 32) or because the vote tally was close (Br. 39-40). Without substantive support for any of the three objections, neither proposition has force.

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<sup>12</sup> LifeSource improperly attempts (Br. 29-30) to enlarge the scope of its third objection on appeal by questioning whether the ballot box was protected or the eligibility list was improperly marked during the Board Agent’s absence. Neither argument is properly before the Court, as LifeSource’s third objection before the Board in the representation case (JA 20) addressed only whether the ballots were secure. *See Pace Univ. v. NLRB*, 514 F.3d 19, 24 (D.C. Cir. 2008) (explaining that “a representation issue not previously litigated is not properly before the court upon a petition for review of an order in the unfair labor practice proceeding”); *see also United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (noting that arguments should be raised before an agency “at the time appropriate under its practice”).

As the Court has cautioned, a cumulative-impact argument “may not be used to turn a number of insubstantial objections to an election into a serious challenge.” *Amalgamated Clothing & Textile Workers*, 736 F.2d at 1569 (internal quotations omitted); *accord Case Farms of North Carolina, Inc. v. NLRB*, 128 F.3d 841, 849 (4th Cir. 1997) (noting that, when “individual objections . . . [a]re without merit, there is no reason to conclude that they compel a different result when considered as a whole”). For the reasons detailed above, LifeSource’s three objections are insubstantial and wholly insufficient to overturn an election; they do not gain substance when considered in the aggregate.

Indeed, LifeSource’s objections regarding the ballot box and the ballots are similar to four of the seven objections that the Board rejected in *Sawyer Lumber*. 326 NLRB at 1331-33. If those objections were insufficient to overturn an election when combined with three other objections, they are certainly insufficient by themselves. LifeSource relies (Br. 37-38) on *Fresenius USA Manufacturing, Inc.*, 352 NLRB 679 (2008), but that case involved quantitatively and qualitatively more significant conduct—the Board Agent twice misidentified ballots, refused to allow the observers to examine the ballots during the vote count, and took unsecured ballots home with him over the weekend, all of which raised questions as to

whether the ballots were counted properly. *Id.* at 679-82.<sup>13</sup> And unlike here, the objections that LifeSource references (Br. 32) from *Swing Staging, Inc. v. NLRB*, 994 F.2d 859, 862-63 (D.C. Cir. 1993), contained multiple concrete allegations of threats and sabotage.

LifeSource also repeatedly invokes (Br. 19, 27, 39-41) the closeness of the election, but “there is . . . no presumption against the validity of a closely contested election.” *Elizabethtown Gas*, 212 F.3d at 268; *see also NLRB v. Eskimo Radiator Mfg. Co.*, 688 F.2d 1315, 1319-20 (9th Cir. 1982) (“The closeness of the vote is simply one factor the board and courts consider . . . . It is not the controlling factor.”). Indeed, the Court in *Amalgamated Clothing & Textile Workers*, 736 F.2d at 1569, upheld against multiple objections an election in which “a one-vote swing . . . could have changed the results.” And even if objectionable conduct may merit heightened scrutiny in the context of a close election, insubstantial objections remain insubstantial. Where, as here, there is no evidence that any impropriety occurred in the first place, the closeness of the election is immaterial. The Board and courts repeatedly have upheld elections decided by a one or two-vote margin under such circumstances. *Amalgamated Clothing & Textile Workers*, 736 F.2d at 1569; *NLRB v. Southern Metal Serv., Inc.*, 606 F.2d 512, 515 (5th Cir. 1979); *CSC*

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<sup>13</sup> *Fresenius USA* was decided by a Board panel that had only two members, and thus lacked a quorum. *See New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 688 (2010).

*Oil Co. v. NLRB*, 549 F.2d 399, 400 (6th Cir. 1977); *Sawyer Lumber*, 326 NLRB at 1331; *see also NLRB v. WFMT*, 997 F.2d 269, 279-80 (7th Cir. 1993) (upholding an election with a one-vote margin despite “a disturbing pattern of activity permitted by the Board representative during the election”).<sup>14</sup> LifeSource thus cannot rely on the vote tally to evade its burden of providing evidentiary support for its objections.<sup>15</sup>

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<sup>14</sup> Unlike here, many of the cases that LifeSource cites (Br. 39-40) involved concrete instances of active misconduct, and the issue that warranted closer scrutiny given the close election was whether that misconduct affected the election. *See Trimm Assocs., Inc. v. NLRB*, 351 F.3d 99, 101, 104 (3d Cir. 2003) (prolonged conversation with voters by alleged union agents during the election); *North of Market Senior Servs., Inc. v. NLRB*, 204 F.3d 1163, 1166-67, 1169-70 (D.C. Cir. 2000) (union agents interfered with employer’s property rights and openly disagreed with employer immediately before the election); *RJR Archer, Inc.*, 274 NLRB 335, 335-36 (1985) (threats of violence).

<sup>15</sup> LifeSource’s process arguments are no more availing. It mischaracterizes the Board’s decision by asserting (Br. 13, 33) that the Board “rubber-stamp[ed]” the Regional Director’s report; rather, the Board “considered de novo [LifeSource’s] objections” and concluded that LifeSource “failed to present evidence that would support overturning the election.” (JA 8.) Nor has LifeSource offered any evidence to overcome the “strong presumption of regularity [that] supports the inference that when administrative officials purport to decide weighty issues within their domain they have conscientiously considered the issues.” *Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 460 (D.C. Cir. 1967). In any event, the rubber-stamp accusation is just a repackaged variant of LifeSource’s argument on the merits. Because the Regional Director’s recommendation to reject LifeSource’s insubstantial objections was correct, the Board appropriately adopted that recommendation; no additional analysis was necessary.

**C. LifeSource Failed To Satisfy Its Burden of Showing That It Was Entitled to an Evidentiary Hearing**

A party seeking a hearing on election objections faces a similarly demanding standard as for overturning an election. As the Court has made clear, “there is no right to a post-election hearing in a representation proceeding.” *Amalgamated Clothing Workers*, 424 F.2d at 828. Instead, the objecting party must produce evidence that “raises a substantial and material issue[] of fact sufficient to support a prima facie showing of objectionable conduct.” *AOTOP, LLC v. NLRB*, 331 F.3d 100, 103 (D.C. Cir. 2003) (internal quotations omitted); *see also* 29 C.F.R. § 102.69(d) (2012). Whether the objecting party has made a prima facie showing depends upon the “substantive criteria for a claim of election misconduct,” *AOTOP*, 331 F.3d at 103—here, whether Board Agent conduct raised “reasonable doubt as to the fairness and validity of the election,” *Physicians & Surgeons Ambulance Serv.*, 2010 WL 4929682, at \*1. The Board’s standard “is designed to resolve expeditiously questions preliminary to the establishment of the bargaining relationship and to preclude the opportunity for protracted delay of certification of the results of representation elections.” *Amalgamated Clothing Workers*, 424 F.2d at 828 (internal quotations omitted). If every objection resulted in a hearing, employee choice rarely would be effectuated in a timely manner.

The objecting party’s burden “is not met by nebulous and declaratory assertions, wholly unspecified, but only by specific evidence of specific events

from or about specific people.” *Id.* (internal quotations omitted); *see also Ms. Desserts, Inc.*, 299 NLRB 236, 238 (1990) (“[A] speculative contention does not raise substantial and material factual issues requiring a hearing.” (internal quotations omitted)). If the party raises no such specific issues, the Board may rule on the objections without holding a hearing. *See, e.g., New York Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1077 (D.C. Cir. 2007) (finding that employer’s “paltry evidentiary offering” of a single affidavit and proffer of one employee’s testimony was insufficient to warrant a hearing on claims of improper electioneering); *AOTOP*, 331 F.3d at 105 (declining to hold a hearing on employer’s claims of coercion by a union agent when the employer “produced nothing to suggest [the agent] had any authority over any of her coworkers such that they might reasonably fear job-related reprisal if they voted against the Union”).

Thus, although an objecting party need not prove its case before receiving a hearing, it must meet the threshold of providing specific evidence that it has a case that could be proved. An objecting party without evidence “is not entitled to a hearing to engage in a fishing expedition for possible election improprieties,” *NLRB v. Davenport Lutheran Home*, 244 F.3d 660, 663 (8th Cir. 2001), or “just because it claims that the election was tainted [or] . . . it says it could really pin

things down if it were granted a hearing,” *NLRB v. AmeriCold Logistics, Inc.*, 214 F.3d 935, 939 (7th Cir. 2000).

The Board did not abuse its discretion by not granting LifeSource a hearing or compulsory process on its objections, as LifeSource failed to meet its burden of showing that it was entitled to such mechanisms. LifeSource’s argument for a hearing rests on conjecture as to what *could* have happened when the observers left the voting area, what *might* have happened to the ballots when the Board Agent went to the restroom, and the *possibility* of unlawful list-keeping. Merely speculating that something may have happened does not “raise[] a substantial and material issue[] of fact,” *AOTOP*, 331 F.3d at 103, or point to “specific events from or about specific people,” *Amalgamated Clothing Workers*, 424 F.2d at 828. Because its conjecture as to possible impropriety was not reasonable, LifeSource did not make a prima facie case that “reasonable doubt” existed as to the validity of the election. *Physicians & Surgeons Ambulance Serv.*, 2010 WL 4929682, at \*1.

LifeSource’s contention (Br. 41) that the Board must hold a hearing “to resolve substantial and material factual issues particularly where the factual issues turn on credibility” is beside the point, as no such issues exist in this case. Because the Board proceeded on the understanding that, as LifeSource alleged, the ballot box was unsealed while the observers were away, voters could view the *Excelsior* list, and the Board Agent did not take the unmarked ballots with her to the

restroom, no issues of fact existed for resolution in a hearing. And speculation as to the possible results of those actions is not a “substantial” issue, as LifeSource’s claims contain no substance. Nor did the Board need to make any credibility determinations to rule on LifeSource’s objections, as no one claimed that LifeSource’s hypothetical vote tampering or coercion actually occurred. By contrast, in *Erie Coke & Chemical Co.*, 261 NLRB 25, 25 (1982)—a case on which LifeSource relies (Br. 41)—the Board ordered a hearing to resolve “inconsistent statements” regarding the circumstances of a violent threat to a voter. LifeSource also cites (Br. 42-43) *Swing Staging*, 994 F.2d at 862-63, and *NLRB v. Service American Corp.*, 841 F.2d 191, 194 (7th Cir. 1988), but the objecting parties in both cases made proffers, supported by affidavits, of specific threats by alleged union agents; the veracity of that evidence was at stake. LifeSource’s objections raise no such issues, and no hearing or compulsory process was warranted.

Finally, LifeSource complains (Br. 35, 43) that it needed a hearing to produce evidence, but it largely ignores the one piece of evidence that it did produce—an affidavit that proves nothing about the alleged improprieties. (JA 54-55.) LifeSource had an opportunity to provide relevant evidence, but did not do so. And although its argument for a hearing relies on the assumption (Br. 42-43) that the Regional Director spoke with the Board Agent as part of his investigation,

nothing in the Regional Director's report relies on information that could have come only from the Agent. Moreover, LifeSource's failure to produce any evidence of electoral taint is not grounds for it to have a hearing in order to search for such evidence. *Davenport Lutheran Home*, 244 F.3d at 663; *AmeriCold Logistics*, 214 F.3d at 939. Indeed, under LifeSource's position, the Board essentially would have to hold a hearing every time a party files objections, even when the party proffers little to no evidence. Neither precedent nor policy supports such a rule. *Amalgamated Clothing Workers*, 424 F.2d at 828.

**D. The Passage of Time and the Possibility of Employee Turnover Are Not Grounds for Overturning the Election**

LifeSource's last-resort argument (Br. 45-49) that the Court should overturn the election based on the passage of time and the possibility of employee turnover is misplaced. The primary thrust of LifeSource's argument (Br. 45-47) is that the passage of time since the election could prevent it from receiving a fair hearing on its objections. But the potential impact on a hearing is a relevant consideration only if a hearing is warranted. LifeSource has not shown that it was entitled to a hearing in 2012, and it is no more entitled to one now.<sup>16</sup>

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<sup>16</sup> Even in cases where it determined that one was warranted, the Court has remanded for a hearing several years after the election. *See, e.g., Swing Staging*, 994 F.2d at 861 (nearly three years between election and remand). LifeSource's contention that a fair hearing would be impossible is thus inconsistent with the Court's precedent.

Nor, as LifeSource admits (Br. 45), is the passage of time independent grounds for a new election. Courts regularly uphold Board bargaining orders that issued multiple years after elections. *See, e.g., Pearson Educ., Inc. v. NLRB*, 373 F.3d 127, 128-30 (D.C. Cir. 2004) (four years; almost seven years between election and Court's enforcement of the bargaining order); *Nat'l Posters, Inc. v. NLRB*, 885 F.2d 175, 176-77 (4th Cir. 1989) (six and a half years); *NLRB v. Star Color Plate Serv.*, 843 F.2d 1507, 1507-08 (2d Cir. 1988) (five years). Only "rarely and in extreme cases" will courts declining to enforce such orders consider the passage of time. *Nat'l Posters*, 885 F.2d at 180.

Moreover, in none of the cases referencing time and employee turnover that LifeSource cites (Br. 46) were such factors the grounds for setting aside the election. Instead, the court had already decided to rule against the Board on the merits, either by sustaining election objections or concluding that the Board should have held a hearing. It considered evidence of significant time or turnover since the election only in the context of deciding whether to remand to the Board for a hearing or simply to deny enforcement. *See Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1094-95 (7th Cir. 1984); *NLRB v. Katz*, 701 F.2d 703, 708-09 (7th Cir. 1983); *NLRB v. Conn. Foundry Co.*, 688 F.2d 871, 879-81 (2d Cir. 1982);

*NLRB v. Nixon Gear, Inc.*, 649 F.2d 906, 910-14 (2d Cir. 1981).<sup>17</sup> Because LifeSource’s objections are insubstantial, the Court does not face that choice here. *Cf. Star Color Plate Serv.*, 843 F.2d at 1509 (explaining that time and turnover could be relevant in cases where “our only options were remanding to the Board . . . or outright denial of enforcement,” but not where there was “the option of enforcing the bargaining order”).

LifeSource’s bare assertion (Br. 47) that the composition of the bargaining unit “has certainly changed” since the election is likewise unavailing. Even if LifeSource had evidence to support that claim, the Court has made clear that “it is well settled that post-election turnover is an insufficient ground to set aside an election.” *Pearson Educ.*, 373 F.3d at 132-33 (internal quotations omitted). In addition, LifeSource’s suggestion (Br. 45) that employees must “participate in a new election to fully exercise their Section 7 rights” ignores the rights of the employees who voted for Local 881 and have yet to receive any representation.

Finally, the time between the election and the Board’s Order was not, as LifeSource asserts (Br. 45-46), “unjustifiable.” Much of that time was due to litigation regarding the validity of several recess appointments to the Board—a high-order constitutional question of first impression—and to the effect of the

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<sup>17</sup> LifeSource also cites *National Posters*, 885 F.2d at 180-81, but the court in that case enforced a bargaining order and refused to hold a hearing on employee turnover when the employer had not raised a question concerning representation.

Supreme Court's decision that the appointments were invalid. *See Noel Canning*, 134 S. Ct. at 2556-57. It was not the result of nonfeasance or malfeasance by the Board. *Cf. Continental Web Press*, 742 F.2d at 1094 (Board's loss of relevant exhibits contributed to delay). Any delay that resulted from those circumstances is not grounds for overturning an otherwise valid election and punishing the employees who voted for union representation. Ultimately, LifeSource's delay argument is just another attempt to distract from the lack of evidence in support of its objections and to avoid its obligation to its employees and Local 881.

In sum, LifeSource attempted to deprive its employees of their chosen bargaining representative by pursuing unsubstantiated objections based on unrealistic speculation without even making an effort to provide supporting evidence. The Board's refusal to countenance such tactics was well within its broad discretion regarding representation proceedings. Indeed, "[t]o set aside elections based on such trifles as this would effectively disenfranchise many voters," *Queen Kapiolani Hotel*, 316 NLRB at 669, and would undermine the Act's fundamental principle of effectuating employee choice.

## CONCLUSION

The Board respectfully requests that the Court deny LifeSource's petition for review and enforce the Board's Order in full.

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NATIONAL LABOR RELATIONS BOARD

November 2015

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

LIFESOURCE	)	
	)	Nos. 15-1178 & 15-1201
Petitioner/Cross-Respondent	)	
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case No.
	)	13-CA-091617
Respondent/Cross-Petitioner	)	
	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,871 words of proportionally spaced, 14-point type, and the word-processing system used was Microsoft Word 2010.

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Dated at Washington, DC  
this 23<sup>rd</sup> day of November, 2015

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 23, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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

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