

Nos. 16-1350, 16-1399

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

PRUITTHEALTH-VIRGINIA PARK, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

USHA DHEENAN
Supervisory Attorney

MISCHA K. BAUERMEISTER
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2948
(202) 273-1776

RICHARD F. GRIFFIN, JR.

General Counsel

JENNIFER ABRUZZO

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

National Labor Relations Board

representation proceeding are contained in an unpublished Hearing Officer's Report issued on September 25, 2015; an unpublished Regional Director's Decision and Certification of Representative issued on October 23, 2015; and an unpublished Board order issued January 15, 2016, denying review of the Regional Director's Decision and Certification of Representative.

C. Related Cases

This case has not previously been before this Court. The Board is not aware of any related cases either pending or about to be presented before this or any other court.

/s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1015 Half Street, SE

Washington, DC 20570

(202) 273-2960

Dated at Washington, D.C.
this 26th day of May 2017

TABLE OF CONTENTS

Headings	Page(s)
Statement of jurisdiction	1
Relevant statutory provisions.....	3
Statement of the issue presented	3
Statement of the case.....	3
I. The representation proceeding.....	4
A. Petition and election	4
B. Post-election objections and hearing.....	5
1. The Facility	5
2. Alleged objectionable blocking	6
3. Alleged objectionable threats.....	9
4. Alleged objectionable photography or videotaping.....	9
C. The Hearing Officer’s Report and Regional Director’s Decision.....	10
D. Board’s Decision denying review	11
II. The unfair labor practice proceeding.....	11
Summary of argument.....	13
Argument.....	14
The Board acted within its wide discretion in overruling Pruitt’s election objections and certifying the Union, and therefore properly found that Pruitt violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.....	14
A. Applicable principles.....	15

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
1. A party seeking to overturn an election must prove prejudice to the fairness of the election with specific evidence of misconduct and interference with employees' free choice	15
2. Section 10(e) of the Act deprives the Court of jurisdiction to consider arguments not raised to the Board	16
B. Standard of review	18
C. The Board did not abuse its wide discretion in overruling Pruitt's objections	20
1. Pruitt failed to prove that the Union engaged in objectionable conduct by blocking ingress to or egress from the Facility	20
2. Pruitt failed to prove unlawful threats warranting a new election	27
a. Pruitt failed to prove an objectionable threat to Thornton ..	28
b. Pruitt failed to prove an objectionable threat to Merriweather	35
3. Section 10(e) of the Act bars the Court from reviewing Pruitt's previously abandoned objection based on alleged photography, videotaping, or surveillance of employees.....	39
4. The closeness of the election and the "aggregate impact" of Pruitt's meritless objections do not warrant a rerun	41
Conclusion	45

TABLE OF AUTHORITIES

Cases:	Page(s)
<i>800 River Rd. Operating Co. v. NLRB</i> , 846 F.3d 378 (D.C. Cir. 2017).....	19
* <i>Am. Wholesalers, Inc.</i> , 218 NLRB 292 (1975), <i>enforced</i> , 546 F.2d 574 (4th Cir. 1976)	30–31
* <i>Amalgamated Clothing & Textile Workers Union</i> , 736 F.2d 1559 (D.C. Cir. 1984).....	16, 18, 19, 41, 43
<i>Amalgamated Clothing Workers of Am. v. NLRB</i> , 424 F.2d 818 (D.C. Cir. 1970).....	15
<i>Baja’s Place, Inc.</i> , 268 NLRB 868 (1984)	33
<i>Boire v. Greyhound Corp.</i> , 376 U.S. 473 (1964).....	2
<i>Bon Appetit Mgmt. Co.</i> , 334 NLRB 1042 (2001)	29, 30
<i>Burgreen Contracting Co.</i> , 195 NLRB 1067 (1972).....	26–27
* <i>C.J. Krehbiel Co. v. NLRB</i> , 844 F.2d 880 (D.C. Cir. 1988).....	18, 19, 20
<i>Cadbury Beverages, Inc. v. NLRB</i> , 160 F.3d 24 (D.C. Cir. 1998).....	19–20
<i>Cedars-Sinai</i> , 342 NLRB 596 (2004)	43

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
* <i>Chrill Care, Inc.</i> , 340 NLRB 1016 (2003).....	21, 23, 26
* <i>Comcast Cablevision of New Haven, Inc.</i> , 325 NLRB 833 (1998).....	21, 23, 26
<i>Elastic Stop Nut Div. of Harvard Indus., Inc. v. NLRB</i> , 921 F.2d 1275 (D.C. Cir. 1990).....	17
<i>Electra Food Machinery</i> , 279 NLRB 279 (1986).....	38
<i>Evergreen Am. Corp. v. NLRB</i> , 362 F.3d 827 (D.C. Cir. 2004).....	19
<i>Exxon Chem. Co. v. NLRB</i> , 386 F.3d 1160 (D.C. Cir. 2004).....	14
<i>Family Serv. Agency v. NLRB</i> , 163 F.3d 1369 (D.C. Cir. 1999).....	16, 25, 28, 35, 39
<i>Firestone Textiles Co.</i> , 244 NLRB 168 (1979).....	21
<i>Freund Baking Co.</i> , 330 NLRB 17 (1999).....	3
<i>Hollingsworth Mgmt. Serv.</i> , 342 NLRB 556 (2004).....	43–44
<i>Interstate Cigar Co.</i> , 256 NLRB 496 (1981).....	21, 29

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>John M. Horn Lumber Co. v. NLRB</i> , 859 F.2d 1242 (1988)	41–42
* <i>Lamar Advertising of Janesville</i> , 340 NLRB 979 (2003)	31
<i>Lyon’s Restaurants</i> , 234 NLRB 178 (1978)	33
* <i>Majestic Star Casino, LLC v. NLRB</i> , 373 F.3d 1345 (D.C. Cir. 2004).....	42–43
<i>ManorCare of Kingston, PA, LLC v. NLRB</i> , 823 F.3d 81 (D.C. Cir. 2016).....	38, 43
<i>Matson Terminals, Inc.</i> , 361 NLRB No. 50 (Sept. 26, 2014), <i>enforced</i> , 637 F. App’x 609 (D.C. Cir. Feb. 26, 2016).....	17
<i>Meat Cutters (Cayey Indus.)</i> , 184 NLRB 538 (1970)	26
<i>Metal Polishers, Local 67</i> , 200 NLRB 335 (1972)	27
* <i>NLRB v. Bostik Div., USM Corp.</i> , 517 F.2d 971 (6th Cir. 1975)	30
* <i>NLRB v. Downtown Bid Servs. Corp.</i> , 682 F.3d 109 (D.C. Cir. 2012).....	15, 36, 42
* <i>NLRB v. Enter. Leasing Co. Se., LLC</i> , 722 F.3d 609 (4th Cir. 2013)	16, 31, 34, 39

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>NLRB v. Mar Salle, Inc.</i> , 425 F.2d 566 (D.C. Cir. 1970).....	18
<i>NLRB v. Sheet Metal Workers' Int'l Assoc., Local Union No. 19</i> , 154 F.3d 137 (3d Cir. 1998)	26
<i>NLRB v. United Mine Workers</i> , 429 F.2d 141 (3d Cir. 1970)	26
<i>NLRB v. Wagner Elec. Corp.</i> , 586 F.2d 1074 (5th Cir. 1978)	17
<i>Nova Se. Univ. v. NLRB</i> , 807 F.3d 308 (D.C. Cir. 2015).....	18
<i>Orr-Sysco Food Services</i> , 338 NLRB 614 (2002)	37–38, 43
<i>Picoma Indus.</i> , 296 NLRB 498 (1989)	38
<i>Randell Warehouse of Arizona</i> , 347 NLRB 591 (2006)	40
<i>RJR Archer, Inc.</i> , 274 NLRB 335 (1985)	38
<i>Service Employees Local 525(Gen. Maint. Co.)</i> , 329 NLRB 638 (1999), <i>enforced</i> , 52 F. App'x 357 (9th Cir. 2002)	26
<i>Shopmen's Local Union No. 455</i> , 243 NLRB 340 (1979)	27

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Smithers Tire & Auto. Testing of Texas, Inc.</i> , 308 NLRB 72 (1992).....	33–34
<i>Sonoco of Puerto Rico</i> , 210 NLRB 493 (1974).....	38
* <i>Spectrum Health-Kent Cmty. Campus v. NLRB</i> , 647 F.3d 341 (D.C. Cir. 2011).....	17
<i>Stannah Stairlifts, Inc.</i> , 325 NLRB 572 (1998).....	38, 42
<i>Steak House Meat Co.</i> , 206 NLRB 28 (1973).....	38
<i>Terrace Gardens Plaza, Inc. v. NLRB</i> , 91 F.3d 222 (D.C. Cir. 1996).....	2
<i>United Food & Commercial Workers Union Local 204 v. NLRB</i> , 506 F.3d 1078 (D.C. Cir. 2007).....	19
<i>United States v. L.A. Tucker Truck Lines, Inc.</i> , 344 U.S. 33 (1952).....	17
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	19
* <i>Wayneview Care Ctr. v. NLRB</i> , 664 F.3d 341 (D.C. Cir. 2011).....	20, 25, 32, 37
<i>Westwood Horizons Hotel</i> , 270 NLRB 802 (1984).....	36, 38

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Statutes:	Page(s)
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157)	5, 40, 41
Section 8(a)(1) (29 U.S.C. § 158(a)(1))	3, 12, 14
Section 8(a)(5) (29 U.S.C. § 158(a)(5))	3, 12, 14
Section 9(c) (29 U.S.C. § 159(c))	3
Section 9(d) (29 U.S.C. § 159(d))	2, 3
Section 10(a) (29 U.S.C. § 160(a))	1, 2
Section 10(e) (29 U.S.C. § 160(e))	2, 16, 17, 22, 25, 32, 37, 40
Section 10(f) (29 U.S.C. § 160(f))	2
 Regulations:	
*29 C.F.R. § 102.67(g)	17

* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

Act	National Labor Relations Act (29 U.S.C. §§ 151 et seq.)
Board	National Labor Relations Board
Br.	Opening proof brief of Petitioner/Cross-Respondent PruittHealth-Virginia Park, LLC
Pruitt	PruittHealth-Virginia Park, LLC
NLRB	National Labor Relations Board
Union	Retail, Wholesale and Department Store Union/UFCW Southeast Council

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

Nos. 16-1350, 16-1399

PRUITTHEALTH-VIRGINIA PARK, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of PruittHealth-Virginia Park, LLC (“Pruitt”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of an Order issued by the Board on September 22, 2016, and reported at 364 NLRB No. 125. The Board had jurisdiction over the proceedings below under Section 10(a) of the National Labor

Relations Act (“the Act”), which empowers the Board to prevent unfair labor practices. 29 U.S.C. § 160(a). The Board’s Order is final under Section 10(e) of the Act. *Id.* § 160(e). Pruitt’s petition for review and the Board’s cross-application for enforcement were timely, as the Act places no time limit on those filings. This Court has jurisdiction over the petition and cross-application pursuant to Section 10(e) and (f) of the Act, *id.* § 160(e), (f), which allows an aggrieved party to obtain review of a Board order in this Circuit, and allows the Board to cross-apply for enforcement.

The Board’s Order is based, in part, on findings made in an underlying representation (election) proceeding, *Pruithhealth-Virginia Park, LLC*, Board Case No. 10-RC-156997. The petitioner before the Board in that proceeding was the Retail, Wholesale and Department Store Union/UFCW Southeast Council (“the Union”). The Board held an election, in which the Union prevailed, and, following a subsequent hearing, overruled objections by Pruitt to the election, finding no misconduct requiring that the election results be set aside. Pursuant to Section 9(d) of the Act, 29 U.S.C. § 159(d), the record before this Court includes the record in that proceeding. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477–79 (1964); *Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222, 225 (D.C. Cir. 1996). The Court may review the Board’s actions in the representation proceeding for the limited purpose of deciding whether to enforce, modify, or set aside the Board’s

Order in whole or in part. 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act, *id.* § 159(c), to resume processing the representation case in a manner consistent with the ruling of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999) (collecting cases).

RELEVANT STATUTORY PROVISIONS

Relevant sections of the Act and the Board's Rules and Regulations are contained in the Statutory Addendum to this brief.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board acted within its wide discretion in overruling Pruitt's election objections and certifying the Union, and therefore properly found that Pruitt violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.

STATEMENT OF THE CASE

The Board seeks enforcement of its Order finding that Pruitt violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5), (1), by refusing to recognize and bargain with the Union as the collective-bargaining representative of a unit of Pruitt employees. Pruitt does not dispute that it is refusing to bargain with the Union, but claims the Union was not properly certified as the employees' bargaining representative because the Board erred in overruling certain election objections. The relevant election objections alleged that (1) union demonstrators objectionably blocked ingress to and egress from Pruitt's premises; (2) two

employees were subjected to objectionable threats of physical violence; and (3) union agents objectionably photographed, videotaped, or engaged in surveillance of employees entering and exiting Pruitt's property. The facts and procedural history relevant to these contentions are set forth below.

I. THE REPRESENTATION PROCEEDING

A. Petition and Election

Pruitt operates a nursing home ("the Facility") located off of Briarcliff Road in Atlanta, Georgia. (JA 238; JA 27, 192.)¹ On July 30, 2015, the Union filed a petition with the Board, seeking to represent an 84-person bargaining unit of certified nursing assistants, restorative aides, activity assistants, medical record clerks, and service and maintenance employees at the Facility. (JA 234; JA 300.) The Board's regional office conducted an election on August 20, 2015, in which a majority of the valid ballots were cast in favor of representation by the Union: 35 ballots were cast for representation; 31 ballots were cast against. (JA 234–35; JA 301.) There were 2 non-determinative challenged ballots. (JA 235; JA 301.)

¹ Record references in this final brief are to the Joint Appendix ("JA") filed by Pruitt on May 22, 2017. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." refers to Pruitt's opening proof brief filed on January 30, 2017.

B. Post-Election Objections and Hearing

After the election, Pruitt filed objections alleging that certain conduct affected the election results. In the objections that Pruitt raises before the Court, Pruitt alleged that the Union “destroyed the laboratory conditions necessary for a free and fair election by” (1) handbilling and demonstrating during the week prior to the election in a manner specifically designed to bully, threaten, and intimidate employees in the exercise of their Section 7 rights, including threats of bodily harm to employees; (2) precluding ingress to and egress from the Facility by blocking vehicles of Pruitt employees as they attempted to report for work, blocking vehicles seeking to leave the premises, and precluding employees from accessing the nearby public bus stop to return home; (3) threatening physical violence upon individuals choosing not to vote for the Union; and (4) photographing Pruitt employees entering and exiting the premises. (JA 237–38; JA 230–31.) After an investigation, the Board’s Acting Regional Director for Region 10 ordered a hearing on Pruitt’s objections. (JA 226–28.) A hearing was held before a Hearing Officer on September 16, 2015 (JA 235), in which the Hearing Officer found the following pertinent facts.

1. The Facility

The Facility has two entrances, separated from each other by 30 to 50 yards. (JA 238; JA 136, 154, 216.) The “North” entrance, which is around twenty feet

wide and flanked by a grassy area that runs parallel to Briarcliff Road, is a shorter distance to parking at the rear of the Facility in comparison to the “South” entrance. (JA 238; JA 136, 140–42, 154, 216.) A sidewalk runs the length of Briarcliff Road. (JA 238; JA 53, 56.) A public bus stop is in front of the Facility on Briarcliff Road between the two entrances. (JA 238; JA 53, 216.)

2. Alleged Objectionable Blocking

In the week before the election, on August 13 and 19, 2015, the Union conducted demonstrations from approximately 2:30 pm to 4:00 pm. (JA 238; JA 107, 139, 144, 147.) Around 15 to 20 individuals were present during the demonstrations, including union representative Sandra Williams, a union organizer, and, at least on August 13, the Union’s president. (JA 238 & n.6.; JA 84, 134, 139, 145–46.) Almost all the other demonstrators, who supported the Union’s organizing drive, were individuals from other labor organizations and community groups, or union members employed elsewhere. (JA 238; JA 139–40, 149–50.) It is unclear whether any Pruitt employees participated. (JA 238 & n.7.)

Most demonstrators patrolled the area between Pruitt’s two entrances, carrying pro-union signs. (JA 238; JA 140–42, 145–47.) Union representatives made pro-union statements through a bullhorn. (JA 238; JA 40, 157.) Pruitt called the police each day, but there is no evidence that the police made any citations or arrests. (JA 238; JA 190.)

Individual union demonstrators approached some Pruitt employees' cars from the side to hand them a flyer and peacefully persuade them to support the Union. (JA 241.) The employees so approached include Yolando Thornton, Andrew Johnson, and Erica Merriweather. On August 13, a male demonstrator approached Thornton's driver side window from the curb and handed her a pro-union flyer when she was turning right into the North entrance. (JA 239; JA 19, 31–32, 35–37.) Thornton did not take the flyer, instructed the man to get out of the way, and proceeded into the driveway. (JA 239; JA 31.) The demonstrator did not say anything to Thornton, and the exchange lasted no more than 60 seconds. (JA 239; JA 32.) The man did not have to cross in front of Thornton's car to reach her window. (JA 239; JA 31, 35.)

A male demonstrator similarly approached employee Johnson on August 19. When Johnson was making a right turn into the North entrance, the demonstrator approached his driver side window from the curb, handed him a pro-union flyer and told him to vote for the Union. (JA 239–40; JA 61–62, 67, 72, 216.) The demonstrator did not walk in front of Johnson's car. (JA 240; JA 71–72, 216.) Johnson just "gave him a look" and drove into the parking lot. (JA 240; JA 62, 72.) This exchange lasted no more than a few seconds. (JA 240; JA 63, 68.)

A demonstrator approached employee Merriweather's driver side window as Merriweather turned into the Facility's entrance on both August 13 and 19. (JA

240; JA 118, 122.) On the earlier occasion, Merriweather lowered her window a smidgeon, and the demonstrator began speaking to her about holiday pay and vacation. (JA 240; JA 118.) After a minute or two, Merriweather blew her horn, the demonstrator moved out of the way, and Merriweather proceeded into the parking lot. (JA 240; JA 118.) On August 19, demonstrators were on both sides of the North entrance. (JA 240; JA 120.) When Merriweather entered, one of the demonstrators walked along the side of her car and placed a flyer on the front. (JA 240; JA 122–23.) She was driving slowly enough for this to happen. (JA 240; JA 123.)

Pruitt’s Area Vice President (JA 189), Suzanne Gerhardt, and another employee (JA 38), Jan Marie Benn, encountered the Union’s demonstrations while leaving the Facility. (JA 240.) A demonstrator placed himself in Gerhardt’s line of sight of on-coming traffic as she attempted to leave the South entrance by car on either August 13 or 19. (JA 240; JA 192–93.) The demonstrator did not block the egress of Gerhardt’s vehicle. (JA 240; JA 192–93.)

During the August 19 demonstration, employee Benn missed her bus home from the Facility. Benn was waiting for her bus at the stop in front of the Facility, and there was a “swarm” of demonstrators. (JA 240; JA 40.) The demonstrators were chanting, “[S]hame on Pruitt[,]” and a bullhorn was used. (JA 240; JA 40.) Benn’s bus passed the bus stop without stopping. (JA 240; JA 40.) Benn then got

a ride home from a co-worker. (JA 240; JA 40.) Benn had not been impeded from reaching the bus stop. (JA 242; JA 51.)

3. Alleged Objectionable Threats

Thornton testified that, as she entered the Facility on August 13, she heard a voice from the crowd of demonstrators say the Union will “fuck you up if you don’t vote yes[.]” (JA 239; JA 25, 34.) Her relevant testimony was first elicited from a leading question. (JA 239; JA 21.) Thornton did not see who made the alleged statement. (JA 242; JA 34.)

While clocking in for a shift in the week leading up to the election, Merriweather overheard three or four co-workers, including employee Deidre Ward, talking about the Union. (JA 243; JA 98, 101–02, 115.) They were talking amongst themselves, rather than with Merriweather, who was standing about twenty feet away. (JA 243; JA 115–16.) Employees in the group said that people who were against the Union did not know what was going on. (JA 243; JA 114.) According to Merriweather, the employees may also have said the Union will “get fucked up.” (JA 243 & n.12; JA 88, 188.)

4. Alleged Objectionable Photography or Videotaping

On August 13 or 19, Merriweather sat on the Facility’s porch, which faces Briarcliff Road, and observed the union demonstration for a few minutes. (JA 245; JA 106–10.) Also on the porch were Pruitt’s administrator, another manager, and

employee Thornton. (JA 245; JA 111–13, 128–29.) Merriweather observed union demonstrators arguing with consultants paid by Pruitt. (JA 245; JA 111, 127.) She also saw three demonstrators hold up their phones toward the Facility. (JA 245–46; JA 88–89, 109–10, 112–13.)

Area Vice President Gerhardt saw demonstrators holding their phones in the air on both August 13 and 19. (JA 245; JA 196.) On August 13, Gerhardt was on the porch, and she observed two or three demonstrators holding their phones up and panning toward the Facility for a couple of minutes. (JA 245; JA 196–97, 199.) On August 19, Gerhardt observed two demonstrators panning their phones in the same fashion, but only for a few seconds. (JA 245; JA 199–200.)

C. The Hearing Officer’s Report and Regional Director’s Decision

The Hearing Officer issued a Report on Objections on September 25, 2015. Having considered the allegedly objectionable conduct “both in isolation and cumulatively” (JA 237), the Hearing Officer recommended that Pruitt’s objections be overruled in their entirety (JA 248).

Pruitt filed exceptions to portions of the Hearing Officer’s Report with the Regional Director on October 9. Pruitt specifically argued that the Hearing Officer erred in connection with its objections concerning blocking and threats. (JA 251.) Although Pruitt also stated that it “disagrees with the totality of the Hearing Officer’s conclusions” (JA 250), it did not specifically except to the Hearing

Officer's rejection of its objection concerning the photography, videotaping, or surveillance of employees as well as numerous other findings.

On October 23, 2015, the Regional Director issued a Decision and Certification of Representative. "Having carefully reviewed the entire record," the Regional Director overruled Pruitt's objections in their entirety. (JA 273.) The Regional Director's Decision specifically analyzed and rejected Pruitt's objections concerning blocking and threats. (JA 270–73.) In addition, the Decision "adopt[ed] the Hearing Officer's Report and Recommendations, for the reasons he cites, for those objections and issues not specifically discussed in [the D]ecision." (JA 270 n.2.)

D. Board's Decision Denying Review

On November 6, Pruitt filed a request with the Board for review of the Region Director's Decision. Pruitt included no assertion that the overruling of its objection concerning photography, videotaping, or surveillance was erroneous. (JA 275–90.) On January 15, 2016, a three-member panel of the Board (Chairman Pearce and Members Hirozawa and McFerran) denied Pruitt's request for review. (JA 291.)

II. THE UNFAIR LABOR PRACTICE PROCEEDING

After its certification as the bargaining-unit employees' representative, the Union requested that Pruitt recognize and bargain with it. Pruitt refused to do so.

(JA 293.) Thereafter, the General Counsel issued a complaint against Pruitt, alleging that its refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 8(a)(5), (1), and moved for summary judgment before the Board. (JA 292.)

On September 22, 2016, a three-member panel of the Board (Chairman Pearce and Members Miscimarra and McFerran) granted summary judgment, finding that Pruitt violated the Act as alleged. (JA 293.) The Board concluded that all representation issues raised by Pruitt in the unfair labor practice proceeding were, or could have been, litigated in the underlying representation proceeding, and that Pruitt neither offered any newly discovered or previously unavailable evidence, nor alleged the existence of any special circumstances, that would require the Board to reexamine its decision to certify the Union. (JA 292.) To remedy the unfair labor practice, the Board's Order requires Pruitt to (1) cease and desist from failing and refusing to recognize and bargain with the Union or, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under the Act; (2) bargain with the Union upon request and, if an understanding is reached, to embody that understanding in a signed agreement; and (3) post a remedial notice. (JA 293–94.)

SUMMARY OF ARGUMENT

The Board did not abuse its discretion in overruling Pruitt's election objections because Pruitt failed to meet its heavy burden to prove misconduct that prejudiced the fairness of the election.

First, Pruitt failed to prove that union demonstrators objectionably blocked ingress to or egress from the Facility. The relevant, credited evidence established merely that demonstrators approached employees' cars from the side to hand out flyers and peacefully persuade employees to support the Union, which Board law permits.

Second, Pruitt failed to prove threats warranting a new election. Employee Yolando Thornton testified to hearing a statement come out of a crowd of union demonstrators that "[i]f you don't vote yes for the Union, we will fuck you up," but the Board afforded Thornton's testimony little probative weight, and, in any event, Pruitt failed to prove that the alleged statement reasonably tended to interfere with employees' free choice in the election. And, although employee Erica Merriweather testified that she heard a group of co-workers who were talking amongst themselves say *either* the Union will "fuck people up" *or* the Union will "get fucked up," the Board credited the testimony of one of the co-workers denying that any threat was made. Thus, Pruitt failed to prove any objectionable threats.

Third, Pruitt did not preserve its objection premised on the alleged photography of employees for Court review. In any event, Pruitt failed to prove that the Union objectionably photographed or recorded employees engaging in any protected, concerted activity.

In attempting to support its objections before the Court, Pruitt relies on arguments and factual assertions that it did not preserve for Court review, discredited testimony, irrelevant facts, and misrepresentations of the record and the law. Pruitt also suggests that the close election and the “aggregate impact” of its objections warrant a rerun. At bottom, however, Pruitt has failed to prove any objectionable conduct that would warrant overturning the employees’ decision to be represented by the Union.

ARGUMENT

THE BOARD ACTED WITHIN ITS WIDE DISCRETION IN OVERRULING PRUITT’S ELECTION OBJECTIONS AND CERTIFYING THE UNION, AND THEREFORE PROPERLY FOUND THAT PRUITT VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of [its] employees[.]” 29 U.S.C. § 158(a)(5).² Here, Pruitt has admittedly refused to bargain with the Union.

² An employer that violates Section 8(a)(5) thereby also derivatively violates Section 8(a)(1). *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

(JA 292 & n.2.) Thus, as long as the Board properly certified the Union as the employees' collective-bargaining representative, the Board is entitled to enforcement of its Order finding Pruitt violated Section 8(a)(5) and (1) of the Act. *See, e.g., NLRB v. Downtown Bid Servs. Corp.*, 682 F.3d 109, 112 (D.C. Cir. 2012). Accordingly, the Court's review is limited to the Board's decision to certify the Union as the bargaining representative of Pruitt's employees over Pruitt's election objections. *Id.*

A. Applicable Principles

1. A party seeking to overturn an election must prove prejudice to the fairness of the election with specific evidence of misconduct and interference with employees' free choice

A party objecting to the conduct of a Board-overseen representation election bears a heavy burden to prove prejudice to the fairness of the election.

Amalgamated Clothing Workers of Am. v. NLRB, 424 F.2d 818, 827 (D.C. Cir. 1970). It can meet this burden only with "specific evidence" that misconduct "interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election." *Id.*

Whether pre-election misconduct warrants a new election is determined under objective standards that differ based on who is responsible for the misconduct. When a party to the election is responsible, the election will be set aside only if the misconduct "reasonably tend[ed] to interfere with the employees'

free and uncoerced choice in the election.” *Family Serv. Agency v. NLRB*, 163 F.3d 1369, 1383 (D.C. Cir. 1999) (alteration in original). When known third parties, such as employees supporting the union, are responsible, the election will be set aside only where the misconduct created “an atmosphere of fear and coercion which made a free and fair election impossible.” *Id.* at 1377.

Anonymous conduct, meanwhile, is to be given even less weight than third-party conduct. *Amalgamated Clothing & Textile Workers Union v. NLRB*, 736 F.2d 1559, 1568 (D.C. Cir. 1984). In any case, because pre-election misconduct is evaluated under objective standards, “[s]ubjective reactions of employees are irrelevant to . . . whether there was, in fact, objectionable conduct.” *NLRB v. Enter. Leasing Co. Se., LLC*, 722 F.3d 609, 619 (4th Cir. 2013).

2. Section 10(e) of the Act deprives the Court of jurisdiction to consider arguments not raised to the Board

Parties cannot advance arguments in appellate review of unfair labor practice proceedings that they failed to raise in exceptions to the Board in the underlying representation proceedings. Section 10(e) of the Act provides that “[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e). This provision “is an example of Congress’s recognition” that to facilitate “orderly procedure and good administration[,] . . . courts should not topple over administrative decisions

unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.” *Elastic Stop Nut Div. of Harvard Indus., Inc. v. NLRB*, 921 F.2d 1275, 1284 (D.C. Cir. 1990) (alteration in original) (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)).

To comply with Section 10(e) and “preserve objections for appeal[,] a party must raise [its objections] in the time and manner that the Board’s regulations require.” *Spectrum Health-Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 349 (D.C. Cir. 2011). Under Section 10(e), the Court lacks jurisdiction to consider objections not raised to the Board. *See id.* at 348. Thus, consistent with the Board’s regulations, a party preserves an exception for appellate review in a refusal-to-bargain proceeding only if it raised the exception in a request for Board review of the Regional Director’s decision in the underlying representation proceeding. 29 C.F.R. § 102.67(g) (formerly 102.67(f)); *see also, e.g., NLRB v. Wagner Elec. Corp.*, 586 F.2d 1074, 1076 & n.2 (5th Cir. 1978) (Section 10(e) precluded court review of Regional Director’s overruling of six election objections to which company did not except); *Matson Terminals, Inc.*, 361 NLRB No. 50, slip op. at 1 n.1 (Sept. 26, 2014) (party precluded from making contention in unfair labor practice proceeding that it did not assert in request for Board review in underlying representation proceeding), *enforced*, 637 F. App’x 609 (D.C. Cir. Feb. 26, 2016). Moreover, a party must present the Board with “specific grounds” for its objections

to preserve those objections for appellate review. *Nova Se. Univ. v. NLRB*, 807 F.3d 308, 313 (D.C. Cir. 2015).

B. Standard of Review

Appellate review of Board decisions certifying bargaining representatives is “extremely limited.” *Amalgamated Clothing & Textile Workers Union*, 736 F.2d at 1564. “[T]he Board is entrusted with a wide degree of discretion in conducting representation elections.” *C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 882 (D.C. Cir. 1988). “[U]nion elections are often not conducted under ideal conditions,” and “the Board must be given some latitude in its effort to balance the right of the employees to an untrammelled choice, and the right of the parties to wage a free and vigorous campaign.” *NLRB v. Mar Salle, Inc.*, 425 F.2d 566, 571 (D.C. Cir. 1970) (internal quotation marks omitted). With elections, “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.*, 844 F.2d at 885 (internal quotation marks omitted).

The representation election process is “designed to maximize employee free choice under the very real constraints and conditions that exist in the nation’s workplaces.” *Amalgamated Clothing & Textile Workers Union*, 736 F.2d at 1563. “One of these constraints is the fact that delay itself almost inevitably works to the

benefit of the employer and may frustrate the majority's right to choose to be represented by a union; forcing a rerun election may play into the hands of employers who capitalize on the delay to frustrate their employees' rights to organize." *Id.* Accordingly, the Court will enforce a Board order overruling election objections unless the Board abused its discretion and the abuse of discretion was prejudicial. *800 River Rd. Operating Co. v. NLRB*, 846 F.3d 378, 386 (D.C. Cir. 2017). The Board's decision is not an abuse of discretion if it conforms with Board precedent and its findings of fact are supported by substantial evidence. *See C.J. Krehbiel Co.*, 844 F.2d at 882.

"Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Evergreen Am. Corp. v. NLRB*, 362 F.3d 827, 837 (D.C. Cir. 2004) (internal quotation marks omitted). Therefore, the Court "will not 'displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.'" *United Food & Commercial Workers Union Local 204 v. NLRB*, 506 F.3d 1078, 1080 (D.C. Cir. 2007) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

The Court will not reverse the Board's adoption of a Hearing Officer's credibility determinations unless "those determinations are 'hopelessly incredible,' 'self-contradictory,' or 'patently unsupportable.'" *Cadbury Beverages, Inc. v.*

NLRB, 160 F.3d 24, 28 (D.C. Cir. 1998). A party asking the Court to overturn such credibility determinations must provide the Court with reasons to do so.

Wayneview Care Ctr. v. NLRB, 664 F.3d 341, 349 (D.C. Cir. 2011).

C. The Board Did Not Abuse its Wide Discretion in Overruling Pruitt's Objections

1. Pruitt failed to prove that the Union engaged in objectionable conduct by blocking ingress to or egress from the Facility

Pruitt argues that Union demonstrators “engaged in repeated acts of intentional, objectionable blocking of ingress and egress that warrant setting aside the election.” (Br. 20.) Specifically, Pruitt relies on the testimony of employees Thornton, Merriweather, and Johnson that they were approached by demonstrators as they entered the Facility grounds by car, testimony by employee Benn that she missed her bus during a demonstration because the bus driver bypassed the bus stop in front of the Facility, and testimony of Area Vice President Gerhardt that a demonstrator obstructed her view of traffic as she exited the Facility grounds by car. The Board, however, properly overruled Pruitt’s “blocking” objection because none of that testimony showed that the Union objectionably blocked ingress to or egress from the Facility.

Board law permits unions engaged in election campaigns to hold demonstrations outside employers’ premises and stop employees on their way to work, at least briefly, to disseminate pro-union literature and peacefully advocate

for the union. *See Chrill Care, Inc.*, 340 NLRB 1016, 1016 (2003) (during union demonstrations outside employer’s premises, union supporters unobjectionably attempted to speak to employees entering the area where there was no evidence that employees’ access to the premises was blocked or inhibited more than momentarily); *Comcast Cablevision of New Haven, Inc.*, 325 NLRB 833, 833 n.3, 836–37 (1998) (20–25 union demonstrators around entrances to employer’s facility unobjectionably stopped employee vehicles momentarily to distribute leaflets and pins and encourage employees to vote for union). The Board has found election-related picketing and handbilling that necessarily caused cars to stop to be unobjectionable even where there was evidence of derogatory conduct toward passing employees. *See Interstate Cigar Co.*, 256 NLRB 496, 497, 498 & n.3 (1981) (pickets spit on ground and yelled obscenity as employee passed through); *Firestone Textiles Co.*, 244 NLRB 168, 170–71 (1979) (employee heard someone yell “you’ll be sorry, bitch” when she pulled through plant entrance without stopping for union literature; another employee heard someone say “son of a bitch, you’d better stop next time”).

Here, the Board found that none of the demonstrators engaged in blocking conduct that reasonably tended to interfere with employees’ free choice in the

election.³ (JA 241–42, 271.) Pruitt cannot show that this finding was an abuse of discretion.

As an initial matter, this Court lacks jurisdiction to review Pruitt’s claims (Br. 22–23) that the Board should have found objectionable blocking with respect to Benn missing her bus and Gerhardt’s view being obstructed as she exited the Facility. Pruitt did not except to those findings in its request for Board review. (JA 275–90.) Thus, pursuant to Section 10(e) of the Act, this Court cannot consider Pruitt’s challenges. *See* decisions cited *supra* pp. 16–18.

In any event, the findings are reasonable. Benn’s testimony did not establish objectionable blocking because she conceded that she was not impeded in reaching the bus stop. (JA 242; JA 51.) Moreover, Pruitt cites no authority to support that the bus driver’s failure to stop would warrant overturning an election. Further, Benn’s testimony did not establish that the bus driver’s failure to stop impeded upon her free choice in the election. (JA 242.) Similarly, the mere obstruction of Gerhardt’s view by a demonstrator does not amount to objectionable blocking or other coercive conduct, and, even assuming *arguendo* it does, the conduct did not

³ The Board applied the party-conduct standard because the demonstrations were “tantamount to picketing” and, under Board law, unions are responsible for the actions of authorized picketers. (JA 241.)

impact bargaining-unit employees' free choice because there was no evidence that such employees observed the conduct. (JA 242.)

With regard to Thornton, Merriweather, and Johnson, the Board did not abuse its discretion in finding that Pruitt failed to prove objectionable blocking. The Board made four key factual findings that undermine Pruitt's claims (Br. 20–22) that demonstrators repeatedly blocked ingress and egress: (1) union demonstrators approached employees' cars from the side to hand them a flyer and peacefully persuade them to support the Union; (2) there was no evidence to establish that the demonstrators maneuvered in front of cars to intentionally block employees from entering the Facility; (3) there was no evidence that the demonstrators made any threatening or menacing gestures or remarks to the employees who stopped their cars; and (4) there was no evidence that employees had trouble entering the facility. (JA 241.) In those circumstances, the Board reasonably found that “[a]t most, the record indicates momentary inconveniences to some employees entering or leaving the [F]acility.” (JA 271.) Under Board precedent, such conduct is not objectionable. *See Comcast Cablevision*, 325 NLRB at 833 n.3, 837 (union demonstrators momentarily stopped employees in vehicles to encourage them to vote for the union in the election); *Chrill Care*, 340 NLRB at 1016 (no evidence that union, in attempting to speak to employees

entering area outside employer's premises, blocked or inhibited employees' access to the premises more than momentarily).

Despite Pruitt's claims that demonstrators "blocked" Thornton and Merriweather (Br. 21–22), and "got in front of" Johnson's car (Br. 22), the credited evidence shows that demonstrators approached employees' cars from the side rather than maneuvering in front of them (JA 239 & n.8, 240–41). Indeed, Thornton did not testify that she was "blocked," as Pruitt claims. And the credited evidence showed that no one had to cross in front of her car to hand her a flyer. (JA 239; JA 31, 35.) Likewise, the Board did not credit Merriweather's testimony that she was blocked because it was "conclusory, largely devoid of specifics, contradictory, and confusing." (JA 240 & n.10.) Finally, the Board reasonably found that a demonstrator did not walk in front of Johnson's car. (JA 240.)

Although Johnson at one point testified that the demonstrator "got in front of" his car (JA 62), his later testimony clarified the details. When asked specifically whether the demonstrator approached Johnson's driver side window or "pop[ped] himself right in the middle of [Johnson's] car, in front of [Johnson's] car[.]" Johnson testified that "I'm not going to say in the middle" and that the demonstrator "stopped [him] on the driver side." (JA 71–72.) Johnson's hand-drawn diagram further shows the reasonableness of the Board's finding that

demonstrators approached cars from the side, rather than maneuvering in front of them. (JA 216.)

Pruitt did not except to any of the credibility determinations before the Board (JA 275–90), and it does not do so before the Court. Thus, review of the credibility determinations underlying the finding that the demonstrators approached cars from the side is both jurisdictionally barred by Section 10(e), *see* decisions cited *supra* pp. 16–18, and, additionally, waived under this Court’s rules, *see, e.g., Wayneview Care Ctr.*, 664 F.3d at 353 (petitioner waived argument first raised in reply brief).

Even if the demonstrators were more insistent and determined in their handbilling and engagement of employees than the Board reasonably found them to be, the blocking objection would be meritless because Pruitt fails to show that this conduct “reasonably tend[ed] to interfere with the employees’ free and uncoerced choice in the election.” *Family Serv. Agency*, 163 F.3d at 1383 (alteration in original). Pruitt embellishes the boisterous atmosphere of the demonstrations by rehashing its other election objections and noting that “the police were called[.]” (Br. 24–25.) But it fails to mention that it was *Pruitt* who called the police and that there was no evidence of citations or arrests. (JA 238; JA 190.) In any case, Pruitt’s argument is mere misdirection that fails to support the gravamen of Pruitt’s objection, which alleges that demonstrators interfered with

employees' free choice in the election by blocking their ingress to or egress from the Facility.

Pruitt's discussion of the applicable legal authority is also misguided. Notably, Pruitt does not attempt to address *Comcast Cablevision*, *Chrill Care*, and similar decisions even though the Board explicitly relied on them (JA 241–42). Instead, it erroneously suggests that Board law does not permit a union to briefly stop employees on their way to work for any reason. None of Pruitt's cited cases support that proposition (Br. 20–21, 23–25), which *Comcast Cablevision*, *Chrill Care*, and similar decisions show to be false. Moreover, Pruitt's cases are all factually distinguishable, involving egregious conduct nothing like the Union's peaceful demonstrations here.⁴

⁴ In *NLRB v. United Mine Workers*, 429 F.2d 141 (3d Cir. 1970), the court endorsed the Board's finding that a union unlawfully interfered with a rival union's meeting with employees through violence, threats, and derogatory statements by a mass of hostile men who surrounded the meeting place. *Id.* at 143–44, 146–47. In the remaining decisions, unions used violence, threats, and/or physical blocking to prevent ingress to and/or egress from worksites. *See NLRB v. Sheet Metal Workers' Int'l Assoc., Local Union No. 19*, 154 F.3d 137, 140 & nn.5–6 (3d Cir. 1998) (union induced employees to refrain from working by blocking ingress to jobsite and impliedly threatening employees with violence); *Service Employees Local 525 (Gen. Maint. Co.)*, 329 NLRB 638, 685 (1999) (pickets paraded across entrance to facility's parking garage to keep cars at bay, organizer parked vehicle slantwise across entrance, demonstrators handcuffed themselves to facility's front doors, and unions scattered trash bags in facility's lobby), *enforced*, 52 F. App'x 357 (9th Cir. 2002); *Meat Cutters (Cayey Indus.)*, 184 NLRB 538, 540–41 (1970) (strikers used violence and physical obstruction to prevent workers from entering building and formed circle around car to prevent it from exiting); *Burgreen*

In sum, Pruitt failed to prove that the Union engaged in misconduct that reasonably tended to interfere with the employees' free and uncoerced choice in the election by blocking employees' ingress to or egress from the Facility.

Therefore, the Board did not abuse its discretion in overruling this objection.

2. Pruitt failed to prove unlawful threats warranting a new election

Pruitt contends that alleged threats to employees Thornton and Merriweather warrant a new election (Br. 26), but Pruitt has failed to prove objectionable threats under the applicable objective standards. First, Pruitt failed to prove a threat to Thornton that reasonably tended to interfere with employees' free choice. Second, Pruitt failed to prove a threat to Merriweather, or that the alleged threats created an atmosphere of fear and coercion. Thus, as shown below, the Board properly overruled Pruitt's threat-based objections.

Contracting Co., 195 NLRB 1067, 1073 (1972) (unions hindered employees from working by blocking ingress and egress as well as threats of violence and other intimidation); *Shopmen's Local Union No. 455*, 243 NLRB 340, 346 (1979) (pickets prevented truck from leaving loading dock by stationing themselves in front and on both sides of truck until police broke up the congregation); *Metal Polishers, Local 67*, 200 NLRB 335, 336 (1972) (during strike, union blocked non-striking employees from entering). Unlike the instant case, none of the foregoing decisions involved union demonstrators stopping employees solely to distribute flyers and peacefully communicate pro-union messages.

a. Pruitt failed to prove an objectionable threat to Thornton

In claiming that Thornton was threatened, Pruitt relies on her affirmative response to the leading question from Pruitt’s counsel, “Did any union supporters threaten to fuck you up?” (JA 239; JA 21.) Thornton later quoted the alleged threat as, “If you don’t vote yes for the Union, we will fuck you up.” (JA 25, 34.)

The Board analyzed the alleged threat to Thornton under the party-conduct standard (JA 241–42, 271–73), under which an election is set aside only if misconduct “reasonably tend[ed] to interfere with the employees’ free and uncoerced choice in the election.” *Family Serv. Agency*, 163 F.3d at 1383 (alteration in original). The Board reasonably found that Thornton’s testimony was insufficient to prove an objectionable threat by the Union to warrant a new election. (JA 242, 271–73.) First, Thornton did not see who made the statement, and the record does not demonstrate that the comment was directed at Thornton or establish under what circumstances the comment was made. (JA 242.) Second, inasmuch as Thornton’s testimony was elicited from a leading question, the Board afforded her testimony little probative weight. (JA 242.) Third, there was no evidence that union representatives heard the alleged statement or condoned it. (JA 272.) In fact, union representative Sarah Williams testified that she did not hear union supporters utter obscenities or the kinds of statements alleged in Pruitt’s objections. (JA 272; JA 142–43, 156.) Finally, except for Thornton’s testimony,

there was no evidence of any allegedly threatening remarks to employees entering or leaving the Facility during the Union’s demonstrations. (JA 272.) Thus, as the Board stated (JA 242), Pruitt fell “well short” of establishing that the Union made an objectionable threat. *See Interstate Cigar*, 256 NLRB at 498 & n.5 (refusing to credit employee’s testimony of alleged threats by union pickets around company entrance where employee did not identify individuals who allegedly made threats and where other witnesses including security guards did not corroborate).

Further, the Board found, assuming *arguendo* that a demonstrator made the alleged statement and that the Union could be held responsible for it,⁵ the alleged threat does not warrant setting aside the election because it was too isolated and *de minimis*. (JA 272, 273 & n.4.) Pre-election conduct is *de minimis* where “it is virtually impossible to conclude that the election outcome has been affected” by that conduct. *Bon Appetit Mgmt. Co.*, 334 NLRB 1042, 1044 (2001); *see also id.* at 1043–44 (low-level supervisor asked one employee how she would vote and said that if she voted for the union, her pay would be cut; incident was isolated in large unit with no dissemination and lopsided vote). In determining whether misconduct could have affected the results of the election, the Board considers

⁵ The Regional Director stated that whether “the [Union] could be held responsible for [the alleged statement] rather than it being an[] incidence of third party conduct” was “an issue not free from doubt.” (JA 272.)

factors such as the number of violations, their severity, the extent of dissemination, the size of the unit, the closeness of the election, the proximity of the conduct to the election date, and the number of unit employees affected. *Id.* at 1044.

Here, consideration of such factors led the Board to reasonably find that the alleged threat to Thornton was *de minimis* and did not warrant overturning the election. (JA 272, 273 & n.4.) The alleged threat was isolated, was at most directed toward only a single employee in a unit of approximately 84 employees, and occurred near the end of a campaign devoid of any other objectionable conduct by the Union. (JA 272.) Additionally, the record does not reveal that any other employee heard the remark and there is no evidence that the remark was disseminated to any other employee. (JA 272.) Finally, as the Board found (JA 273 & n.4), the alleged statement “appear[s] to be the kind of rough language seen in close elections made as a result of bravado or over exuberance rather than [a] credible threat[.]” *See NLRB v. Bostik Div., USM Corp.*, 517 F.2d 971, 973 & n.1 (6th Cir. 1975) (noting that “irresponsible threats,” such as union supporter’s statement that anti-union employee “was going to get [his] ass kicked[.]” are “almost inevitable in the course of a heated election campaign” and “not the type that would be expected to have a coercive impact”) (first alteration in original); *Am. Wholesalers, Inc.*, 218 NLRB 292, 292 & n.5 (1975) (“in a climate of no violence whatever[.]” union supporters’ statements, including that “anyone who

did not vote for the [u]nion needed a bullet in his head,” was overzealous partisanship rather than meaningful threat), *enforced*, 546 F.2d 574 (4th Cir. 1976); *Lamar Advertising of Janesville*, 340 NLRB 979, 980–81 (2003) (“Viewed objectively, a threat by one employee to another to ‘kick [his] ass,’ *without more*, is mere bravado that is unlikely to intimidate the listener.”) (emphasis in original); *see also Enter. Leasing Co. Se.*, 722 F.3d at 619 (“A certain amount of hyperbole and exaggeration is expected in an election campaign, which is why the responsibility for assessing the relevant facts and deciding whether the union’s conduct interfered with a reasonable employee’s free and fair choice in a representation election lies with the Board.”). In that regard, Thornton testified that she did not see who made the statement, and the record is devoid of any context that would demonstrate the comment was directed at her or to indicate what may or may not have prompted the alleged remark. (JA 242, 272, 273 & n.4.) Accordingly, the Board reasonably found that Pruitt failed to establish an objectionable threat to Thornton.

In contrast to the Board’s well-founded conclusions, Pruitt pushes its own version of events unsupported by the record and applicable law to argue that the alleged statement to Thornton was an objectionable threat. (Br. 29–30.) However, Pruitt does not challenge the Board’s decision to afford Thornton’s testimony little probative weight. Pruitt likewise omitted such challenges from its request for

Board review. (JA 275–90.) Thus, review of that decision is jurisdictionally barred by Section 10(e) of the Act, *see* decisions cited *supra* pp. 16–18, and waived under this Court’s rules, *Wayneview Care Ctr.*, 664 F.3d at 353.

Accordingly, Pruitt cannot contend before the Court that Thornton’s testimony is sufficiently reliable to warrant overturning an election. On that basis alone, this Court should reject Pruitt’s remaining arguments, which rely on the unwarranted assumption that Thornton’s testimony is sufficiently reliable for that purpose.

In any event, those arguments are meritless. Pruitt makes a number of unsupported or misleading factual assertions in an attempt to represent the alleged statement as a threat that was directed at Thornton and would reasonably instill an employee with fear. First, Pruitt contends that Thornton was “trying to drive around a group of picketers” when she heard the statement. (Br. 28.) Neither the transcript pages Pruitt cites (JA 21, 34) nor any others support the contention. Second, Pruitt contends that “Thornton surmised that the [speaker] was approximately 10 feet away from her” (Br. 28), but Thornton was estimating her distance from the 15–20 union demonstrators “lined up in front of the building[,]” rather than the alleged speaker (JA 33–34). Thornton did not surmise where the alleged speaker might have been among the demonstrators, who were patrolling an area between 30 and 50 yards wide. (JA 238; JA 33, 134, 140–41, 145–47, 216.) Third, Pruitt asserts the alleged threat was made by a “Union agent” without

acknowledging Thornton's admission that she did not see who made the statement. (JA 242; JA 33.) Finally, Pruitt argues, in essence, that a backdrop of "rough language, bravado, and over exuberance" colored the alleged statement as objectively threatening, but offers no specifics.⁶ (Br. 29.) Hence, Pruitt has failed to show that the alleged statement to Thornton was objectionable.

The party-conduct decisions cited by Pruitt (Br. 27, 30) do not warrant a different conclusion. The employers in those decisions proved that identified union agents made serious threats of economic reprisals or physical harm to persons or property that would reasonably instill fear in employees. *See Baja's Place, Inc.*, 268 NLRB 868, 868–69 (1984) (threats of economic reprisals, physical harm, and other unspecified reprisals by union business representative "who wielded substantial influence in the local industry"); *Lyon's Restaurants*, 234 NLRB 178, 179 (1978) (employees received union notices containing threats of job loss that "carried a sufficient ring of plausibility to have interfered with the election" given, *inter alia*, the prior bargaining history between the employer and the union's sister local); *Smithers Tire & Auto. Testing of Texas, Inc.*, 308 NLRB 72, 72–73 (1992) (in-plant spokesman for union told employee with black eye that

⁶ Pruitt implies that the Regional Director found such a backdrop (Br. 29), but the Regional Director was actually commenting on the alleged statements that Pruitt is here attempting to characterize as threats (JA 273 & n.4.)

“this is what happens when you cross us”; two employees told another employee that others would know how she voted and threatened to flatten her car tires, which was of “particular significance here where the record shows that the [e]mployer’s workplace is isolated and the employees need their cars to go to work”). Pruitt, however, failed to show that the alleged statement to Thornton would reasonably instill fear in employees such that it would render the election unfair. As mentioned above, Thornton testified that she did not see who made the statement, and the record is devoid of any context that would demonstrate the comment was directed at her or to indicate what may or may not have prompted the alleged remark. (JA 242, 272, 273 & n.4; JA 33.)

Finally, Pruitt invokes testimony by Thornton to argue that the alleged threats had a “significant impact” on her. (Br. 28–29.) However, as the Board explained (JA 272–73), employees’ subjective reactions are irrelevant to whether misconduct occurred under the Board’s objective standards. *See Enter. Leasing Co. Se.*, 722 F.3d at 619. In any event, Thornton’s testimony does not show that she changed her vote in favor of the Union as Pruitt suggests (Br. 29, citing JA 23). She testified only that she did not “vote her conscience,” not what her vote was or was going to be in the absence of the alleged threat. (JA 23.)

b. Pruitt failed to prove an objectionable threat to Merriweather

In addition to the alleged threat to Thornton, Pruitt invokes the testimony of employee Merriweather to attempt to conjure (Br. 30–34) “an atmosphere of fear and coercion which made a free and fair election impossible.” *Family Serv. Agency*, 163 F.3d at 1377. Specifically, Pruitt relies on Merriweather’s testimony that, while clocking in for a shift in the week leading up to the election, she overheard co-workers, who were standing about 20 feet away from her, say *either* the Union will “fuck people up” *or* the Union will “get fucked up.” (JA 243; JA 88, 114.)

The Board, however, reasonably found that Merriweather’s testimony did not establish any threat to employees. The Board found Merriweather’s testimony too unclear to establish such a threat. (JA 243.) In that regard, Merriweather testified her co-workers might have said the Union will “get fucked up,” which is not a threat directed to employees. (JA 243.) Moreover, the Board credited the testimony of Deidre Ward, one of the co-workers in the group, who denied saying or hearing anyone say that the Union is going to “fuck people up.” (JA 243; JA 188.)

In light of the foregoing, the Board reasonably found that Merriweather’s testimony “is insufficient to establish objectionable conduct.” (JA 243.) Because the alleged threat cannot be attributed to the Union, the Board assessed it under the

third-party standard.⁷ To assess alleged threats under the third-party standard of whether the conduct created an atmosphere of fear and coercion making a free and fair election impossible, the Board considers five factors: (1) the nature of the threat; (2) whether the threat was directed at the entire bargaining unit; (3) the extent of dissemination of the threat; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that employees acted in fear of that capability; and (5) whether the threat was made or revived at or near the time of the election. *Downtown Bid Servs. Corp.*, 682 F.3d at 116 (citing *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984)).

Under the *Westwood* factors, the credited evidence does not establish objectionable conduct to warrant overturning the election. First, as explained above, it was not evident from the testimony that a threat was directed toward Merriweather or any other employee. (JA 244.) Second, there was no evidence of a threat encompassing the entire unit. (JA 244.) Third, there was no evidence that Merriweather disseminated the overheard conversation to other employees.⁸ (JA 244.) Fourth, there was no testimony to suggest Merriweather's co-workers were

⁷ Pruitt does not dispute that the third-party standard applies. (Br. 30.)

⁸ Pruitt asserts, without basis in the record, that Merriweather told Thornton about the alleged threat. (Br. 28.) In the testimony that Pruitt cites, Merriweather recounted telling Thornton about an entirely different matter. (JA 91.)

capable of carrying out any threat, as there was no evidence that they engaged in any coercive conduct toward Merriweather or any other employee. (JA 244.)

Finally, even assuming the co-workers had made a threat, that threat would have been isolated in nature, and not revived or repeated. (JA 244, 271.) Thus, overall, the Board appropriately found that Merriweather's testimony did not establish an objectionable threat. (JA 244.)

In urging its own version of events, Pruitt ignores the Board's crediting of Ward's testimony that no threat was made. (Br. 28.) Because Pruitt failed to challenge this credibility determination in its request for Board review (JA 275–90) and its opening brief, review of the determination is both jurisdictionally barred by Section 10(e) of the Act, *see* decisions cited *supra* pp. 16–18, and waived, *Wayneview Care Ctr.*, 664 F.3d at 353. As Pruitt has failed to preserve that credibility determination for review, Pruitt's factual argument is meritless.

Furthermore, the third-party decisions cited by Pruitt (Br. 27–28, 30–32) involve facts incomparable to the instant case. All but one of those decisions involve widely disseminated and very specific threats by identified employees that would create an atmosphere of fear and coercion that would make a fair election impossible.⁹ The remaining case did not involve evidence of widespread

⁹ *See Orr-Sysco Food Services*, 338 NLRB 614, 614–15 (2002) (numerous threats of physical violence, property damage, and deportation made to several employees

dissemination, but did involve particularly egregious threats by an identified employee that specifically targeted a 16-year-old co-worker and would reasonably instill fear. *See Steak House Meat Co.*, 206 NLRB 28, 28–29 (1973) (meatcutter brandishing knife told 16-year-old co-worker that he would kill him if he voted against the union, again threatened co-worker in presence of third employee, and third employee later told co-worker that he would get even with him if the union lost). Clearly, none of Pruitt’s decisions compel a finding that the conversation

and disseminated among several more); *Stannah Stairlifts, Inc.*, 325 NLRB 572, 572 (1998) (pro-union employee threatened, in front of entire four-man bargaining unit, to “kick the shit out of and kill” employee known to oppose unionization); *Picoma Indus.*, 296 NLRB 498, 498–99 (1989) (assorted threats by six employees to persons and property disseminated to approximately 25 employees in 140-employee unit); *Electra Food Machinery*, 279 NLRB 279, 279–80 (1986) (widely disseminated threats by employees to kill or beat up identified or suspected nonunion adherents or burn their automobiles); *RJR Archer, Inc.*, 274 NLRB 335, 335–36 (1985) (employee made widely disseminated threat to burn down anti-union co-worker’s house and van; another employee threatened another anti-union co-worker, who had been receiving anonymous hang-up calls at all hours of the night, with harm to his wife, children, and vehicle, and repeatedly asked him whether he had “made it through the night” when seeing him at work); *Sonoco of Puerto Rico*, 210 NLRB 493, 493–94 (1974) (four threats of physical harm, including threat to thirteen employees the day before election); *Westwood Horizons Hotel*, 270 NLRB 802, 802–03 (1984) (multiple threats by pro-union employees, made in the presence of other employees, to “beat up” specific co-workers; pro-union employees also threatened and used physical force to compel other employees to vote); *ManorCare of Kingston, PA, LLC v. NLRB*, 823 F.3d 81, 86–87 (D.C. Cir. 2016) (court found objectionable numerous threats of physical harm and property damage, “disseminated widely within the unit,” made to non-supporters of unionization by two employees, one of whom was known to have been in fights before and bore a hand injury from a knife fight).

overheard by Merriweather, even in conjunction with the alleged statement to Thornton, created “an atmosphere of fear and coercion which made a free and fair election impossible.” *Family Serv. Agency*, 163 F.3d at 1377.

Finally, as with Thornton, Merriweather’s subjective reactions are irrelevant to whether misconduct occurred under the Board’s objective standards. *See Enter. Leasing Co. Se.*, 722 F.3d at 619. In any event, although Merriweather testified that she submitted a resignation notice partly because she was scared after overhearing her co-workers (JA 88), she admitted that she did not actually leave her job (JA 102–03). Moreover, although Merriweather testified that she voted in the election (JA 81), there is no evidence that any alleged conduct influenced her vote.

In sum, Pruitt failed to prove threats warranting a new election.

3. Section 10(e) of the Act bars the Court from reviewing Pruitt’s previously abandoned objection based on alleged photography, videotaping, or surveillance of employees

Before the Hearing Officer, Pruitt alleged that a new election is required because the Union objectionably photographed employees during its demonstrations. (JA 230.) The Hearing Officer recommended overruling this objection. (JA 245–46.) Pruitt thereafter abandoned it, failing to raise it in exceptions to the Regional Director or in its request for review to the Board. (JA

250–54, 275–90.) Thus, Section 10(e) bars the Court from reviewing this objection. *See* decisions cited *supra* pp. 16–18.

In any event, the objection is meritless. Board law prohibits unions from photographing employees who are engaged in activity protected by Section 7 of the Act¹⁰ unless the party provides a valid explanation for the photography in a timely manner. *Randell Warehouse of Arizona*, 347 NLRB 591, 591 (2006). Here, Pruitt failed to prove that Union demonstrators photographed or recorded employees at all. (JA 246.) Rather, the credited testimony established only that demonstrators were holding up their cell phones toward the Facility. (JA 246.) And, assuming *arguendo* that the demonstrators were taking pictures at the time, the record failed to establish that employees were photographed while engaging, or refraining from engaging, in union or other protected concerted activities. (JA 246.)

Pruitt contends that photographed or recorded employees were engaged in Section 7 activity by “entering and exiting work” and “interacting (either positively or negatively) with [u]nion picketers who were stopping oncoming cars in the area

¹⁰ Under Section 7, employees “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 also “have the right to refrain from any or all of such activities[.]” 29 U.S.C. § 157.

where the [u]nion cameras were pointed.” (Br. 37.) However, there is no evidence that any union demonstrators pointed any phones or cameras in the direction of employees interacting with the demonstrators. Additionally, the record fails to show that Pruitt employees’ mere presence at work was Section 7 activity. Pruitt has thus fallen far short of establishing any objectionable conduct with respect to this allegation.

4. The closeness of the election and the “aggregate impact” of Pruitt’s meritless objections do not warrant a rerun.

Although Pruitt failed to substantiate any objection, it argues that the “aggregate impact” of the allegedly objectionable conduct and the closeness of the election results warrant a new election. (Br. 33, 40–42.) This contention lacks merit. First, as this 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). Here, the Board considered the alleged objectionable conduct “both in isolation and cumulatively.” (JA 237.) Even had it not done so, Pruitt has failed to identify any aggregate effect that the Board prejudicially failed to consider.¹¹

¹¹ Pruitt’s case citations (Br. 41–42) are inapposite. Several of these cases involved threats likely to instill fear in employees, unlike the alleged conduct in the instant case. *See John M. Horn Lumber Co. v. NLRB*, 859 F.2d 1242, 1244 (6th

Second, the closeness of the election also does not warrant a rerun, as the Board found. (JA 273.) The dispositive question is whether, based on the objective evidence, it can reasonably be said that the alleged objectionable conduct affected the outcome of the election. (JA 273.) The answer is “no.” Pruitt has failed to prove that union misconduct reasonably tended to interfere with employees’ free choice in the election or that there was an atmosphere of fear and coercion which made a free and fair election impossible. And, this Court has refused to require a rerun in cases involving close election results and much more egregious conduct than is alleged here. *See Downtown Bid Servs.*, 682 F.3d at 111–12, 116–17 (56 to 51 for union, with 1 challenged ballot; pro-union employees made “serious” threats of job loss to co-workers if they did not support the union, pro-union employees harassed co-workers with profanity and racial epithets, and employee locker room poster was anonymously defaced with profane and racist language); *Majestic Star Casino, LLC v. NLRB*, 373 F.3d 1345, 1347, 1350 (D.C. Cir. 2004) (13 to 8 for union; Board overruled objections without hearing even though employer alleged that employee, in presence of other

Cir. 1988) (court finds new election warranted where employee assaulted a co-worker while wearing a “throwing knife” and saying that he had “better vote for the f— union” and another employee said, “There’s a m— f—, I’m gonna blow his brains out and I’m looking straight at him”); *Stannah Stairlifts*, 325 NLRB at 572 (pro-union employee threatened to “kick the shit out of and kill” anti-union employee).

employees, said, “[I]t’s time to light them up fellas,” which was directed at anti-union employees); *Amalgamated Clothing & Textile Workers Union*, 736 F.2d at 1561, 1565, 1567–68 (101 to 94 for union, with 5 challenged ballots; pro-union employee talked “about . . . cars being torn up by the union people against the people that were anti-union” and stated that “people could be hurt[,]” another pro-union employee told co-worker in jest that if co-worker did not vote for the union, the employee would kill him and “[drink] up all of his liquor[,]” anonymous phone call threatening employee with property damage was followed by anonymous acts of vandalism against that employee and others, and there was hearsay evidence of employee receiving calls threatening bodily harm if he did not sign union card).

Pruitt’s cited cases (Br. 40–41) are inapposite in that they invariably involve far more troubling conduct, including specific threats that would reasonably instill fear in voters. *See ManorCare*, 823 F.3d at 86–87 (court finds objectionable threats of physical harm and property damage, some by employee who was known to have been in fights before and bore a hand injury from a knife fight); *Orr-Sysco Food Services*, 338 NLRB at 614–15 (threats of physical violence including cracking an employee’s head, property damage including to employee vehicle, and deportation); *Cedars-Sinai*, 342 NLRB 596, 596–97 (2004) (threatening phone calls to activist anti-union employees including telling one to think about her family and her daughters and back off); *Hollingsworth Mgmt. Serv.*, 342 NLRB

556, 557–58 (2004) (unlawful electioneering with use of physical force). The alleged misconduct here does not even approach that in the cases cited by Pruitt. All told, Pruitt has failed to prove misconduct requiring that the election results be set aside.

Almost two years have passed since a majority of the Facility’s unit employees chose union representation in a secret-ballot election. This Court should give that choice effect.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying Pruitt's petition for review and enforcing the Board's Order in full.

/s/ Usha Dheenan
USHA DHEENAN
Supervisory Attorney

/s/ Mischa K. Bauermeister
MISCHA K. BAUERMEISTER
Attorney

National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570
(202) 273-2948
(202) 273-1776

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

May 2017

STATUTORY AND REGULATORY ADDENDUM
TABLE OF CONTENTS

National Labor Relations Act (“the Act”), 29 U.S.C. § 151, et seq.

Section 7 (29 U.S.C. § 157) ii
Section 8(a)(1) (29 U.S.C. § 158(a)(1)) ii
Section 8(a)(5) (29 U.S.C. § 158(a)(5)) ii
Section 9(c) (29 U.S.C. § 159(c)) ii
Section 9(d) (29 U.S.C. § 159(d)) iii
Section 10(a) (29 U.S.C. § 160(a)) iv
Section 10(e) (29 U.S.C. § 160(e)) iv
Section 10(f) (29 U.S.C. § 160(f)) v

The Board’s Rules and Regulations

29 C.F.R. § 102.67(g) [79 FR 74308, 74485 (Dec. 15, 2014)]v

THE NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157):

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

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer--

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

* * *

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

Section 9 of the Act (29 U.S.C. § 159) provides in relevant part:

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

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

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

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

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [section 160(c) of this title].

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act [subchapter] in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) [of this section] the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10(c) [section 160(c) of this title] is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f) [subsection (e) or (f) of section 160 of this title], and thereupon the decree of the court enforcing, modifying, or setting aside in

whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

* * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to

the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

THE BOARD'S RULES AND REGULATIONS

[Representation—Case Procedures, 79 FR 74308, 74485 (Dec. 15, 2014)]

Sec. 102.67 *Proceedings before the regional director; further hearing; action by the regional director; appeals from actions of the regional director; statement in opposition; requests for extraordinary relief; Notice of Election; voter list.*

* * *

(g) Finality; waiver; denial of request. The regional director's actions are final unless a request for review is granted. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

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

PRUITTHEALTH-VIRGINIA PARK, LLC)	
)	
Petitioner/Cross-Respondent)	
)	Nos. 16-1350, 16-1399
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	10-CA-173537
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 10,377 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 26th day of May, 2017

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

PRUITTHEALTH-VIRGINIA PARK, LLC)	
)	
Petitioner/Cross-Respondent)	
)	Nos. 16-1350, 16-1399
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	10-CA-173537
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2017, I electronically filed the foregoing document 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 further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

Jonathan E. Kaplan, Attorney
Little Mendelson PC
3725 Champion Hills Drive, Suite 3000
Memphis, TN 38125

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 26th day of May, 2017