

[ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED]

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In The United States Court Of Appeals For The D.C. Circuit

**RadNet Management, Inc., d/b/a Orange Advanced Imaging;  
RadNet Management, Inc., doing business as West Coast Radiology – Irvine;  
RadNet Management, Inc., d/b/a Anaheim Advanced Imaging;  
RadNet Management, Inc., d/b/a West Coast Radiology - Santa Ana;  
RadNet Management, Inc., d/b/a Garden Grove Advanced Imaging;  
RadNet Management, Inc., d/b/a La Mirada Imaging,**

*Petitioners,*

v.

**NATIONAL LABOR RELATIONS BOARD,**

*Respondent.*

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**NATIONAL LABOR RELATIONS BOARD,**

*Petitioner,*

v.

**RadNet Management, Inc., d/b/a Orange Advanced Imaging;  
RadNet Management, Inc., doing business as West Coast Radiology – Irvine;  
RadNet Management, Inc., d/b/a Anaheim Advanced Imaging;  
RadNet Management, Inc., d/b/a West Coast Radiology - Santa Ana;  
RadNet Management, Inc., d/b/a Garden Grove Advanced Imaging;  
RadNet Management, Inc., d/b/a La Mirada Imaging,**

*Respondents.*

ON APPEAL FROM THE NATIONAL LABOR RELATIONS BOARD

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**OPENING BRIEF OF PETITIONERS/CROSS-RESPONDENTS**

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**BRYAN T. CARMODY  
CARMODY & CARMODY, LLP  
134 Evergreen Lane  
Glastonbury, CT 06033  
(203) 249-9287  
bcarmody@carmodyandcarmody.com**

*Counsel for Petitioners  
/Cross-Respondents*

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

<p>RADNET MANAGEMENT, INC. D/B/A ORANGE ADVANCED IMAGING</p> <p>Petitioner</p> <p><i>versus</i></p> <p>NATIONAL LABOR RELATIONS BOARD,</p> <p>Respondent</p>	<p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>Docket Nos: 19-1180</p> <p>19-1194</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p>
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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

The Undersigned, as Counsel for RadNet Management, Inc. d/b/a Orange Advanced Imaging (hereafter, the “Petitioner”), the Petitioner in the above-captioned case, whereby the Petitioner has filed a Petition for Review of the Decision and Order officially reported by the Respondent National Labor Relations Board (hereafter, the “Board”) at RadNet Management, Inc., Case No. 21-CA-242665 (August 28, 2019), does hereby certify, in accordance with Local Rule 28(a)(1), as follows:

- (A) PARTIES AND AMICI: As part of the proceedings below before the Board, the following parties appeared: (1) The Board’s Acting General Counsel, (2) RadNet Management, Inc. d/b/a Orange Advanced Imaging, and (3) the

intervenor or *amicus* appeared before the Board.

In the case now before the Court, there are currently two parties, as follows:

Petitioner:

RadNet Management, Inc. d/b/a Orange Advanced Imaging  
230 South Main Street, Suite 101  
Orange, California 92868

Respondent:

National Labor Relations Board  
Office of the General Counsel  
Appellate Court Branch  
1015 Half Street, SE  
Washington, DC 20570

(B) RULINGS UNDER REVIEW: The ruling at issue as part of the case now before the Court is set forth by RadNet Management, Inc., Case No. 21-CA-242665 (August 28, 2019).

(C) RELATED CASES: The Petitioner notes that the following cases present some issues that are substantially similar to some of the issues that the Petitioner intends to pursue before the Court as part of the present case:

- RadNet Management, Inc. d/b/a West Coast Radiology - Irvine v. National Labor Relations Board – United States Court of Appeals for the District of Columbia, Case Nos. 19-1181, 19-1195

- RadNet Management, Inc. d/b/a Anaheim Advanced Imaging v. National Labor Relations Board – United States Court of Appeals for the District of Columbia, Case Nos. 19-1182, 19-1191
- RadNet Management, Inc. d/b/a West Coast Radiology – Santa Ana v. National Labor Relations Board – United States United States Court of Appeals for the District of Columbia, Case Nos. 19-1183, 19-1192
- RadNet Management, Inc. d/b/a Garden Grove Advanced Imaging v. National Labor Relations Board – United States Court of Appeals for the District of Columbia, Case Nos. 19-1184, 19-1193
- RadNet Management, Inc. d/b/a La Mirada Imaging v. National Labor Relations Board – United States Court of Appeals for the District of Columbia, Case Nos. 19-1203, 19-1207
- RadNet Management, Inc. d/b/a San Fernando Valley Interventional Radiology and Imaging Center and RadNet Management, Inc. d/b/a San Fernando Valley Advanced Imaging Center v. National Labor Relations Board – United States Court of Appeals for the Ninth Circuit, Case Nos. 19-71261, 19-71447

However, the Petitioner notes that some of the issues and facts raised in the above cases are distinct, in various manners, from the issues and facts presented by the Petitioner's case, rendering the cases inappropriate for any kind of

between the parties and before the Court, in light of the Amended Motion to Consolidate filed by the Board, and the Opposition thereto that will soon be filed by the Petitioner.

Dated: Atlanta, Georgia  
October 21, 2019

Respectfully Submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

KAITLIN KASETA LAMMERS  
1035 Euclid Avenue NE Atlanta,  
Georgia 30307  
(860) 307-3223  
kkaseta@carmodyandcarmody.com



or intervenor or *amicus* appeared before the Board.

In the case now before the Court, there are currently two parties, as follows:

Petitioner:

RadNet Management, Inc. d/b/a West Coast Radiology - Irvine  
16300 Sand Canyon Avenue, Suite 102  
Irvine, California 92618

Respondent:

National Labor Relations Board  
Office of the General Counsel  
Appellate Court Branch  
1015 Half Street, SE  
Washington, DC 20570

(B) RULINGS UNDER REVIEW: The ruling at issue as part of the case now before the Court is set forth by RadNet Management, Inc., 368 NLRB No. 57 (August 27, 2019).

(C) RELATED CASES: The Petitioner notes that the following cases present some issues that are substantially similar to some of the issues that the Petitioner intends to pursue before the Court as part of the present case:

- RadNet Management, Inc. d/b/a Anaheim Advanced Imaging v. National Labor Relations Board – United States Court of Appeals for the District of Columbia, Case Nos. 19-1182, 19-1191

- RadNet Management, Inc. d/b/a Orange Advanced Imaging v. National Labor Relations Board – United States Court of Appeals for the District of Columbia, Case Nos. 19-1180, 19-1194
- RadNet Management, Inc. d/b/a West Coast Radiology – Santa Ana v. National Labor Relations Board – United States United States Court of Appeals for the District of Columbia, Case Nos. 19-1183, 19-1192
- RadNet Management, Inc. d/b/a Garden Grove Advanced Imaging v. National Labor Relations Board – United States Court of Appeals for the District of Columbia, Case Nos. 19-1184, 19-1193
- RadNet Management, Inc. d/b/a La Mirada Imaging v. National Labor Relations Board – United States Court of Appeals for the District of Columbia, Case Nos. 19-1203, 19-1207
- RadNet Management, Inc. d/b/a San Fernando Valley Interventional Radiology and Imaging Center and RadNet Management, Inc. d/b/a San Fernando Valley Advanced Imaging Center v. National Labor Relations Board – United States Court of Appeals for the Ninth Circuit, Case Nos. 19-71261, 19-71447

However, the Petitioner notes that some of the issues and facts raised in the above cases are distinct, in various manners, from the issues and facts presented by the Petitioner’s case, rendering the cases inappropriate for any kind of

consolidation. In fact, the question of consolidation is a presently-pending dispute between the parties and before the Court, in light of the Amended Motion to Consolidate filed by the Board, and the Opposition thereto that will soon be filed by the Petitioner.

Dated: Atlanta, Georgia  
October 24, 2019

Respectfully Submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

KAITLIN KASETA LAMMERS  
1035 Euclid Avenue NE  
Atlanta, Georgia 30307  
(860) 307-3223  
kkaseta@carmodyandcarmody.com



or intervenor or *amicus* appeared before the Board.

In the case now before the Court, there are currently two parties, as follows:

Petitioner:

RadNet Management, Inc. d/b/a Anaheim Advanced Imaging  
947 South Anaheim Boulevard, Suite 130  
Anaheim, California 92805

Respondent:

National Labor Relations Board  
Office of the General Counsel  
Appellate Court Branch  
1015 Half Street, SE  
Washington, DC 20570

(B) RULINGS UNDER REVIEW: The ruling at issue as part of the case now before the Court is set forth by RadNet Management, Inc., 368 NLRB No. 56 (August 28, 2019).

(C) RELATED CASES: The Petitioner notes that the following cases present some issues that are substantially similar to some of the issues that the Petitioner intends to pursue before the Court as part of the present case:

- RadNet Management, Inc. d/b/a West Coast Radiology - Irvine v. National Labor Relations Board – United States Court of Appeals for the District of Columbia, Case Nos. 19-1181, 19-1195

- RadNet Management, Inc. d/b/a Orange Advanced Imaging v. National Labor Relations Board – United States Court of Appeals for the District of Columbia, Case Nos. 19-1180, 19-1194
- RadNet Management, Inc. d/b/a West Coast Radiology – Santa Ana v. National Labor Relations Board – United States United States Court of Appeals for the District of Columbia, Case Nos. 19-1183, 19-1192
- RadNet Management, Inc. d/b/a Garden Grove Advanced Imaging v. National Labor Relations Board – United States Court of Appeals for the District of Columbia, Case Nos. 19-1184, 19-1193
- RadNet Management, Inc. d/b/a La Mirada Imaging v. National Labor Relations Board – United States Court of Appeals for the District of Columbia, Case Nos. 19-1203, 19-1207
- RadNet Management, Inc. d/b/a San Fernando Valley Interventional Radiology and Imaging Center and RadNet Management, Inc. d/b/a San Fernando Valley Advanced Imaging Center v. National Labor Relations Board – United States Court of Appeals for the Ninth Circuit, Case Nos. 19-71261, 19-71447

However, the Petitioner notes that some of the issues and facts raised in the above cases are distinct, in various manners, from the issues and facts presented by the Petitioner’s case, rendering the cases inappropriate for any kind of

between the parties and before the Court, in light of the Amended Motion to Consolidate filed by the Board, and the Opposition thereto that will soon be filed by the Petitioner.

Dated: Atlanta, Georgia  
October 23, 2019

Respectfully Submitted,

\_\_\_\_\_/s/\_\_\_\_\_

KAITLIN KASETA LAMMERS  
1035 Euclid Avenue NE  
Atlanta, Georgia 30307  
(860) 307-3223  
kkaseta@carmodyandcarmody.com



other party or intervenor or *amicus* appeared before the Board.

In the case now before the Court, there are currently two parties, as follows:

Petitioner:

RadNet Management, Inc. d/b/a West Coast Radiology - Santa Ana  
1100-A North Tustin Avenue  
Santa Ana, California 92705

Respondent:

National Labor Relations Board  
Office of the General Counsel  
Appellate Court Branch  
1015 Half Street, SE  
Washington, DC 20570

(B) RULINGS UNDER REVIEW: The ruling at issue as part of the case now before the Court is set forth by RadNet Management, Inc., 368 NLRB No. 57 (August 28, 2019).

(C) RELATED CASES: The Petitioner notes that the following cases present some issues that are substantially similar to some of the issues that the Petitioner intends to pursue before the Court as part of the present case:

- RadNet Management, Inc. d/b/a West Coast Radiology - Irvine v. National Labor Relations Board – United States Court of Appeals for the District of Columbia, Case Nos. 19-1181, 19-1195

- RadNet Management, Inc. d/b/a Orange Advanced Imaging v. National Labor Relations Board – United States Court of Appeals for the District of Columbia, Case Nos. 19-1180, 19-1194
- RadNet Management, Inc. d/b/a Anaheim Advanced Imaging v. National Labor Relations Board – United States United States Court of Appeals for the District of Columbia, Case Nos. 19-1182, 19-1191
- RadNet Management, Inc. d/b/a Garden Grove Advanced Imaging v. National Labor Relations Board – United States Court of Appeals for the District of Columbia, Case Nos. 19-1184, 19-1193
- RadNet Management, Inc. d/b/a La Mirada Imaging v. National Labor Relations Board – United States Court of Appeals for the District of Columbia, Case Nos. 19-1203, 19-1207
- RadNet Management, Inc. d/b/a San Fernando Valley Interventional Radiology and Imaging Center and RadNet Management, Inc. d/b/a San Fernando Valley Advanced Imaging Center v. National Labor Relations Board – United States Court of Appeals for the Ninth Circuit, Case Nos. 19-71261, 19-71447

However, the Petitioner notes that some of the issues and facts raised in the above cases are distinct, in various manners, from the issues and facts presented by the Petitioner’s case, rendering the cases inappropriate for any kind of

between the parties and before the Court, in light of the Amended Motion to Consolidate filed by the Board, and the Opposition thereto that will soon be filed by the Petitioner.

Dated: Atlanta, Georgia  
October 23, 2019

Respectfully Submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

KAITLIN KASETA LAMMERS  
1035 Euclid Avenue NE  
Atlanta, Georgia 30307  
(860) 307-3223  
kkaseta@carmodyandcarmody.com



party or intervenor or *amicus* appeared before the Board.

In the case now before the Court, there are currently two parties, as follows:

Petitioner:

RadNet Management, Inc. d/b/a Garden Grove Advanced Imaging  
9191 Westminster Avenue, Suite 105  
Garden Grove, California 92844

Respondent:

National Labor Relations Board  
Office of the General Counsel  
Appellate Court Branch  
1015 Half Street, SE  
Washington, DC 20570

(B) RULINGS UNDER REVIEW: The ruling at issue as part of the case now before the Court is set forth by RadNet Management, Inc., 368 NLRB No. 58 (August 27, 2019).

(C) RELATED CASES: The Petitioner notes that the following cases present some issues that are substantially similar to some of the issues that the Petitioner intends to pursue before the Court as part of the present case:

- RadNet Management, Inc. d/b/a Anaheim Advanced Imaging v. National Labor Relations Board – United States Court of Appeals for the District of Columbia, Case Nos. 19-1182, 19-1191

- RadNet Management, Inc. d/b/a Orange Advanced Imaging v. National Labor Relations Board – United States Court of Appeals for the District of Columbia, Case Nos. 19-1180, 19-1194
- RadNet Management, Inc. d/b/a West Coast Radiology – Santa Ana v. National Labor Relations Board – United States United States Court of Appeals for the District of Columbia, Case Nos. 19-1183, 19-1192
- RadNet Management, Inc. d/b/a West Coast Radiology - Irvine v. National Labor Relations Board – United States Court of Appeals for the District of Columbia, Case Nos. 19-1181, 19-1195
- RadNet Management, Inc. d/b/a La Mirada Imaging v. National Labor Relations Board – United States Court of Appeals for the District of Columbia, Case Nos. 19-1203, 19-1207
- RadNet Management, Inc. d/b/a San Fernando Valley Interventional Radiology and Imaging Center and RadNet Management, Inc. d/b/a San Fernando Valley Advanced Imaging Center v. National Labor Relations Board – United States Court of Appeals for the Ninth Circuit, Case Nos. 19-71261, 19-71447

However, the Petitioner notes that some of the issues and facts raised in the above cases are distinct, in various manners, from the issues and facts presented by the Petitioner's case, rendering the cases inappropriate for any kind of

consolidation. In fact, the question of consolidation is a presently-pending dispute between the parties and before the Court, in light of the Amended Motion to Consolidate filed by the Board, and the Opposition thereto that will soon be filed by the Petitioner.

Dated: Atlanta, Georgia  
October 25, 2019

Respectfully Submitted,

\_\_\_\_\_/s/\_\_\_\_\_

KAITLIN KASETA LAMMERS  
1035 Euclid Avenue NE  
Atlanta, Georgia 30307  
(860) 307-3223  
kkaseta@carmodyandcarmody.com



or intervenor or *amicus* appeared before the Board.

In the case now before the Court, there are currently two parties, as follows:

Petitioner:

RadNet Management, Inc. d/b/a La Mirada Imaging  
15651 Imperial Highway, Suite 103  
La Mirada, California 90638

Respondent:

National Labor Relations Board  
Office of the General Counsel  
Appellate Court Branch  
1015 Half Street, SE  
Washington, DC 20570

(B) RULINGS UNDER REVIEW: The ruling at issue as part of the case now before the Court is set forth by RadNet Management, Inc., 368 NLRB No. 89 (October 2, 2019).

(C) RELATED CASES: The Petitioner notes that the following cases present some issues that are substantially similar to some of the issues that the Petitioner intends to pursue before the Court as part of the present case:

- RadNet Management, Inc. d/b/a Anaheim Advanced Imaging v. National Labor Relations Board – United States Court of Appeals for the District of Columbia, Case Nos. 19-1182, 19-1191

- RadNet Management, Inc. d/b/a Orange Advanced Imaging v. National Labor Relations Board – United States Court of Appeals for the District of Columbia, Case Nos. 19-1180, 19-1194
- RadNet Management, Inc. d/b/a West Coast Radiology – Santa Ana v. National Labor Relations Board – United States United States Court of Appeals for the District of Columbia, Case Nos. 19-1183, 19-1192
- RadNet Management, Inc. d/b/a West Coast Radiology - Irvine v. National Labor Relations Board – United States Court of Appeals for the District of Columbia, Case Nos. 19-1181, 19-1195
- RadNet Management, Inc. d/b/a Garden Grove Advanced Imaging v. National Labor Relations Board – United States Court of Appeals for the District of Columbia, Case Nos. 19-1184, 19-1193
- RadNet Management, Inc. d/b/a San Fernando Valley Interventional Radiology and Imaging Center and RadNet Management, Inc. d/b/a San Fernando Valley Advanced Imaging Center v. National Labor Relations Board – United States Court of Appeals for the Ninth Circuit, Case Nos. 19-71261, 19-71447

However, the Petitioner notes that some of the issues and facts raised in the above cases are distinct, in various manners, from the issues and facts presented by the Petitioner's case, rendering the cases inappropriate for any kind of

consolidation. In fact, the question of consolidation is a presently-pending dispute between the parties and before the Court, in light of the Amended Motion to Consolidate filed by the Board, and the Opposition thereto filed by the Petitioner.

Dated: Atlanta, Georgia  
November 6, 2019

Respectfully Submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

KAITLIN KASETA LAMMERS  
1035 Euclid Avenue NE Atlanta,  
Georgia 30307  
(860) 307-3223  
kkaseta@carmodyandcarmody.com

**CORPORATE DISCLOSURE STATEMENT [19-1180]**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, RadNet Management, Inc. d/b/a Orange Advanced Imaging, as the Petitioner in the above- captioned case, hereby makes the following disclosures:

- (1) RadNet Management, Inc. d/b/a Orange Advanced Imaging is a corporation with no stock that is organized under the laws of the State of California, and that operated a diagnostic imaging facility in Orange, California.
- (2) RadNet, Inc. is a publicly held corporation organized under the laws of the State of Delaware that is the parent corporation of RadNet Management, Inc. d/b/a Orange Advanced Imaging. RadNet, Inc. does not itself have any parent corporation.

**CORPORATE DISCLOSURE STATEMENT [19-1181]**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, RadNet Management, Inc. d/b/a West Coast Radiology - Irvine, as the Petitioner in the above-captioned case, hereby makes the following disclosures:

1. RadNet Management, Inc. d/b/a West Coast Radiology - Irvine is a corporation with no stock that is organized under the laws of the State of California, and that operates a diagnostic imaging facility in Irvine, California.
2. RadNet, Inc. is a publicly held corporation organized under the laws of the State of Delaware that is the parent corporation of RadNet Management, Inc. d/b/a West Coast Radiology - Irvine. RadNet, Inc. does not itself have any parent corporation.

**CORPORATE DISCLOSURE STATEMENT [19-1182]**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, RadNet Management, Inc. d/b/a Anaheim Advanced Imaging, as the Petitioner in the above-captioned case, hereby makes the following disclosures:

1. RadNet Management, Inc. d/b/a Anaheim Advanced Imaging is a corporation with no stock that is organized under the laws of the State of California, and that operated a diagnostic imaging facility in Anaheim, California.
2. RadNet, Inc. is a publicly held corporation organized under the laws of the State of Delaware that is the parent corporation of RadNet Management, Inc. d/b/a Anaheim Advanced Imaging. RadNet, Inc. does not itself have any parent corporation.

**CORPORATE DISCLOSURE STATEMENT [19-1183]**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, RadNet Management, Inc. d/b/a West Coast Radiology – Santa Ana, as the Petitioner in the above-captioned case, hereby makes the following disclosures:

1. RadNet Management, Inc. d/b/a West Coast Radiology - Santa Ana is a corporation with no stock that is organized under the laws of the State of California, and that operated a diagnostic imaging facility in Santa Ana, California.
2. RadNet, Inc. is a publicly held corporation organized under the laws of the State of Delaware that is the parent corporation of RadNet Management, Inc. d/b/a West Coast Radiology – Santa Ana. RadNet, Inc. does not itself have any parent corporation.

**CORPORATE DISCLOSURE STATEMENT [19-1184]**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, RadNet Management, Inc. d/b/a Garden Grove Advanced Imaging, as the Petitioner in the above-captioned case, hereby makes the following disclosures:

1. RadNet Management, Inc. d/b/a Garden Grove Advanced Imaging is a corporation with no stock that is organized under the laws of the State of California, and that operated a diagnostic imaging facility in Garden Grove, California.
2. RadNet, Inc. is a publicly held corporation organized under the laws of the State of Delaware that is the parent corporation of RadNet Management, Inc. d/b/a Garden Grove Advanced Imaging. RadNet, Inc. does not itself have any parent corporation.

**CORPORATE DISCLOSURE STATEMENT [19-1203]**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, RadNet Management, Inc. d/b/a La Mirada Imaging, as the Petitioner in the above captioned case, hereby makes the following disclosures:

1. RadNet Management, Inc. d/b/a La Mirada Imaging is a corporation with no stock that is organized under the laws of the State of California, and that operated a diagnostic imaging facility in La Mirada, California.
2. RadNet, Inc. is a publicly held corporation organized under the laws of the State of Delaware that is the parent corporation of RadNet Management, Inc. d/b/a La Mirada Imaging. RadNet, Inc. does not itself have any parent corporation.

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## **GLOSSARY OF TERMS**

There are no applicable terms warranting a glossary.

## **JURISDICTIONAL STATEMENT**

Pursuant to Section §10(e) of the National Labor Relations Act, (the “Act”), 29 U.S.C. §§151, *et seq.*, the National Labor Relations Board (the “Board”) possessed the subject matter jurisdiction to issue: (1) the Decision and Order issued in RadNet Management, Inc., 368 NLRB No. 55 (2019), dated August 27, 2019; (2) the Decision and Order issued in RadNet Management, Inc., 368 NLRB No. 58 (2019), dated August 27, 2019; (3) the Decision and Order issued in RadNet Management, Inc., 368 NLRB No. 53 (2019), dated August 28, 2019; (4) the Decision and Order issued in RadNet Management, Inc., 368 NLRB No. 56 (2019), dated August 28, 2019; (5) the Decision and Order issued in RadNet Management, Inc., 368 NLRB No. 57 (2019), dated August 28, 2019; and (6) the Decision and Order issued in RadNet Management, Inc., 368 NLRB No. 89 (2019), dated October 2, 2019; which are all final orders, and are each the subject of the Applications for Enforcement and the Petitions for Review now before the Court, all of which were timely filed pursuant to the Act.

This Court has appellate jurisdiction pursuant to §10(e) of the Act, and venue in this Court is proper pursuant to §10(f) of the Act. See 29 U.S.C. §160(e); 29 U.S.C. §160(f).

### **STATEMENT OF THE ISSUES**

- 1) Whether the Board erred in the issuance of its denial of the Requests for Review filed by RadNet Management, Inc. d/b/a Anaheim Advanced Imaging (“Anaheim”); RadNet Management, Inc. d/b/a Garden Grove Advanced Imaging (“Garden Grove”); RadNet Management, Inc. d/b/a La Mirada Imaging (“La Mirada”); RadNet Management, Inc. d/b/a Orange Advanced Imaging (“Orange”); RadNet Management, Inc. d/b/a West Coast Radiology - Irvine (“Irvine”); and RadNet Management, Inc. d/b/a West Coast Radiology - Santa Ana (“Santa Ana”) (collectively, the “Petitioners” or “Employers” of the Regional Director for Region 21 of the Board’s Decisions and Certifications of Representative (the “Requests for Review”) to the National Union of Healthcare Workers (the “Union”) because the Board erred by eschewing its obligation to ensure that the unit sought by the Union, and ultimately certified by the Board, did not include those employees defined as “guards” by Section 9(b)(3) of the Act in a bargaining unit with non-guard members.
- 2) Whether the Board erred in the issuance of its denial of the Employers’ Requests for Review because the Board erred by permitting the improper impounding of the ballots and the improper delay of the tally of the ballots after the election had occurred.

- 3) Whether the Board erred in the issuance of its denial of the Employers' Requests for Review because the Board erred by permitting the improper impounding of the ballots and the improper delay of the tally of the ballots in other elections conducted under the same representation case number.
- 4) Whether the Board erred in the issuance of its denial of the Employers' Requests for Review because the Board erred by permitting Region 21 of the Board to conduct the elections in Case No. 21-RC-226166 as though they were a single unit election.
- 5) Whether the Board erred in the issuance of its denial of the Employers' Requests for Review because the Board erred by failing to recognize the unlawful application of the Board's revised election rules, both as a facial matter, and as applied to the facts of the underlying representation proceedings.
- 6) Whether the Board erred in the issuance of its denial of Santa Ana's Request for Review because the Board erred by failing to recognize that the Region's conduct of the October 24, 2018 election required the election results be vacated.
- 7) Whether the Board erred in the issuance of its denial of Irvine's Request for Review because the Board erred by failing to recognize that the misconduct

during, and the Region's conduct of, the October 25, 2018 election required the election results be vacated.

- 8) Whether the Board erred in the issuance of its denial of the Garden Grove's Request for Review because the Board erred by failing to recognize that the misconduct during, and the Region's conduct of, the October 25, 2018 election required the election results be vacated.
- 9) Whether the Board erred in the issuance of its denial of the Employers' Requests for Review because the Board refused to permit litigation of, and failed to recognize the import of, the affiliation between the Union and the International Association of Machinists and Aerospace Workers (the "IAMAW"), which was never disclosed to eligible voters, and therefore affected the validity of the elections at the Employers' facilities.
- 10) Whether the Board erred by failing to consider the underlying representation issues, *supra*, as part of its analysis of the Employers' alleged refusals to bargain with the Union, and before granting Counsel for the General Counsel of the Board's Motions for Summary Judgment against the Employers.

### **STATUTES AND REGULATIONS**

In compliance with Local Rule 28(a)(5), RadNet Management, Inc. has set forth pertinent statutes and regulations in the addendum to this Brief.

## **STATEMENT OF THE CASE AND FACTS**

### **1.) The Representation Case Proceedings**

#### ***A. The Petition and Pre-Election Hearing***

On August 23, 2018, a petition was filed by the Union with Region 21 of the Board, seeking to represent certain employees in a multi-facility unit comprised of diagnostic imaging facilities in Orange County, California, including Anaheim, Garden Grove, Irvine, Santa Ana, La Mirada, and Orange. Election Decision 1-3; App. at 1112-1114. <sup>1</sup> Thereafter, a pre-election hearing was held on August 31, 2018 and September 4, 2018 before a Hearing Officer of the Board, in order to litigate the issues raised by the Employers' Statement of Position. Election Decision 4; App. at 1115. During the hearing, the Regional Director of Region 21 of the Board, William

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<sup>1</sup> References to exhibits from the representation hearing shall be indicated as "E. Ex. \_\_\_", "GC Ex. \_\_\_", and "U Ex. \_\_\_". References to the transcript from the first and second days of the representation hearing shall be indicated as "1Tr. \_\_\_" and "2Tr. \_\_\_", respectively. References to the Employers' Post-Hearing Brief shall be indicated as "PHB \_\_\_". References to the Regional Director's Election Decision shall be indicated "Election Decision \_\_\_". References to the Employers' Objections shall be indicated "*Facility* Objections \_\_\_" or, collectively, "Objections \_\_\_". References to the Employers' Offers of Proof in support of their Objections shall be indicated "*Facility* OOP \_\_\_" or, collectively, "OOPs \_\_\_". References to the Regional Director's Certification Decisions shall be indicated as "*Facility* Certification Decision \_\_\_" or, collectively, "Certification Decisions \_\_\_". References to the Employers' Requests for Review shall be indicated as "*Facility* RFR \_\_\_" or, collectively, "RFRs \_\_\_". References to the Board's Orders concerning the Employers' Requests for Review shall be indicated "*Facility* Board Order \_\_\_" or, collectively, "Board Orders \_\_\_".

B. Cowen (the “Regional Director”) requested that the Employers make an offer of proof regarding their evidence in support of their challenges to the Board’s revised election rules. 1Tr. 24-25; App. at 43-44. Upon receiving the Employers’ oral offer of proof, the Regional Director declined to permit litigation of the Employers’ challenges to the Board’s revised election rules “because the Board ha[d] already considered and rejected such arguments”. 1Tr. 24-25, 40-42; Election Decision 17; App. at 43-44, 46-48, 1128. The remaining issues raised by the Employers’ Statement of Position relevant to these cases were litigated as set forth below.

i. Evidence of Guard Status

To support the contention made in their Statement of Position that MRI Technologists (including Lead MRI Technologists, and Multi-Modality Technologists who perform MRI procedures) employed by the Employers (except for La Mirada), and Nuclear Medicine Technologists (including Nuclear Medicine / PET Technologists) employed by Irvine and Orange served the Employers as guards within the meaning of §9(b)(3) of the Act, the Employers presented testimony from Dr. Hiendrick Vartani, who has served as the Medical and Health Physicist for all of the Employers’ operations for the past eighteen years. 2Tr. 79-80; App. at 54-55.

a. *MRI Technologists*

During his testimony, Dr. Vartani explained that MRI is an acronym for Magnetic Resonance Imaging. 2Tr. 83; App. at 58. MRI procedures are performed

in a separate MRI suite within each facility that offers MRI. 2Tr. 85; App. at 60. The MRI suite includes the room where the MRI machine itself is located (referred to as “Zone Four”), the room where the MRI Technologists sit while performing the imaging (referred to as “Zone Three”), and may additionally include a waiting room and / or an exterior hallway (potentially referred to as Zone Two or Zone One, depending upon how many doors separate those areas from Zone Four). 2Tr. 85, 87, 89, 91; App. at 60, 62, 63, 66; E. Ex. 3; App. at 147-148. The four “Zones” delineate or indicate the amount and severity of the magnetic force that the MRI machine exerts upon each area, with Zone Four possessing the highest levels of magnetic force, and Zone One possessing the lowest levels of magnetic force (but not necessarily *no* magnetic force). 2Tr. 89; App. at 64.

Within Zone Four, the MRI machine itself is primarily composed of a large, powerful magnet (of varying force, depending on the specific MRI equipment possessed by the facility) that is always turned on. 2Tr. 88-89, 90; App. at 63-64, 65. For this reason, Dr. Vartani explained that, due to the strength of the magnetic forces created by the MRI machine within both Zone Four and Zone Three, these Zones require the highest levels of precaution be taken to avoid adverse consequences related to the potentially destructive magnetic fields that are emitting from the MRI machine at all times. 2Tr. 89; App. at 64. Because of the strength of the magnetic field in Zone Four, any substance containing metal present in Zone Four could be

sucked, with great force, into the gantry (the opening where a patient would lie during a procedure) of the MRI machine. 2Tr. 90; App. at 65. Dr. Vartani testified that, if a metal object were to enter Zone Four, the results could be “catastrophic”. 2Tr. 97-98; App. at 72-73. For example, if a patient entered Zone Four with metal on their person (like metal shavings in their eye) or metal implanted in their body (like a cardiac stint), the metal could be sucked into the gantry (thereby blinding the individual), or the MRI machine could prevent the metal implant from working properly (in the example of the cardiac stint, by causing severe internal burns to the individual that could cause the individual’s organs to shut down). 2Tr. 94, 98, 99-100; App. at 75. Similarly, if a metal object was introduced into Zone Four separate and apart from the body of a patient or individual, that metal object would be sucked into the gantry with potentially serious consequences. 2Tr. 98; App. at 73. Dr. Vartani explained that any metal object introduced into Zone Four would essentially become a “projectile” that would fly through the air toward the gantry. 2Tr. 98; App. at 73. In one RadNet Management, Inc. facility, a cleaning crew was erroneously permitted to bring a metal floor buffing machine into Zone Four, and the entire buffing machine was pulled into the gantry. 2Tr. 98; App. at 73. In another example that highlighted the grave potential consequences of introducing metal into Zone Four, Dr. Vartani recalled an incident that had happened at an unrelated facility, where a metallic oxygen tank was introduced into Zone Four while a six-

year old child was being scanned. 2Tr. 98-99; App. at 73-74. Because of the strong magnetic forces present, the oxygen tank flew into the gantry while the child was still lying inside the machine, and bludgeoned the child to death. 2Tr. 98-99; App. at 73-74.

Therefore, as a result of the serious consequences of the introduction of metal into Zones Three and Four, in some facilities, the MRI machine, and thus Zone Four, are protected by a cipher lock, to which only the MRI Technologists have the code. 2Tr. 124; App. at 99. In all facilities involved in the instant case, the only facility personnel who are permitted to access Zones Three and Four are the MRI Technologists, and the radiologists and physicists who analyze the results of the scans taken by the MRI Technologists. 2Tr. 91; App. at 66. The MRI Technologists at each facility are the *only* personnel tasked with policing the magnetic fields in Zones Three and Four, as set forth in great detail by the MRI Department Manual made available to all MRI Technologists electronically. 2Tr. 95-97; App. at 70-72; E. Ex. 4; App. at 149-334. As a result, the MRI Technologists screen and control the entry of other employees, patients, visitors, and objects into Zones Three and Four, and are required to call the police if any individual refuses to obey their directions with regard to entry into those areas. 2Tr. 100-101; App. at 75-76.

Aside from the strong magnetic forces which it emits, the MRI magnet itself can also be dangerous. Dr. Vartani testified that the MRI magnet must be maintained at a specific temperature, and that if the magnet overheats, it becomes, quite literally, a “bomb” that could explode. 2Tr. 101; App. at 76. The MRI Technologists are the sole personnel at each facility who are responsible for monitoring and maintaining the temperature of the MRI magnet. 1Tr. 101; App. at 76. If the MRI Technologist is unable to control the temperature of the MRI magnet, they may be required to evacuate the entire facility in order to ensure the safety of facility personnel, visitors and patients. 2Tr. 101; App. at 76. In such circumstances, the only way to prevent the MRI magnet from overheating and exploding may be to “quench” the MRI magnet, which would render the MRI machine inoperable for approximately one week thereafter, and cost the facility approximately \$50,000 - \$55,000 in lost revenue per facility, thus underscoring the importance of the MRI Technologists’ proper monitoring of the MRI magnet’s temperature as part of their regular job duties. 2Tr. 113-114; App. at 88-89. Accordingly, given the multitude of important security and safety functions performed by the MRI Technologists, Dr. Vartani testified that permitting the MRI Technologists employed by the Employers to strike with other technical employees if included in the same bargaining unit, thus abandoning their posts and their enforcement of the facility’s access rules for Zones 3 and 4, “could be a fatal mistake”. 2Tr. 127; App. at 102.

*b. Nuclear Medicine Technologists*

Dr. Vartani explained that Nuclear Medicine, which is offered at Irvine and Orange, differs from the other radiological procedures including MRI, because Nuclear Medicine involves the acquisition of images of the human body on the molecular level, rather than the anatomical level. 2Tr. 102; App. at 127. In order to obtain images of the human body on the molecular level, a patient is injected with an isotope or “tracer”, and cameras known as “gamma cameras” are utilized to take pictures of the patient’s body’s reaction to those isotopes on a cellular level. 2Tr. 102; App. at 127. The isotopes that are injected into the patient are unstable, and thus radioactive – meaning that they give off certain levels of radiation, depending on the amount of and type of isotope that is injected into the patient. 2Tr. 102; App. at 127. While some exposure to radiation is required for nuclear imaging, as a general matter, limited exposure to radioactive material is best for the human body, as exposure to radiation can lead to various serious health consequences, from low platelet counts, to internal bleeding, and even death. 2Tr. 118; App. at 93. Exposure to radiation is particularly dangerous for certain segments of the population, like pregnant women.<sup>2</sup> 2Tr. 106; App. at 81.

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<sup>2</sup> Nuclear Medicine Technologists themselves take various measures to avoid overexposure to radiation, including wearing “dosimetry badges” which track their exposure to radiation over time, and working behind numerous lead barriers to prevent direct exposure to radioactive sources. 2Tr. 118-119; App. at 93-94.

In order to avoid the unnecessary exposure of patients, employees, and visitors to radiation, the facilities with Nuclear Medicine Departments are designed so that the Nuclear Medicine Departments are entirely separated from the rest of the facility. 2Tr. 104, 112; App. at 79, 87; E. Ex. 6; App. at 335-336. The walls that encompass the Nuclear Medicine Department are lined with lead, and the Nuclear Medicine Department is a completely locked area, to which only the Nuclear Medicine Technologists and Nuclear Medicine physicians possess the key codes to enter. 2Tr. 104, 106, 112, 137-138; App. at 79, 81, 87, 112-113; E. Ex. 6; App. at 335-336. Nuclear Medicine Technologists at Irvine and Orange are the sole facility personnel tasked with policing the Nuclear Medicine Department, both to ensure that outside individuals do not access or attempt to access the Department, and also to ensure that Nuclear Medicine patients, who have been injected with isotopes and are thus *themselves* radioactive, do not exit the Nuclear Medicine Department and enter the other areas of the facility while they still pose a radiation threat to other human beings. 2Tr. 105-106, 107-108; App. at 80-81, 82-83. These duties are of particular importance when it comes to PET scan patients, who remain so radioactive for such extended periods of time after they are scanned that they are placed in a lead-lined room after they are scanned, and are required to remain in that room until released by the Nuclear Medicine Technologist, who determines that the patient's level of radioactivity has diminished to a safe level before personally escorting them out of

the facility through a separate exit, in order to eliminate the risk of radiation exposure for the rest of the individuals present in the facility. 2Tr. 106, 107-108; App. at 81, 82-83. The monitoring of the Nuclear Medicine Department and the specific patients within the Nuclear Medicine Department are accomplished in part by the use of security cameras, the feeds of which the Nuclear Medicine Technologist is responsible for reviewing. 2Tr. 134-135; App. at 109-110. Nuclear Medicine Technologists also round on foot within the Nuclear Medicine Department, to ensure that only authorized individuals are inside the Department, and that no patients leave the Department while still radioactive. 2Tr. 135; App. at 110. The safety protocols that Nuclear Medicine Technologists are required to follow to police the Nuclear Medicine Department are also set forth in great detail in the Employers' Radiation Safety Manuals, Nuclear Medicine Manuals, and PET Scan Manuals, all of which are made available to Nuclear Medicine Technologists electronically. E. Exs. 7-9; App. at 337-1030; 2Tr. 114-116; App. at 89-91.

Dr. Vartani additionally testified that Nuclear Medicine Technologists at Irvine and Orange are responsible for guarding and monitoring the radioactive materials that are contained within the Nuclear Medicine Department. 2Tr. 105, 106; App. at 80, 81. Within the Nuclear Medicine Department at each facility is a separately-locked room known as the "hot lab". 2Tr. 109; App. at 84. This is the room in which the radioactive isotopes that will be injected into the patients are

stored. 2Tr. 109; App. at 84. The hot lab additionally contains, and the Nuclear Medicine Technologists additionally control, “sealed sources” - radioactive materials with significantly longer half-lives than the isotopes, which are used to calibrate the gamma cameras. 2Tr. 109-110, 114, 117; App. at 84-85, 89, 92. If a radioactive source, such as one of the sealed sources stored in the hot lab, were stolen, Dr. Vartani testified that it would be “extremely dangerous”, as the stolen radioactive material could be used to poison the general public with radiation – for example, by poisoning public drinking water. 2Tr. 117; App. at 92. The only personnel at a facility with authority to access the hot lab are the Nuclear Medicine Technologists, and the Nuclear Medicine Technologists are also the listed contact for any emergency involving the hot lab or the Nuclear Medicine Department. 2Tr. 109, 110, 112, 114; App. at 84, 85, 87, 89. In order to receive certification and licensure from the state of California to run a Nuclear Medicine Department, it is the Nuclear Medicine Technologists who must demonstrate that they have appropriately and safely secured the hot lab from any external access. 2Tr. 112-113; App. at 87-88. Securing the hot lab in this manner may include calling the police to remove any individual who attempts to access the hot lab despite the orders of the Nuclear Medicine Technologist to leave the area. 2Tr. 120; App. at 95. The safety protocols that Nuclear Medicine Technologists are required to follow to police and secure the hot lab are also set forth in great detail in the Employers’ Radiation Safety Manuals,

Nuclear Medicine Manuals, and PET Scan Manuals, all of which are made available to Nuclear Medicine Technologists electronically. E. Exs. 7-9; App. at 337-1030; 2Tr. 114-116; App. at 90-91.

Given the multitude of important security and safety functions performed by the Nuclear Medicine Technologists within the Employers' facilities, Dr. Vartani testified that permitting the Nuclear Medicine Technologists employed by Irvine and Orange to strike with other technical bargaining unit employees the Union sought to represent would potentially be even more dangerous than permitting the MRI Technologists employed by the Employers to participate in a strike, because of the possibility that radioactive materials could be stolen from the facility in the Nuclear Medicine Technologists' absence. 2Tr. 138; App. at 113. Dr. Vartani concluded that, "Regardless of what's going on outside the center," Nuclear Medicine Technologists have a duty and obligation to secure the Nuclear Medicine Department and the hot lab. 2Tr. 138-139; App. at 113-114.

***B. The Regional Director's Decision & Direction of Elections***

After the representation hearing, on October 10, 2018, the Regional Director issued his Election Decision, in which he concluded that the Union had not met its burden of proof with regard to the community of interest between and amongst the employees of the fifteen facilities it sought to include in a multi-facility bargaining unit. Election Decision 4, 13-16; App. at 1115, 1124-1127. Therefore, the Regional

Director concluded that single-facility units at each facility – including each of the Employers’ facilities - would be the appropriate units for elections. Election Decision 4, 16; App. at 1115, 1127. The Regional Director additionally concluded that the Employers’ arguments regarding the “facial validity” of the Board’s revised election rules had “been addressed and resolved by the Board the Courts and are therefore not appropriately raised in this proceeding”. Election Decision 4, 17; App. at 1115, 1128.

Finally, the Regional Director held that MRI Technologists and Nuclear Medicine Technologists were not guards within the meaning of §9(b)(3) the Act, and therefore should not be excluded from the single-facility units. Election Decision 4, 17; App. at 1115, 1128. The Regional Director stated that “employees who perform guard-like duties that are merely incidental to their other duties are not guards”, and determined that the employees at issue were “engaged to perform certain diagnostic testing” – though he acknowledged that the employees did possess responsibility for the “safe operation of the Employer’s equipment”. Election Decision 16, 17; App. at 1127, 1128. The Regional Director’s Election Decision relied upon the fact that the MRI Technologists and Nuclear Medicine Technologists “do not carry weapons, clubs, wear uniforms or badges, or display any other common indicia of guards” and do not sit in a security booth. Election Decision 16-17; App. at 1127-1128. Despite record evidence to the contrary, the Regional Director’s Election Decision also stated that MRI Technologists and Nuclear

Medicine Technologists “do not make periodic rounds of the facility as part of their regular duties” or “monitor the entrance and exit of persons into the facility”. Election Decision 17; App. at 1128. Similarly contradictory to the evidence, the Regional Director concluded that MRI Technologists and Nuclear Medicine Technologists did not receive “specialized instructions on what to do in the event there is a threat to the security of the premises”. Election Decision 17; App. at 1128. On the basis of his findings, the Regional Director concluded that MRI Technologists and Nuclear Medicine Technologists could be included in the units petitioned for by the Union. Election Decision 17; App. at 1128.

Pursuant to his findings, the Regional Director directed elections to take place in eleven individual units located at ten facilities<sup>3</sup> in Orange County, California over the course of two days. Election Decision 18-23; App. at 1129-1134. The Regional Director further ordered that, at the conclusion of each election held pursuant to the Election Decision, the ballots from that election would be impounded, and would not be counted until the conclusion of the final polling period at the final election held pursuant to the Election Decision. Election Decision 23; App. at 1134. The

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<sup>3</sup> Following the conclusion of the representation hearing, the Union notified Region 21 that if elections were directed in single-facility units instead of the petitioned-for multi-facility unit, the Petitioner did not wish to proceed to an election at five of the facilities that were listed on and included the Union’s original multi-facility petition. Election Decision 18, FN 22; App. at 1286.

Regional Director did not cite any authority for his decision to impound the ballots in this manner.

***C. The Elections & The Employers' Objections to the Elections***

Elections were held at each of the Employers' facilities from October 24, 2018 to October 25, 2018. Election Decision 18-23; App. at 1129-1134. Pursuant to the Regional Director's Election Decision, the ballots from each election were impounded, and were not counted until after the final election was held pursuant to the Election Decision, and voting closed at Irvine and Santa Ana at 6:30 pm on October 25, 2018. Election Decision 22-23; App. at 1133-1134. The Union prevailed in each of the elections at issue in the instant case, and on November 1, 2018, each Employer filed timely Objections to the election held at its facility, along with a supporting Offer of Proof. Objections; App. at 1140-1147, 1298-1305, 1452-1459, 1590-1597, 1754-1762, 1917-1924; OOPs; App. at 1031-1073.

The Objections filed by each Employer alleged that the results of the elections should be overturned, because: (1) The Board Agents did not count and tally the ballots at the conclusion of each election, and instead impounded the ballots, in violation of the Board's Rules and Regulations and the Administrative Procedure Act (the "APA"), 5 U.S.C. §706; (2) The Board Agents assigned to oversee the other elections conducted pursuant to the Regional Director's Election Decision similarly did not count and tally the ballots at the conclusion of those elections, and instead

impounded the ballots, in violation of the Act and Board precedent; (3) The Board Agents assigned to oversee the other elections conducted pursuant to the Election Decision did not count and tally the ballots at the conclusion of those elections, and instead impounded the ballots, in violation of the Act; (4) The Regional Director treated the elections as a “*de facto* single election”, violating each Employer’s due process rights and the APA; (5) The Union failed to disclose to eligible voters, and thus materially misrepresented, the Union’s affiliation with the IAMAW; and (6) The Region erred by conducting the election pursuant to the Board’s revised elections rules, which violated the Act, the APA, and public policy considerations. Objections; App. at 1140-1147, 1298-1305, 1452-1459, 1590-1597, 1754-1762, 1917-1924; OOPs; App. at 1031-1073.

The Objections filed by each Employer, with the exception of La Mirada, additionally alleged that each election was conducted in violation of §9(b)(3) of the Act, because the units included guards – namely, the MRI Technologists and Nuclear Medicine Technologists. Objections; App. at 1140-1147, 1298-1305, 1452-1459, 1590-1597, 1754-1762, 1917-1924; OOPs; App. at 1031-1073.

Finally, certain of the Employers raised objections to the elections held at their facility that were based upon specific conduct that occurred in connection with the election at their facility. Irvine alleged that the Board Agent conducting the election at Irvine had failed to maintain the security of the ballot box; and that

Union's election observer was permitted to use their cellular phone during the election. Irvine Objections 4-5; App. at 1759-1760, Irvine OOP 5-6; App. at 1063-1064. Santa Ana alleged that the Board Agent conducting the election at Santa Ana did not post a "Voting Place" sign at or near the polling place. Santa Ana Objections 4; App. at 1921, Santa Ana OOP 4; App. at 1070. Finally, Garden Grove alleged that the Board Agent conducting the election at Garden Grove allowed a pro-Union employee to remain in the polling area while voting was taking place, in violation of the Act and Board precedent. Garden Grove Objections 4-5; App. at 1301-1302, Garden Grove OOP 5-6; App. at 1042-1043.

***D. The Regional Director's Decisions on the Employers' Objections***

On February 19, 2019 the Regional Director issued Decisions and Certifications of Representative in response to each Employer's Objections (hereafter, the "Certification Decisions"), overruling each Employer's Objections in their entirety, and issuing a Certification of Representation to the Union in each case. Certification Decisions 8-9; App. at 1157. With regard to the Objections concerning the Regional Director's decision to impound the ballots from the elections, and the Board Agents' subsequent effectuation of the Regional Director's decision in each individual case, the Regional Director acknowledged that §102.69 of the Board's Rules and Regulations required that ballots be counted "at the conclusion of the election" and that a tally of ballots should be "immediately made available to the

parties.” Certification Decisions 4-7; App. at 1151-1155. The Regional Director further admitted that the Board’s Casehandling Manual required the count of ballots to “take place as soon as possible after the close of voting.” Certification Decisions 4-7; App. at 1151-1155. Finally, the Regional Director’s Certification Decisions cited to Nathan Katz Realty LLC v. NLRB, as an acknowledgement of the limitations on a Regional Director’s authority and discretion to impound election ballots. 251 F.3d 981 (D.C. Cir. 2001); Certification Decisions 5-7; App. at 1152-1155.

However, the Regional Director did not set a hearing on the Employers’ Objections concerning the impounding of ballots, but instead cited to his discretion to “deviat[e] from the typical practice” in such “highly unusual circumstances”, in part in the interest of “administrative efficiency”. Certification Decisions FN 3-4; App. at 1154. The Regional Director cited to Independent Rice Mill, a sixty-three-year-old Board decision, in support of his decision to impound ballots in the case at bar pursuant to a “similar rationale”. 111 NLRB 536 (1955); Certification Decisions 4-8; App. at 1151-1156. In support of his decision to impound the ballots in the other elections held pursuant to the Election Decision, the Regional Director additionally lauded the fact that “*no one* [...] would know the outcome of *any* of the earlier elections” and therefore no one “could disseminate any information about the results of any of the elections until after all the elections were concluded.” Certification Decisions 6-8; App. at 1154 (emphasis in originals). Finally, the Regional Director stated that his decision to

impound the ballots was based on a desire to avoid “the potential for [...] information to be disseminated in an objectionable manner by either of the parties or its agents.” Certification Decisions 6-8; App. at 1154. On the basis of this analysis, the Regional Director overruled the Employers’ Objections concerning the impounding of the ballots in each case, and in all of the elections held pursuant to the Election Decision. Certification Decisions 7-9; App. at 1155.

In connection with the Employers’ Objections concerning the Union’s failure to disclose its affiliation with the IAMAW to eligible voters, despite acknowledging the Board’s responsibility to ascertain that employees “know the identity of the organization that they were voting for or against”, the Regional Director held that the Employers “failed to establish any evidence to support a misrepresentation by the Petitioner that would provide grounds for setting aside the election”, and thus overruled the Objections. Certification Decisions 8-14; App. at 1155. With regard to the Employers’ Objections alleging that the Board had erred by conducting the elections pursuant to the Board’s revised election rules, which the Employers alleged violated the Act, the APA, and public policy considerations underlying a number of other federal statutes, the Regional Director held that, because the Board had “already considered and rejected” the Employers’ challenges to the validity of the Board’s revised election rules, the Objections “would not constitute grounds for setting aside the election”, and thus overruled the Objections. Certification Decisions 6-9; App. at 1155. Turning to the Employers’ allegations that the

elections were conducted in violation of the Act, because the units included guards, the Regional Director held that his Election Decision had “fully considered the record evidence” regarding the guard status of employees, and that on the basis of that evidence, and the “substantially [similar]” evidence presented by the Employers’ Offers of Proof, the Regional Director had concluded that the employees were not guards within the meaning of the Act. Certification Decisions 2-4; App. at 1150.

Finally, the Regional Director addressed the facility-specific Objections raised by Irvine, Santa Ana, and Garden Grove. In response to Irvine’s assertion that the Board Agent had failed to maintain the security of the ballot box by failing to maintain the ballot box within her line of sight during polling, the Regional Director, while recognizing the importance of the “integrity of the election process”, held that the allegations – even if true – would not be grounds for setting aside the election. Irvine Certification Decision 7; App. at 1773. In response to Irvine’s allegation that the Union’s observer continuously used their cell phone during the election, in view of voters, the Regional Director ruled that Irvine’s evidence was “speculative” and that a hearing on the Union observer’s use of their cell phone, in violation of the Board Agent’s admonitions, was “unwarranted”. Irvine Certification Decision 13; App. at 1776. In response to Santa Ana’s Objection that the Board Agent conducting the election had failed to posting a “Voting Place” sign at or near the polling the area, the Regional Director held that a failure to post voting signs is not objectionable conduct. Santa Ana

Certification Decision 8; App. at 1933. Finally, with regard to Garden Grove's Objections, which alleged that the prolonged presence of a pro-Union employee in the polling area destroyed the laboratory conditions necessary for a valid election, the Regional Director dismissed the Objections, based on his finding that no voters were present while the pro-Union employee loitered in the polling area, as well as his finding that the pro-Union employee did not engage any voters in conversation. Garden Grove Certification Decision 9-10; App. at 1315-1316. Having thus overruled the entirety of each Employers' Objections, the Regional Director then issued a Certification of Representative in favor of the Union in each bargaining unit. Certification Decisions 8-15; App. at 1157-1158, 1317-1318, 1468-1469, 1586-1587, 1777-1778, 1935-1936.

***E. The Employers' Requests for Review and the Board's Decisions***

On March 12, 2019, each Employer filed a Request for Review of the Regional Director's Certification Decision (hereafter, the "Requests for Review") concerning their respective facility. RFRs; App. at 1159-1215, 1319-1370, 1470-15404, 1656-1711, 1779-1835, 1937-1988. In their Requests for Review, the Employers argued that the Regional Director had erred by overruling each of their Objections; alleged that each of their Objections should have been set for hearing; and that on the basis of each of the Objections filed by each of the Employers, alone or in concert, the results of the election at each facility should have been set aside. RFRs; App. at 1159-1215, 1319-1370, 1470-15404, 1656-1711, 1779-1835, 1937-1988. On June 12, 2019, the Board denied each

Employers' Request for Review, holding that the Requests for Review raised "no substantial issues warranting review". Board Orders 1; App. at 1216. The Board stated in a footnote to its Orders that it "expressed no view" with respect to whether it "agree[d] or disagree[d] with revisions made by the Board's Election Rule." Board Orders FN 1; App. at 1216. Furthermore, the Board found that the Regional Director had not abused his discretion by impounding the ballots from the separate elections "for the reasons stated in his decision, including the administrative challenges presented by the number of elections and their overlapping schedules", and claimed that, "[u]nder the unusual circumstances of this case, the earliest practicable time at which the count could take place was after the completion of voting in all units." Board Orders FN 1; App. at 1216.

#### ***F. The Subsequent Unfair Labor Practice Proceedings***

##### ***i. The Refusal to Bargain Charges***

As the representation case proceedings detailed above were pending, on April 8, 2019, the Union sent the Employers a letter demanding that the Employers commence negotiations with the Union on the basis of the Certifications of Representative that had been issued by the Regional Director on February 19, 2019. Union Letter; App. at 1218.<sup>4</sup> On June 3, 2019 and June 11, 2019, the Union filed

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<sup>4</sup> References to the Charges shall be indicated "*Facility Charge* \_\_\_", or, collectively, "Charges \_\_\_". References to the Complaints shall be indicated "*Facility Complaint*\_\_\_", or, collectively, "Complaints \_\_\_". References to the Employers' Answers and Amended Answers shall be indicated "*Facility Answer* \_\_\_" and "*Facility Amended Answer* \_\_\_" or, collectively, "Answers \_\_\_" and

Unfair Labor Practice Charges against the Employers in Case Numbers 21-CA-242660 (Irvine), 21-CA-242664 (La Mirada), 21-CA-242665 (Orange), 21-CA-242668 (Anaheim), 21-CA-242697 (Santa Ana), and 21-CA-243181 (Garden Grove) (collectively, the “Charges”), alleging in each case that the Employer had unlawfully refused to recognize and bargain with the Union. Charges; App. at 1220-1221, 1375-1376, 1624-1625, 1840-1841, 1993-1994.

ii. The Complaints and Motions for Summary Judgment

On June 14, 2019 through June 17, 2019, the Regional Director issued a Complaint and Notice of Hearing (collectively, the “Complaints”), against each of the Employers, alleging in each case that each Employer had both failed and refused to recognize and bargain with the Union in violation of §§8(a)(5) and (1) of the Act. Complaints; App. at 1224-1229, 1379-1384, 1513-1522, 1628-1633, 1844-1849, 1997-2002. On June 27, 2019 and July 12, 2019, the Employers filed timely Answers to the Complaints, in which the Employers denied that the units certified by the Region constituted appropriate units for the purpose of collective bargaining; denied that the

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“Amended Answers \_\_\_\_”. References to Counsel for the General Counsel’s Motions for Summary Judgment shall be indicated “*Facility* MSJ \_\_\_\_” or, collectively, “MSJs \_\_\_\_”. References to the Board’s Notices to Show Cause shall be indicated as “*Facility* NSC \_\_\_\_” or, collectively, “NSCs \_\_\_\_”. References to the Employers’ Responses to the Notice to Show Cause and Opposition to the Counsel for the General Counsel’s Motions for Summary Judgment shall be indicated as “*Facility* Response \_\_\_\_” or, collectively, “Responses \_\_\_\_”. References to the Board’s Decisions shall be indicated “*Facility* Decision \_\_\_\_” or, collectively, “Decisions \_\_\_\_”.

Union was properly certified; and therefore denied that the Employers had “failed or refused” to recognize and bargain with the Union, or that the Employers’ failure to recognize and bargain with the Union constituted a violation of the Act. Answers; App. at 1235-1241, 1390-1396, 1528-1534, 1636-1642, 1855-1861, 2008-2014.

On July 15, 2019, Counsel for the General Counsel of the Board (the “General Counsel”) filed Motions for Summary Judgment in connection with each of the Complaints, contending that there were no “genuine” issues of fact in the case that warranted a hearing before an Administrative Law Judge. MSJs 1; App. at 1098-1107, 1255-1264, 1410-1419, 1548-1557, 1712-1721, 1875-1884. In advocating for summary judgment, the General Counsel relied heavily on the assertion that the Employers were precluded from “re-litigating” issues from the representation proceedings in the instant unfair labor practice cases. MSJs 7-8; App. at 1261-1262. The General Counsel also asserted that the Employers had not presented “any newly discovered or previously unavailable evidence” arising since the representation proceedings, and claimed that the Employers had additionally failed to raise “any special circumstances that would require the Board to re-examine the decisions made in the underlying representation proceedings.” MSJs 8; App. at 1262.

On July 24, 2019, the Board issued Orders Transferring Proceedings to the Board and Notices to Show Cause (the “Notices to Show Cause”), by which the Board transferred the instant cases to the Board, and required any party seeking to oppose the

General Counsel's Motions for Summary Judgment to do so in writing. NSCs; App. at 2028-2035. In response to the Board's Notices to Show Cause, the Employers each filed a timely Response to Notice to Show Cause and Opposition to General Counsel's Motion for Summary Judgment (the "Responses") on August 14, 2019. Responses; App. at 2071-2112. Each Employer's Response raised Board precedent, including, Sub Zero Freezer Co., 271 NLRB 47 (1984), in which the Board had reviewed the representation case proceedings that preceded the "technical refusal-to-bargain" unfair labor practice charges in those cases, and had, in some cases, not only dismissed the unfair labor practice charge, but also vacated the certification of representative that had been previously issued to the union in the prior representation case proceedings. Responses; App. at 2071-2112. Pursuant to this precedent, the Employers requested that the Board deny the General Counsel's Motions for Summary Judgment, and remand the proceedings to Region 21 of the Board for a fair and complete evidentiary hearing on each of the Employers' Objections. Responses; App. at 2071-2112.<sup>5</sup>

iii. The Board's Decisions

On August 27, 2019 through October 2, 2019, the Board issued its Decisions and Orders (the "Decisions") in each Employer's case. Decisions; App. at 2133-

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<sup>5</sup> On August 13, 2019, the Employers also filed Amended Answers to the Complaints, in which the Employers incorporated their prior Answers, but in which the Employers additionally alleged affirmative defenses to the Complaints that tracked the Objections to the election at their facility that were previously filed by each Employer. Amended Answers; App. at 2036-2070.

2155. In the Decisions, the Board held that “all representation issues raised by the Respondent were or could have been litigated in the prior representation proceedings.” Decisions 1; App. at 2113. The Board further held that the Employers had not offered to adduce at hearing any “newly discovered” or “previously unavailable” evidence, and had not shown “special circumstances” warranting a reexamination of the Board’s decision in the representation case proceedings. Decisions 1; App. at 2133. The Board therefore concluded that the Employers “had not raised any representation issue that is properly litigable in this unfair labor practice proceeding.” Decisions 1; App. at 2113. Finally, the Board held that the precedents cited by the Employers in their Responses “[were] two of a limited number of cases in which the Board has departed from the rule that, in a certification-testing unfair labor practice case, issues that had been presented to and decided by the Board in a prior, related representation case cannot be re-litigated and will not be reconsidered”, and declined to depart from what the Decisions deemed the Board’s “longstanding rule”. Decisions FN 2; App. at 2113. Therefore, the Board granted the General Counsel’s Motions for Summary Judgment against each Employer, and found that each Employer had violated §§8(a)(1) and (5) of the Act by refusing to bargain with the Union. Decisions 1, 2; App. at 2113, 2114.

## **SUMMARY OF THE ARGUMENT**

In the cases at bar, a series of errors by the Board and its regional agents permitted determinative issues in the underlying representation proceedings before the Board to remain unresolved, leading to the Union's wrongful certification, and thereafter, the Board's erroneous finding that the Employers were obligated to bargain with the Union. First, the Board's affirmance of the Regional Director's decision not to hear or consider any of the Employers' Objections to the underlying elections cannot stand, in light of both the factual record and Board precedent to the contrary. Second, the Board's refusal, during the unfair labor practice proceedings, to consider the Employers' arguments concerning the underlying representation proceedings was erroneous, given extant Board law that required the Board to review the underlying representation proceedings in the instant cases. For all these reasons, the Board's Decisions, the Regional Director's and Board's underlying decisions, and the underlying elections at the Employers' facilities must all be vacated, and the cases remanded to the Board for further proceedings.

## **ARGUMENT**

### **1.) The Standard of Review**

An employer is unable to seek direct judicial review of the Board's election rulings, and may only obtain court review of those decisions after refusing to bargain with the certified union – a review process often referred to as the employer's

“testing of certification.” Magnesium Casting Co. v. NLRB, 401 U.S. 137, 139 (1971). In reviewing the Board’s rulings during a testing of certification proceeding, the Courts will overturn the Board’s factual findings when they are contrary to the record evidence considered as a whole. Bellagio, LLC v. NLRB, 863 F.3d 839, 842 (D.C. Cir. 2017), *citing* 29 U.S.C. §§160(e), (f). This Court has further clarified that the standard of review is “deferential but not abject” - “We may not find substantial evidence merely on the basis of evidence which in and of itself justified the Board’s decision, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.” Id., *quoting* NLRB v. Tito Contractors, Inc., 847 F.3d 724, 732-733 (D.C. Cir. 2017). Similarly, this Court has held that the Court “is not merely the Board’s enforcement arm” – “rather it is the Court’s responsibility to examine the Board’s findings and its reasoning carefully, in particular taking account of anything in the record that fairly detracts from the weight of the evidence supporting the Board’s conclusion.” General Electric Co. v. NLRB, 117 F.3d 627, 630 (D.C. Cir. 1997).

The Board’s legal determinations will not be affirmed by the Court if the Board has acted “arbitrarily or otherwise erred in applying established law to the facts of the case.” Pirlott v. NLRB, 522 F.3d 423, 432 (D.C. Cir. 2008); See Also, 5 U.S.C. §706(2)(A); Allentown Mack Sales and Service, Inc. v. NLRB, 522 U.S. 359, 377 (1998) (The Board’s exercise of its authority may not be “arbitrary,

capricious, or an abuse of discretion.”). The Board’s failure to explain a departure or deviation from precedent has long been held to be an arbitrary and capricious action on the part of the Board, in violation of the Administrative Procedure Act (the “APA”). Allentown Mack Sales and Service, Inc. v. NLRB, 522 U.S. at 377; Wayneview Care Center v. NLRB, 664 F.3d 341, 348 (D.C. Cir. 2011). This Court has held that it will not “rubberstamp [Board] decisions, and requires that the Board provide “a reasoned explanation” for its decisions and policy judgments. International Transp. Service, Inc. v. NLRB, 449 F.3d 160, 163 (D.C. Cir. 2006).

**2.) The Election Results Should Have Been Vacated on the Grounds of the Employers’ Objections**

***A. The Improper Impounding of Election Ballots***

The Regional Director erred by refusing to hear and consider each Employer’s Objections, and the Board then affirmed that error by denying the Employers’ Requests for Review. First, both the Regional Director and the Board failed to sufficiently consider the Regional Director’s improper decision to impound the election ballots. Section 102.69 of the Board’s Rules and Regulations requires that election ballots be counted “at the conclusion of the election and a tally of ballots prepared and immediately made available to the parties”. NLRB Rules §102.69. Furthermore, the Board’s Casehandling Manual provides that the count of ballots “should take place as soon as possible after the close of voting”. NLRB Casehandling Manual §11340. While the Act permits the Board to delegate the

details of elections to the Board's Regional Directors, a Regional Director's authority is far from absolute, and a Regional Director is not authorized to abuse his or her discretion, or act in an arbitrary or capricious manner in violation of the APA. Macmillan Publ'g Co. v. NLRB, 194 F.3d 165 (D.C. Cir. 1999); Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983). In the cases at bar, the Board agreed with the Regional Director's decision to impound ballots from *each* of the elections until the final election was held, claiming that the decision was appropriate given the "unique circumstances" of the instant cases.

However, in the specific context of impounding ballots, in Nathan Katz Realty, LLC v. NLRB, 251 F.3d 981 (D.C. Cir. 2001), this Court imposed limitations upon the Board's authority to stray from its typical procedure. In Nathan Katz Realty, the Regional Director decided to impound ballots in a multi-facility election, and count the ballots simultaneously after all of the elections had taken place, on the grounds that "to count the ballots in both units simultaneously [would] guarantee that neither party will enjoy an unfair advantage over the other". Id. at 993. The employer filed an objection, asserting that the decision to delay part of the ballot count unreasonably deviated from normal Board procedure. Id. at 993-994. This Court held that the Regional Director's reasoning for his deviation was insufficient, and remanded the case to the Board for further explanation of how, precisely,

counting the ballots after each election, in accordance with customary Board procedure would be “unfair”. Id. at 994-995.

The Regional Director’s reasoning is similarly deficient in the cases at bar. Each Employer raised four separate and distinct objections to the Regional Director’s decision to impound the ballots from the elections arising from the Regional Director’s Election Decision. First, the Employers objected to the fact that the Regional Director’s decision to impound the ballots was, on its face, unsupported by Board precedent <sup>6</sup> or legal authority, and violated the Board’s Rules and Regulations. The Employers also objected to the fact that the impounding of the

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<sup>6</sup> In his Certification Decisions, the Regional Director claimed that his decision to impound the ballots was supported by Independent Rice Mill, a case from 1955, in which the Board found that the Regional Director’s decision to impound the ballots was appropriate in a case involving *six separate companies* and the same union, in order to prevent “chain voting” and to avoid disadvantage to any of the six employers or the union. 111 NLRB 536 (1955). The six companies involved in the Independent Rice Mill case were part of a multi-employer bargaining unit, in which the votes from all six elections were combined in one tally of ballots, rendering the case factually distinguishable. See Independent Rice Mill at 1, *citing* Imperial Rice Mills, Inc., et. al., 110 NLRB 612 (1954). Second, the Regional Director’s concern with “chain voting” (“stuffing the ballot box”) in Independent Rice Mill was not a reasonable ground for concern in the instant case, inasmuch as the elections took place on different dates, both simultaneously and at different times, and in different geographic locations, miles away from one another. Furthermore, even if the Regional Director’s alleged concern about chain voting were reflected by facts in the record, the likelihood of chain voting was, if anything, increased by the Regional Director’s decision to impound the ballots – which placed all the ballot boxes in the same location at the same time. Accordingly, the Regional Director’s reliance upon Independent Rice Mill must be rejected by this Court.

ballots during the elections prevented the Employers from announcing the results of the elections as they occurred, in violation of the Employers' free speech rights under §8(c) of the Act, which the Courts have held are "firmly established and cannot be infringed by [...] the National Labor Relations Board". Gissel Packing Co. v. NLRB, 395 U.S. 575, 617-618 (1969) See Also, Franzia Bros. Winery, 290 NLRB 927, 932 (1988); Letter Carriers v. Austin, 418 U.S. 264, 270 (1974). Because the Regional Director's exercise of his discretion violated §8(c) of the Act, as well as the Board's Rules and Regulations; and was unsupported by procedure or precedent, the decision to impound the ballots was arbitrary and capricious, and thus, pursuant to the APA, cannot stand.

The Employers next objected to the fact that the impounding of ballots prevented employees of each individual Employer from voting with full, real-time knowledge of the results in other bargaining units encompassed by the Regional Director's Election Decision, and thus prevented employees from exercising the "fullest freedom" guaranteed to them by the Act when they voted. See 29 U.S.C. §159(b); PCC Structurals, Inc., 365 NLRB No. 160 (2017); Labriola Baking Co., 361 NLRB 412 (2014); Western & Southern Life Insurance, 163 NLRB 138 (1967). Specifically, the Employers' Offers of Proof demonstrated that at least two employees from the individual bargaining units included in the Election Decision wished to know the outcome of the other elections held pursuant to the Election Decision before

casting their votes. OOPs 2-3; App. at 1032-10033, 1039-1040, 1048-1049, 1054-1055, 1060-1061, 1068-1069. This was a rational consideration, in light of the fact that the Employers are all part of a regional network of facilities, and their bargaining power as part of the Union might well be determined by how many other facilities voted to be represented by the Union in the elections. By dint of the Regional Director's decision to impound the ballots, employees at each facility were required to vote with impaired knowledge, because they did not know whether they would be voting for a Union that was accepted or rejected by the colleagues who voted before them - which could go directly to the heart of the Union's strength in the region and the industry, and thus to the Union's strength at the bargaining table.

Finally, the Employers objected to the fact that, despite his determination that the various facilities encompassed by the Union's multi-facility election petition properly constituted independent bargaining units, the Regional Director's determination to impound the ballots treated the elections in those independent bargaining units as though they were one election conducted at multiple locations. The Regional Director's decision was therefore internally inconsistent and arbitrary. Not only did the decision to impound ballots cut against the Election Decision, but the decision affected the Employers' due process rights, as each Employer was entitled to have ballots counted in its election normally and immediately, consistent with Board procedure and precedent. The Regional Director's decision to impound

the election ballots was thus arbitrary, capricious and discriminatory, and deprived the Employers of their due process rights. Therefore, the Regional Director's decision to impound the ballots violated the tenets of the APA.

In response to the Employers' specific objections to the Regional Director's decision, the Regional Director, later affirmed by the Board, offered scant reasoning insufficient to satisfy his obligation to justify his deviation from Board precedent and procedure. First, both the Board and the Regional Director referenced a desire for administrative efficiency in their Decisions, but neither the Regional Director nor the Board explained how the Regional Director's decision to impound the ballots was significantly more efficient than counting them after each election. This is particularly faulty logic where a Board Agent would already be at each facility to administer the election, and in light of the fact that the units were comprised of no more than two dozen employees (in fact, four of the six units included less than a dozen employees). Furthermore, the Board and the Regional Director both failed to acknowledge that a desire for efficiency, standing alone, would insufficient to support a decision to impound ballots which, as demonstrated by the Employers' arguments, is otherwise contrary to established procedure and precedent, violates due process, and violates the Act.

Next, the Regional Director claimed that his decision was in the best interest of the parties, because it prevented *any* party from knowing the outcome of any

election before elections were completed. However, the Regional Director fails to recognize that his argument cuts both ways – preventing parties from having knowledge of and the ability to communicate about election results is as much (if not more) of a negative consequence of the Regional Director’s exercise of discretion. Generally speaking, the Board, in interpreting the Act, has favored all parties having access to information about election outcomes over muzzling parties’ free speech and suppressing such information. Similarly, the Regional Director’s claim that impounding the ballots in the elections was preferable because it would prevent either the Employers or the Union from engaging in misconduct when announcing the results of the individual elections was highly speculative at best, and unlawfully paternalistic at worst. This is particularly so where the underlying record contains no evidence of misconduct on the part of the Employers, and the Union did not file any unfair labor practice charges alleging unlawful conduct during the Union’s campaign at any facility. The Regional Director’s articulated desire to prevent speculative harm from occurring, thereby causing actual harm to be done, is – along with the rest of the reasoning he advanced – insufficient to support his deviation from Board precedent and procedure, and thus cannot stand.

For its part, the Board did not undertake a critical review of the Regional Director’s decision to impound the ballots from the Employers’ elections, and instead adopted the Regional Director’s reasoning, as expressed in his Certification

Decisions, stating simply that it agreed with the Regional Director in light of the “administrative challenges” posed by the “unusual circumstances”. The Board’s reasoning is insufficient, and its adoption of the Regional Director’s logic is equally deficient and problematic. As this Court set forth in Nathan Katz Realty, *supra*, where the Board intends to deviate from precedent or procedure, it must provide an explanation sufficient to buoy that determination. Here, it is clear that the Regional Director’s determination to impound the ballots violated the Board’s Rules; departed from the Board’s typical procedure without sufficient justification; and imposed upon the Employers’ right to free speech under the Act, the Employer’s right to due process, and the employees’ right to vote with the fullest knowledge and freedom possible, as required by the Act. Accordingly, for all these reasons, this Court must reject the Regional Director’s decision to impound the ballots in the underlying cases, must vacate the Board decisions which endorse the Regional Director’s decision, and must vacate the underlying unlawful elections, in order to remedy this unwarranted departure from the Board’s procedural safeguards and precedent.

***B. The Union’s Affiliation with the IAMAW***

The underlying elections must also be vacated due to the undisclosed affiliation between the Union and the IAMAW in each case. The Board has an obligation to ensure that employees’ votes are not affected by the erroneous designation of a bargaining representative, without any knowledge or reference to

its affiliate, and the Board has previously held that the question of a union's affiliation "is a material and substantial issue" that has the "potential to significantly impact the employees' choice of bargaining representative." In re. Woods Cabinetry 340 NLRB 1355, 1355 (2003), *citing* Nelson Chevrolet Co., 156 NLRB 829 (1966); Douglas Aircraft Co., 51 NLRB 161 (1943). Therefore, in In re. Woods Quality Cabinetry, the Board held that a Region's failure to correct notices of election and ballots that inaccurately reflected the affiliation of the union with another organization warranted the setting aside of the election. Id. Furthermore, in the same case, the Board cautioned that issues concerning "the very identity of the union" are a "significant matter" – particularly where the affiliation raises questions of assistance from another labor organization, and questions about the "autonomy or dependence" of the union. Id. at 1356.

By upholding the Regional Director's rulings in his Certification Decisions, the Board adopted the Regional Director's bare assertion that the Employers had presented insufficient proof to establish an affiliation between the Union and the IAMAW in the cases at bar. However, this finding ignores both the Board precedent cited above and the evidence in the instant cases, which support the finding of affiliation, or at the very least warranted an evidentiary hearing to properly consider the Employers' evidence of the affiliation between the Union and the IAMAW. Specifically, the Employers' Offers of Proof illustrated that the IAMAW and the

Union announced an affiliation in 2012, and that the affiliation had continued through the elections at the Employers' facilities, with the IAMAW attending the election conferences as part of the Union's contingent, and the Union utilizing IAMAW materials and logos during the Union's organizing campaign. See OOPs; App. at 1031-1073. The Employers' Offers of Proof illustrate that IAMAW representatives are paid cash incentives for organizing employees, which may have included the employees in the cases at bar, and have participated in strikes and been accused of unfair labor practices. OOPs; App. at 1031-1073.

In the cases at bar, the Union's affiliation with IAMAW contained the same hallmarks found troubling by the Board in In re. Woods Cabinetry, including questions of the Union's autonomy from and dependence, financial or otherwise, upon the IAMAW. The evidence of IAMAW's aggressive organizing tactics and history of strikes and unfair labor practices well may have been relevant to employees' determinations as to whether they wished to be represented by a Union affiliated with the IAMAW. This evidence thus compelled the Board to convene hearings, and to determine whether a question of affiliation existed, and whether the undisclosed affiliation could have affected the outcome of the elections. The Board's failure to recognize the validity of these concerns and related failure to conduct elections that recognized and made clear to employees this affiliation, ignored both facts in evidence and the Board's own clear precedent. As a result,

employees were deprived of an opportunity to understand the true nature of the Union for which they were voting, and both the Board and Regional Director's decisions, as well as the underlying elections, must therefore be vacated.

### ***C. The Board's Revised Election Rules***

The Board next erred in this case by failing throughout to dismiss the Union's election petition, which was filed and processed pursuant to the Board's revised election rules, on the grounds that the Board's revised election rules violated the Employer's rights, public policy, the APA, the Board's statutory authority under the Act, and Sections 7, 8(c), and 9(b) of the Act. Section 9 of the Act requires the Board to resolve questions concerning representation, and sets forth the basic steps of that process, including the requirement that the Board investigate any petition filed, and provide "for an appropriate hearing upon due notice." 29 U.S.C. §159(c)(1). Section 9(b) of the Act further requires the Board, *in each case*, to determine the appropriate bargaining unit, "in order to ensure employees the fullest freedom in exercising the rights guaranteed by the Act." 29 U.S.C. §159(b) (emphasis added). The Board's revised election rules violated these requirements, because the revised rules circumvent the Board's obligation to hold, and an employer's right to be heard at, a hearing on questions concerning representation, such as the voter eligibility issues that the Board now largely defers. Indeed, the clear language of the legislative history underlying the passage of Act, as well as the

Board's past precedent, both expressly support this reading of the Act. See, Barre-National, Inc., 316 NLRB 877 (1995). By refusing employers a full opportunity to be heard at a pre-election hearing, the Board's revised election rules violated Section 9(b) of the Act, and therefore, the Employers argued, constituted an impermissible interpretation of the Act by the Board.

The Employers next argued that the Board's revised election rules violated Sections 7 and 8(c) of the Act by restricting employee and employer free speech during a union's organizing campaign. By substantially shortening the electioneering period between the filing of a petition by a union, and the date of an election, the Board's revised rules had the cumulative effect of curtailing the employee and employer free speech envisioned by Sections 7 and 8(c) of the Act. These Sections of the Act are intended to protect the rights of employees and employers to engage in "uninhibited, robust, and wide-open debate in labor disputes." Chamber of Commerce of U.S. v. Brown, 544 U.S. 60, 67-68 (2008). 29 U.S.C. §§157, 158(c). These goals were not only not achieved, but were actively prevented, by the Board's drastic shortening of the campaign period, which failed to allocate any time for the kind of meaningful free speech during a union's organizing campaign as envisioned by Sections 7 and 8(c) of the Act.

Additionally, the requirements set forth by the Board's revised election rules, which required employers, including the Employers in the instant cases, to share an

expanded amount of private employee information - such as employees' hours of work, work locations, emails, and telephone numbers - with the Union violated federal privacy law and public policy. In the years since the Board decided Excelsior Underwear, 156 NLRB 1236 (1966), which required employers to provide unions with significantly more limited information about employees within the union's petitioned-for unit than the Board's revised rules, public policy has supported *increased*, rather than decreased, protection of employee privacy.<sup>7</sup> Therefore, the Employers argued, the Board's revised election rules ran counter to public policy, and also run afoul of the APA's requirement that the Board's decision-making not be arbitrary or capricious, inasmuch as they disregarded employees' legitimate interests in privacy, exposed employees to greater threat of union intimidation and harassment, and imposed a substantial burden on employers expected to collect, maintain, and disseminate the now-longer list of required employee information in a shorter period of time.

Finally, the Employers argued that the Board's revised election rules also violated the APA because the Board's decision to change the manner in which representation cases are handled by the Board was, in and of itself, unlawfully

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<sup>7</sup> This shift in public policy is evidenced by more recent federal legislation, including the federal Privacy Act, the privacy exemption contained in the Freedom of Information Act, the Telemarketing and Consumer Fraud Abuse Prevention Act, and the Controlling the Assault of Non-Solicited Pornography and Marketing Act.

arbitrary and capricious. In promulgating the revised election rules, the Board relied heavily on factors not considered relevant to representation cases by Congress when it wrote the Act, such as speed in scheduling elections, and the facilitation of organized labor. Similarly, the Board's revised election rules failed to account for delays that the changes caused later in the representation case proceedings, due to blocking charges and increased post-election challenges caused by the procedures set forth by the Board's revised rules. Because the procedural obstacles still delayed representation proceedings, the Board's changes were rendered equal parts ineffective and arbitrary in violation of the APA. Accordingly, for all of these reasons, the Board's revised election rules should have been rescinded, and the Union's Petition, which was filed and processed pursuant to the Board's revised election rules, should have been dismissed.

Instead, the Regional Director's Certification Decisions additionally claimed that the Board had "already considered and rejected" the Employer's challenges to the validity of the Board's revised election rules. The Regional Director's claim that the Board has already considered the Employer's objections to the Board's revised election rules was not accurate, inasmuch as the cases cited by the Regional Director in his Election Decision did not foreclose the possibility that the Board's revised election rules might be invalid *as applied in future cases*, and in particular, the instant cases. The Employers' Objections raised not only the facial invalidity of the

Board's revised election rules, but also set forth the Employers' intentions to challenge the Board's revised election rules *as applied* in the cases at bar. For example, the inclusion of personal, private employee information on the voter list that the Board's revised election rules required the Employers to provide to the Union violated the privacy rights of the employees in the petitioned-for units. Thus, contrary to the Regional Director's holdings, the Employers' specific, "as-applied" challenges were in no way discussed, never mind foreclosed, by the precedent cited by the Regional Director, and thus were never addressed in these cases by either the Regional Director or the Board.

Furthermore, in connection with the Employers' Objections to the Board's conduct of the election pursuant to the Board's revised election rules, the Board's Orders stated that the Board "expressed no view" with respect to whether it "agree[d] or disagree[d] with revisions made by the Board's Election Rule", but upheld the Regional Director's holding that the Employer's stated objections to the Board's revised election rules did not constitute grounds for dismissing the Union's Petition or setting aside the elections. However, since the Board issued its Orders, it has promulgated, and intends to shortly implement newly revised election rules. See 29 C.F.R. §102 (2019); 84 FR 69524 (December 18, 2019). These newly revised election rules reverse many of the features of the revised election rules that the Employers found objectionable. Specifically, the Board held that its modifications

were intended to “better balance the interest in the expeditious processing of questions of representation with the efficient, fair, and accurate resolution of questions of representation.” Id. In these circumstances, it is the height of arbitrary and capricious decision-making for the Board to, at once, dismiss the Employers’ valid arguments concerning the Board’s previously-revised election rules, while at the same time revising those same election rules to address the legal issues with the rules objected to by the Employers. In light of these circumstances, the Board’s Decisions cannot stand, and the underlying proceedings and elections – which were all conducted and processed pursuant to the Board’s unlawful revised election rules – must be dismissed and vacated.

***D. The Inclusion of Statutory Guards in the Bargaining Units***

The Regional Director and the Board next erred in the cases at bar by permitting elections to be conducted and upheld in violation of §9(b)(3) of the Act, by permitting elections in bargaining units that included employees who functioned as statutory guards. Pursuant to §9(b)(3) of the Act, the Board is expressly precluded from approving or certifying any bargaining unit that includes, together with other employees, “any individual employed as a guard”. 29 U.S.C. §159(b)(3); Brink’s, Inc., 272 NLRB 868, 869 (1985); University of Chicago, 272 NLRB 873, 875 (1984). Section 9(b)(3) of the Act defines a “guard” as an “individual employed to enforce against employees and other persons rules to protect the property of the

employer or to protect the safety of persons on the employer's property." 29 U.S.C. §159(b)(3); See Also, Petroleum Chemicals, Inc., 121 NLRB 630 (1958).

Guard status is a factual question tied to the particulars of each case. Bellagio, LLC v. NLRB, 863 F.3d 839, 842 (D.C. Cir. 2017), *citing* Burns Int'l. Sec. Servs., 278 NLRB 565, 569 (1986). Pursuant to longstanding Board precedent, employees who are guards may possess both guard duties and non-guard job duties that they perform on a daily basis. See Brinks, Inc., 272 NLRB at 868-869 (Coin room operators met the definition of "guard" set forth by the Act); Reynolds Metal Co., 198 NLRB 120 (1972) (Firefighters found to be guards even though only approximately 25% of their time on duty is spent performing guard duties); Wackenhut Corp., 196 NLRB 278 (1972) (Security toll operators found to be guards); Wright Memorial Hospital, 255 NLRB 1319 (1980) (Ambulance drivers found to be guards). The Courts and the Board have recognized that "guards", as defined by the Act, may encompass many, varying job classifications beyond typical security personnel, and have not historically been limited to "security guards" in the traditional sense. Id.; See Also, Bellagio, LLC v. NLRB, 863 F.3d 839 (D.C. Cir. 2017), Jakel Motors, 288 NLRB 730 (1988); West Virginia Pulp & Paper, 140 NLRB 1160 (1963); A.W. Schlesinger Geriatric Center, 267 NLRB 1363 (1983); Crossroads Community Correctional Center, 308 NLRB 558 (1992); Wackenhut Corp., 196 NLRB 278 (1972).

In analyzing whether employees function as guards under §9(b)(3) of the Act, the Board looks to the “specific and primary” responsibilities of the employee in the employer’s workplace. Lion Country Safari, 225 NLRB 969 (1976); Reynolds Metal Co., 198 NLRB 120 (1972). For example, the Board has held that, where the enforcement of company safety rules is a “continued” and “significant” portion of the requirements of an employee’s job, the employee may classify as a guard for purposes of §9(b)(3) of the Act. Reynolds Metal Co., 198 NLRB 120 (1972); Wackenhut Corp., 196 NLRB 278 (1972). Whether the employees in question wear uniforms or carry weapons, clubs, or handcuffs is not considered dispositive of the question of whether those employees constitute guards pursuant to the Act. Crossroads Community Correctional Center, 308 NLRB 558 (1992); Thunderbird Hotel, Inc. et. al., 144 NLRB 84 (1963); Allen Services Co., 314 NLRB 1060 (1994). Similarly, the Board and the Courts have found it “immaterial” to the analysis whether the employees at issue are themselves authorized to use force or the “power of police” to compel compliance with the rules set forth for the protection of the employer’s property and premises, so long as the employees at issue possessed and exercised the power to observe and report infractions of the employer’s safety rules to the appropriate authorities. Wackenhut Corp., 196 NLRB 278 (1972); See Also, Wright Memorial Hospital, 255 NLRB 1319 (1980); MGM Grand Hotel, 274 NLRB 139 (1985); McDonnell Aircraft Co. v. NLRB, 827 F.2d 324, 327 (8<sup>th</sup> Cir. 1987).

In the cases at bar, the Board adopted the Regional Director's conclusion that the Employers' MRI Technologists and Nuclear Medicine Technologists did not constitute statutory guards. This conclusion was not based upon an objective review of the entirety of the evidentiary record by either the Board or the Regional Director. The record shows that MRI Technologists and Nuclear Medicine Technologists must police and secure the facilities in which they work, and screen individuals who enter those facilities, in accordance with the Employers' voluminous safety rules. The MRI Technologists' duties to police and control the Employer's property – namely the MRI magnet itself, and the adjoining Zones of the MRI suite, are significant and continuous, inasmuch as constant monitoring is required to ensure that metallic objects do not enter the wrong areas, that the MRI magnet does not explode or does not need to be quenched, and that patients and fellow employees are protected from the ever-present magnetic fields created by the MRI magnet. Indeed, in this regard, MRI Technologists carry out some of the very traditional “guard duties” delineated by Board precedent, including the prevention of unauthorized individuals, including fellow employees, from accessing certain areas of the Employer's premises, and the evacuation of the Employer's facilities, including fellow employees, under circumstances where the MRI magnet cannot be cooled and may explode.

Similarly, the record, reviewed as a whole, proves that the Employers' Nuclear Medicine Technologists are also guards within the meaning of §9(b)(3) of

the Act. The Nuclear Medicine Technologists' responsibilities to police and surveil the locked-down Nuclear Medicine Department, and in particular, the hot lab, are continuing and ever-present. Not only must Nuclear Medicine Technologists prevent the entry of unauthorized personnel, including fellow employees, into these locked areas, but the Nuclear Medicine Technologists must also guard and restrain the Nuclear Medicine patients, who are themselves radioactive, so that those individuals do not leave the Nuclear Medicine Department and cause harm to the facility's other employees, patients, and visitors. Additionally, the Nuclear Medicine Technologists are individually and specifically tasked with securing and guarding the hot lab, which contains radioactive sources which are not only valuable to the Employer, but also incredibly dangerous to the public health if stolen or removed. Thus, the Nuclear Medicine Technologists' responsibilities to constantly guard both people on the Employers' premises (including coworkers), and the Employers' valuable and dangerous property, render the Nuclear Medicine Technologists' guard duties both significant and continuous, particularly in light of the extreme health consequences that can result from exposure to radioactive materials. Furthermore, the record illustrates that, in enforcing the Employers' safety rules, the Nuclear Medicine Technologists also carry out some of the very traditional "guard duties", including the prevention of unauthorized individuals from accessing certain areas of the Employers' premises, all of which are locked, and to

which only Nuclear Medicine Technologists possess the keycodes, as well as the monitoring of individuals in the Employer's facility using security cameras and the conducting of security rounds within the Nuclear Medicine Department.

Certain of the Regional Director's conclusions about employees' guard status, later adopted without modification by the Board, were based upon claims that were directly contradicted by the evidentiary record. For example, the Regional Director inaccurately concluded that Nuclear Medicine Technologists did not monitor the entrance or exit of patients from the facility, and did not round within the Employers' facilities, where the evidence from the pre-election hearing proved unequivocally that they do. See 2Tr. 134-135; App. at 109-110. Similarly, the Regional Director's conclusion that MRI Technologists and Nuclear Medicine Technologists could not constitute guards because they did not receive "specialized instructions on what to do in the event that there is a threat to the security of the premises" was directly contradicted by Dr. Vartani's testimony that MRI Technologists and Nuclear Medicine Technologists "are the authority" for their modality at their facility, and are not only required to report safety incidents through a chain of command, but may furthermore be given additional safety responsibilities thereafter. See 2Tr. 122; App. at 97. Finally, the Regional Director's conclusion that employees' safety functions were incidental to their jobs with the Employers ignores the plethora of evidence about the roles of the MRI and Nuclear Medicine Technologists, Dr. Vartani's

testimony that MRI Technologists “are essential in the safety operations of the MRI unit”, and that the guarding of patients is one of the “fundamental duties and responsibilities” of the Nuclear Medicine Technologist. See 2Tr. 94, 106; App. at 69, 81. Therefore, the Regional Director’s conclusions are not supported, and are in fact rebutted, by the evidentiary record and thus should not have been endorsed by the Board and cannot be accepted by this Court.

Furthermore, the Regional Director’s selective focus on specific record facts does not serve to controvert the employees’ status as guards, based upon review of the record as a whole. The fact that the MRI Technologists and Nuclear Medicine Technologists also conduct scans and perform testing of patients while at work does not preclude a finding that the safety and security functions of their jobs render them guards within the meaning of §9(b)(3) of the Act. Similarly, the Regional Director’s conclusion that the MRI Technologists and Nuclear Medicine Technologists do not constitute guards because they do not carry weapons, sit in a security booth, or wear security uniforms or badges, misses the broader and more theoretical criteria commonly espoused by the Board’s analysis of guard status, and focuses too narrowly on the traditional concept of the “security guard”. These factors have never been the focus of the analysis by the Board, and constitutes an approach explicitly discredited by both the Board and this Court in past cases. See Bellagio, LLC, supra. Finally, even if it had been supported by the record evidence, the Regional

Director's conclusion that MRI Technologists and Nuclear Medicine Technologists could not constitute guards because they did not receive "specialized instructions on what to do in the event that there is a threat to the security of the premises is directly contradicted by the Board's own precedent. See Wackenhut Corp., et al., supra. Accordingly, as detailed herein, an objective review of the entirety of the underlying record reveals that the Employers' MRI Technologists and Nuclear Medicine Technologists constituted statutory guards. Therefore, the underlying decisions and elections in these cases, which permitted statutory guards to be included in the bargaining units at issue, in violation of the Act, must be vacated by this Court.

***E. Employer – Specific Objections to Elections at Their Facilities***

The Regional Director and the Board next erred, in the cases of Irvine, Santa Ana, and Garden Grove, by failing to accord the legitimate, facility-specific Objections raised by those Employers.

i. Objections Raised by Irvine

a. *Security of the Irvine Ballot Box*

Irvine's Objections requested that the Regional Director take notice of two separate instances of conduct during voting which could have affected the results of the Irvine election. In both cases, the Regional Director, and the Board, refused to review the conduct raised by Irvine. First, Irvine raised a concern regarding the security of the ballot box during its election. The results of a Board election must

be set aside “when the conduct of a Board election agent tends to destroy confidence in the Board’s election process or could reasonably be interpreted as impairing the election standards the Board seeks to maintain.” Sonoma Health Care Center, 342 NLRB 933 (2004); Athbro Precision Engineering Corp., 166 NLRB 966 (1967); North of Market Senior Services, Inc. v. NLRB, 204 F.3d 1163, 1168 (D.C. Cir. 2000) The Board requires the “highest standards possible to avoid any taint of the balloting process”, and to that end, has long held that a Board Agent must maintain personal custody of the ballot box at all times during an election. Benavent & Fournier, Inc., 208 NLRB 636, FN 2 (1974); Austill Waxed Paper Co., 169 NLRB 1109, 1109 (1968). The question of the integrity of a ballot box “goes to the very heart of the conduct of an election”, and therefore, where a situation exists that “casts a doubt or cloud over the integrity of the ballot box itself, the practice has been, without hesitation, to set aside the election.” Austill Waxed Paper Co., 169 NLRB 1109, 1109 (1968). For this reason, the Board in Austill Waxed Paper Co. held that the Regional Director should have set aside an election where the ballot box was unattended by the Board Agent for only two to five minutes, because the Regional Director “could not certify the validity of its own balloting procedures.” Id. at 1109-1110.

In the case at bar, the Board Agent’s near-constant and seemingly willful failure, throughout nearly the entirety of voting, to monitor, let alone secure, the

ballot box during the Irvine election cast a reasonable “doubt or cloud over the integrity of the ballot box.” Specifically, Irvine’s Objections alleged that , for “nearly the entirety of both polling sessions”, the Board Agent conducting the election sat with her back turned to the polling area and the ballot box, while reading a newspaper and using a cellular phone. Irvine OOP 5; App. at 1063. Where, as here, the Board is unable to certify the validity of its own balloting procedures, particularly with regard to the integrity of the ballot box, Austill Waxed Paper dictated that the Regional Director should not have certified the results of the election.

Instead, the Regional Director should have set aside the election, or – at the very least – set Irvine’s Objection for hearing, so that a record regarding the integrity of the ballot box during voting could be further developed. Instead, the Regional Director summarily concluded that Irvine’s allegations, even if proven, would not warrant setting aside the election, and the Board adopted the Regional Director’s conclusion. The Board affirmed this holding without further analysis. Given the Board’s precedent, and the specific facts included in Irvine’s Offer of Proof, the Irvine election must be set aside on the basis of the appearance of impropriety on the part of the Board Agent, or - at the very least - Irvine must be given the opportunity to present evidence in support of its Objection at a hearing before the Board.

*b. Cell Phone Usage During Irvine Voting*

Next, Irvine objected to the Union observer's repeated use of her cell phone during the Irvine election. Board policy, as set forth by the Board's Representation Casehandling Manual, and the Board's precedent, prohibits list-keeping during an election by the parties' election observers. NLRB Casehandling Manual §11322.1; International Stamping Co., 97 NLRB 921 (1951). During voting, the Board has acknowledged that observers act as representatives of their principals. NLRB Casehandling Manual §11310.3. An election must be set aside where an observer maintains a list of employees who have voted, and it can be shown *or inferred from the circumstances* that employees knew their names were being recorded. Piggly-Wiggly #011, 168 NLRB 792 (1967); Julliard A.D. & Co., 110 NLRB 2197, 2199 (1954); Masonic Homes of California, 258 NLRB 41 (1981) (emphasis added). Because of the importance of maintaining the secrecy and freedom of voting for employees, the Board has held that "activity that can be construed as improper" – such as list-keeping – "is proscribed, whether or not the activity is, in fact improper." Masonic Homes of California, 258 NLRB 41, 48 (1981); Cross Pointe Paper Corp., 330 NLRB 658, 662 (2000) ("the focus of the inquiry must be on what voters observed and could reasonably believe" rather than what information was actually recorded).

Pursuant to the Board's precedent and standard, Irvine's Objection, which alleged the Union's election observer continually used her cellular phone to send text messages during the afternoon polling session, should have been set for hearing by the Regional Director. A hearing would have revealed precisely what the Union's observer was, in fact, recording and texting with her cell phone, and would have been the appropriate venue in which to determine whether a list was being maintained by the Union's observer, and whether employees knew or could have known about the maintenance of the list. Furthermore, the Board's precedent makes clear that exactly what the Union's observer was *actually* recording is not dispositive of the potential taint of the election. Even if voters could not see exactly what and who the Union's observer was texting, the Union's observer was a recognized agent of the Union during polling, and therefore employees could have reasonably concluded that the Union's observer was sharing information about voting with the Union in real time. This is particularly so where Irvine's Offer of Proof makes clear that the Union observer's texting corresponded with the presentation of voters to cast ballots. See Irvine OOP 6; App. at 1064. In these circumstances, faced with these facts, the Regional Director and the Board erred by not setting Irvine's Objection for hearing, and thus the case must be remanded to the Board so that a hearing on Irvine's Objection can be held.

ii. Objections Raised by Santa Ana

Santa Ana also filed an Objection specific to the election held at its facility, which the Regional Director and the Board also refused to consider. Specifically, Santa Ana objected to the fact that the Board Agent conducting the election did not post a “Voting Place” sign in the polling area during the election. Section 11318 of the Board’s Representation Casehandling Manual directs the Board Agent conducting an election to post a “Voting Place” sign in the polling area where the election is taking place. NLRB Casehandling Manual §11318. The purpose of the “Voting Place” sign is, obviously, to direct employees as to where they can vote, and by so doing, increase voter participation in the election. The standard for determining whether Board Agent conduct during an election is objectionable is whether it has a reasonable tendency to interfere with the employees’ exercise of their free choice, thereby affecting the outcome of the election. NLRB v. Gulf State Cannery, 585 F.2d 757, 759 (5<sup>th</sup> Cir. 1978). Where a Board Agent deviates from the standards set forth by the Board’s own Manuals, deviations that “raise a reasonable doubt as to the fairness and validity of the election” require that the election results be set aside. Kirsch Drapery Hardware, 299 NLRB 363, 364 (1990), *quoting* Polymers, Inc., 174 NLRB 282 (1969).

The fact that the Santa Ana election was decided by a single vote renders the Board Agent’s unexplained deviation from the Board’s Casehandling Manual a

much more serious deviation in this case than it might be in other cases. For example, in Pacific Grain Products, 309 NLRB 690 (1992), which was cited by the Regional Director in his Santa Ana Certification Decision, the outcome of the election was not close, as the union had won by 25 votes. In the case at bar, one, single vote would make the difference between a Union victory and an Employer victory, which renders the question of the Board Agent's compliance with approved Board procedures even more important, and correspondingly, the Board Agent's non-compliance even more potentially impactful upon the outcome of the election. Here, there is particularly good reason to believe that the Board Agent's failure to post a "Voting Place" sign affected the outcome of the election, where two eligible employees did not vote, the election was decided by one vote, and the election was held in a building physically removed from the building in which employees worked. See Santa Ana OOP 4; App. at 1070. Therefore, the Board Agent's conduct raised a serious question about the validity of the results of the election, and thus under the Board's own precedent, Santa Ana's Objection should have been set for hearing by either the Regional Director of the Board, and the results of the election should have been set aside.

iii. Objections Raised by Garden Grove

Finally, Garden Grove also raised Objections concerning events that occurred during the election at its facility before the Regional Director and the Board, to no

avail. Specifically, Garden Grove's Objections addressed a pro-Union employee who was permitted to loiter in the polling area. During a Board election, voters are not permitted to loiter in the polling area, or wait for other voters. NLRB Casehandling Manual §11322.4. The Board's precedent prohibits prolonged interactions between representatives / agents of the parties and voters during an election regardless of the content of the interaction. Milchem, Inc., 170 NLRB 362 (1968); NLRB Casehandling Manual §11326. Part of the rationale underlying the Board's precedent is the desire to avoid "last minute electioneering or pressure" on voters, so that voters may exercise their right to vote "as free from interference as possible." Milchem, Inc., 170 NLRB 362, 362 (1968). In Milchem, the Board held that a conversation of roughly five minutes "could not, in any view of the evidence, be dismissed as minimal." Id. In such cases, the election result must be set aside. Id.

Here too, the Regional Director summarily dismissed the facility's concerns, and once again, the Board affirmed his ruling. The question of the pro-Union employee's relationship with the Union, which was raised by the Regional Director in his Certification Decision, was a factual issue which should have been resolved by setting Garden Grove's Objections for hearing. See Tyson Fresh Meats, Inc., 334 NLRB 1335 (2004); AOTOP, LLC v. NLRB, 331 F.3d 100, 104 (D.C. Cir. 2003). The Regional Director should have gathered evidence regarding the particular

involved employee's relationship with the Union, in order to properly evaluate the impact of their conduct pursuant to Milchem. Furthermore, the Regional Director's claim that the pro-Union employee did not converse with any eligible voters is patently false – the Union's election observer was an eligible voter, as was the Garden Grove's election observer. Finally, the pro-Union employee's conversation with the Union's observer could have been overheard other eligible voters, who may have been discouraged from voting by the pro-Union employee's presence, particularly where Garden Grove's Offer of Proof asserts that others would have been close enough to the polling area to observe and/or hear the conversation between the Union's observer and the pro-Union employee. See Garden Grove OOP 5; App. at 1042. For all these reasons, the Regional Director and the Board should have set Garden Grove's Objections for hearing, and this Court must overturn the underlying decisions and remand the case to the Board so that Garden Grove's Objections may finally be heard.

**3.) The Board Erred by Failing to Consider Underlying Representation Case Issues Before Granting the Motion for Summary Judgment**

Finally, the Board's errors in the instant cases continued in the more recent unfair labor practice proceedings before the Board, wherein the Board's conclusion that the Employers were presented with an opportunity to litigate their claims regarding the underlying representation proceedings in the representation case, is proven patently untrue by the record. Had the Board undertaken meaningful review

of the record in the representation proceedings, and conducted a meaningful investigation of the Employers' affirmative defenses, the Board would have vacated the underlying representation proceedings. Instead, the Board simply claimed that the Employers were precluded from re-litigating the issues that arose in the underlying representation proceedings pursuant to the Board's "longstanding" precedent. The Board erred by failing to adequately explain or address its continued maintenance of the Sub Zero line of cases as extant law, in circumstances where it refuses and / or declines to apply the precedent to cases such as the instant case. The Board's failure to adequately explain its reasoning with regard to Sub Zero and its progeny constitutes a separate violation of the APA, and therefore precludes this Court from enforcing the Board's Decisions.

In Sub Zero Freezer Co., the Board concluded that during the underlying Union campaign, "conduct occurred which resulted in an atmosphere of fear and reprisal such that a free and fair election could not be conducted." 271 NLRB 47, 2 (1984). "Having reached this conclusion", the Board held that the union's certification could not stand, where the election was thus invalid. Id. Noting the divergent lines of Board precedent, the Board held that "while reconsideration of issues in technical refusal-to-bargain cases may, in some instances, cause delays or involve changes in Board law, we are not willing to grant a Motion for Summary Judgment that would result in an order requiring an employer to bargain with a union

that has not attained the status of majority representative from a free and fair election.” Id. On these grounds, the Board vacated the Board’s Decision and Order in the representation case, dismissed the complaint in the proceedings then before the Board, revoked the certification issued to the union, and remanded the case for direction of a new election, if desired by the union. Id. Thereafter, in St. Francis Hospital, Heuer International Trucks, and Atlantic Hilton & Towers, the Board again denied the General Counsel’s Motions for Summary Judgment in technical refusal-to-bargain cases, because the Board determined that the questions of the appropriateness of the bargaining units that had been certified, which in all cases had been litigated without success by the employers during the underlying representation proceedings, warranted the Board’s reconsideration. 271 NLRB 948, 949 (1984); 273 NLRB No. 57, 1 (1984); 273 NLRB 87, 91 (1984). Since issuing these decisions, the Board has never explicitly overruled Sub Zero or its progeny.

When the Employers raised Sub Zero in the instant cases, the Board failed to explain in any way, shape, or form, why it declined to apply the Sub Zero line of precedent. Both the instant cases and the Sub Zero line of cases present identical technical refusal-to-bargain charges and matching procedural histories, and both grappled with questions of the appropriateness of the bargaining unit certified by the Regional Director. Rather than address these similarities, the Board simply held that it “found no basis” to apply the holding of Sub Zero. Accordingly, the Board’s

Decisions do not provide any explanation whatsoever as to why the Board has continued to maintain the Sub Zero line of cases as valid law, rather than overruling those cases, in circumstances where it rarely applies those precedents and – as here - has in some circumstances declined to apply them, despite factual similarities, upon reliance of the vaguest of rationales. Pursuant to the requirements of the APA, the Board must contend with its clearly-deviant precedents on the question of the appropriateness of the litigation of representation issues in technical refusal-to-bargain unfair labor practice proceedings. The Board is not be permitted to continue to maintain two positions on the subject that it can apply at will, with no preceding notice to the labor organizations and employers who appear before it. Because the Board’s Decisions achieve precisely this result, the Board’s Decisions violate the APA, and thus must be remanded and reconsidered by the Board.

### **CONCLUSION**

For all the reasons set forth herein, the Employers respectfully request that this Honorable Court deny enforcement of and vacate the Board’s August 27, 2019, August 28, 2019, and October 2, 2019 Decisions and Orders; vacate the Regional Director’s and Board’s underlying decisions and orders; vacate the underlying elections at the Employers’ facilities; and remand the cases to the Board for further proceedings, for any or all of the reasons set forth by the Employers’ arguments, above.

Dated: Atlanta, Georgia  
August 31, 2020

/s/ BRYAN T. CARMODY  
BRYAN T. CARMODY  
CARMODY & CARMODY, LLP  
134 Evergreen Lane  
Glastonbury, CT 06033  
(203) 249-9287  
bcarmody@carmodyandcarmody.com

*Counsel for Petitioners  
/ Cross-Respondents*

## CERTIFICATE OF COMPLIANCE

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

PER CURIAM ORDER [1823151] filed granting motion to consolidate and exceed word limits [[1810915-3](#)] [[1809752-2](#)] [[1810916-2](#)]. Directing that RadNet Management, Inc. and the National Labor Relations Board may each file one principal brief not to exceed **16,000 words**.

this brief contains **15,999** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

this brief has been prepared in a proportionally-spaced typeface using Microsoft Word in 14 point Times New Roman font.

Dated:           Atlanta, Georgia  
                    August 31, 2020

/s/BRYAN T. CARMODY  
BRYAN T. CARMODY  
CARMODY & CARMODY, LLP  
134 Evergreen Lane  
Glastonbury, CT 06033  
(203) 249-9287  
bcarmody@carmodyandcarmody.com

*Counsel for Petitioners  
/ Cross-Respondents*

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on this 31st day of August, 2020, I caused this Brief, to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated:       Atlanta, Georgia  
              August 31, 2020

/s/BRYAN T. CARMODY  
BRYAN T. CARMODY  
CARMODY & CARMODY, LLP  
134 Evergreen Lane  
Glastonbury, CT 06033  
(203) 249-9287  
bcarmody@carmodyandcarmody.com

*Counsel for Petitioners  
/ Cross-Respondents*

**ADDENDUM**

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# 5 U.S. Code § 706.

## Scope of review

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  - [Notes](#)
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To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an [agency action](#). The reviewing court shall—

(1)

compel [agency action](#) unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside [agency action](#), findings, and conclusions found to be—

(A)

arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B)

contrary to constitutional right, power, privilege, or immunity;

(C)

in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D)

without observance of procedure required by law;

(E)

unsupported by substantial evidence in a case subject to sections [556](#) and [557](#) of this title or otherwise reviewed on the record of an [agency](#) hearing provided by statute; or

(F)

unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

# 29 U.S. Code § 159.

## Representatives and elections

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### **(b) DETERMINATION OF BARGAINING UNIT BY BOARD**

The Board shall decide in each case whether, in order to assure to [employees](#) the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the [employer](#) unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both [professional employees](#) and [employees](#) who are not [professional employees](#) unless a majority of such [professional employees](#) vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the [employees](#) in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other [employees](#), any individual employed as a guard to enforce against [employees](#) and other [persons](#) rules to protect property of the [employer](#) or to protect the safety of [persons](#) on the [employer's](#) premises; but no [labor organization](#) shall be certified as the representative of [employees](#) in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, [employees](#) other than guards.

### **(c) HEARINGS ON QUESTIONS AFFECTING COMMERCE; RULES AND REGULATIONS**

**(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 subsection (a), or (ii) assert that the individual or [labor organization](#), which has been certified or is being currently recognized by their [employer](#) as the bargaining representative, is no longer a representative as defined in subsection (a); or

**(B)**

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

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

**(2)**

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