IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, and COALITION FOR A DEMOCRATIC WORKPLACE, Plaintiffs, v. NATIONAL LABOR RELATIONS BOARD, Defendant	Case No. 11-cv-02262 Judge James E. Boasberg

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

ERIC G. MOSKOWITZ
Assistant General Counsel
for Special Litigation
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
Phone: (202) 273-2930
Fax: (202) 273-1799
E-mail: Eric.Moskowitz@nlrb.gov
D.C. Bar No. 184614

ABBY PROPIS SIMMS
Deputy Assistant General Counsel
Special Litigation Branch
Phone: (202) 273-2934
E-mail: Abby.Simms@nlrb.gov
D.C. Bar No. 913640

JOEL F. DILLARD
DAWN L. GOLDSTEIN
Attorneys
Special Litigation Branch
Phone: (202) 273-3775
E-mails: Joel.Dillard@nlrb.gov
Dawn.Goldstein@nlrb.gov

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INTRODUCTION

The Chamber of Commerce et al. ("Chamber"), and the Amicus, the American Hospital Association et al. ("AHA"), challenge a Rule issued by the National Labor Relations Board that amends the Board's procedure for representation proceedings. The amendments are modest, incremental improvements in the efficiency and timeliness of the Board's procedures. The Chamber sued to challenge both the rulemaking procedure and the Rule, and all parties moved for summary judgment. Chamber et al., Docket 22 (Memo. cited hereinafter "Chamber at #"); Br. of Amicus Curiae, Docket 27 (hereinafter "AHA at #"); NLRB Mot. Supp. SJ, Docket 21.

Regarding the rulemaking procedure, the Chamber avers that the Board lacked a quorum when it issued the Rule. But all three members fully participated in the decision whether to issue this Rule. In any event, the Chamber's proffered definition of a "quorum" is contradicted by centuries of law on point. The Chamber also complains that the Board did not follow a number of internal past practices, but the Board explained why those practices are inapplicable here.

Concerning the amendments themselves, the Chamber singles out a few of the amendments and contends that Congress intended to prohibit these changes. First, the Chamber disputes the change focusing the pre-election hearing only on the relevant evidence. However, the statute is specifically designed to give the Board authority to hold a timely pre-election investigation that focuses on the relevant issues. Next, the Chamber challenges the change providing that Board review will *usually* occur after the election (rather than before). But the statute gives the Board broad discretion to choose whether and when to review the actions of a regional director. Lacking any meaningful anchor in the statutory text for either argument, the Chamber resorts to vague, extrinsic statements—made decades after the statute was adopted—by individual congressmen. Such statements are neither relevant nor persuasive. Accordingly, this Court should grant the Board's motion for summary judgment.

ARGUMENT

I. The Chamber's and AHA's challenges to the Board's internal rulemaking procedures fall far short of establishing that the Board exceeded its authority.

The Chamber attacks three aspects of the Board's rulemaking procedure. First, it challenges the manner in which this Rule was approved, arguing that the Board acted in violation of the National Labor Relations Act's quorum provision, Section 3(b), 29 U.S.C. § 153(b), and claiming that only two members "participated" in this rulemaking. Chamber at 2, 8-15; AHA at 4, 33-34. Second, it repeats and reframes this "participation" point as a contention that the Board was required to wait longer for the dissenting member to prepare a written statement of his views. Chamber at 41-45, AHA at 4, 33-34. Third, it claims that the Board inadequately responded to comments. Chamber at 40; AHA at 31-34. These arguments lack merit.[1] None of the procedures at issue are specifically required by law, and the Chamber's and AHA's contrary argument is, in fact, a thinly disguised invitation to this Court to "impose upon agencies specific procedural requirements that have no basis in the APA." *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990) (discussing *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978)); *see* NLRB Memo Supp SJ at 34-35. This invitation must be rejected.

A. The Board had a quorum when it approved the Rule.

The facts make abundantly clear that all three members participated in this rulemaking in every way that could possibly be relevant to the existence of a "quorum" under 3(b). The Chamber's contrary argument is inconsistent with centuries of law on point, which, as discussed

1 The Chamber also claims that one of the amendments—regarding the kind of evidence generally admissible at the pre-election hearing—was procedurally defective for an additional reason, namely, that three affirmative votes are required to overrule extant Board precedent on the point. As shown below, Section II(A)(ii)(b), this argument also lacks merit.

below, holds that "mere presence" is enough to constitute a "quorum."

The Chamber claims that the "quorum" requires three members to "participate" (Chamber at 1-2, 9-12), which it interprets as mandating that *all three members* "vote on whether to approve the text of the Final Rule." Chamber at 13-14. This is patently incorrect. The Supreme Court has held for over a hundred years that *mere presence is enough* to create a quorum, and that abstaining voters are counted toward the quorum:

> [A] quorum . . . [is] created by the mere presence of a majority, and does not depend upon the disposition or assent or action of any single member or fraction of the majority present. All that the constitution requires is the presence of a majority, and when that majority are present the power of the house arises. . . . [W]hen a quorum is present, the act of a majority of the quorum is the act of the body. This has been the rule for all time . . . .

United States v. Ballin, 144 U.S. 1, 5-6 (1892); *see also* 2 Am. Jur. 2d Admin. Law § 82 ("One who merely abstains, however, is counted toward the quorum."); 59 Am. Jur. 2d Parliamentary Law § 9 ("An abstaining voter, however, is counted in determining the presence of a quorum.").

What did the non-voting members in *Ballin* do to constitute the quorum? They were identified as sitting in their seats when the U.S. House of Representatives called the question for a vote. And then, they did nothing. They did not *have* to do anything: the quorum was created by their mere presence. In addition, this "presence" does not have to occur at a single meeting in a single room: "[T]he Board [may] proceed with its members acting separately, in their various offices, rather than jointly in conference." *Braniff Airways, Inc. v. CAB*, 379 F.2d 453, 460-62 (D.C. Cir. 1967).

The application of *Ballin* and *Braniff* in this case is straightforward. The Final Rule was circulated to all three Members, and all three Members were specifically called upon to cast their votes. This occurred when the draft Rule was circulated in the Board's "Judicial Case Management System." Hayes at ¶ 6, 9, 10 (Affidavit attached as Exh 1). Whenever a draft is put

into the Judicial Case Management System, the System alerts the Board Members and requests their votes. Hayes at ¶ 11.

Thus, the question was called for a vote, a quorum was "present" and in receipt of that call, and a majority of the quorum voted to approve the Rule. That is sufficient legally for a valid issuance of the Final Rule. *Ballin*, 144 U.S. at 6 ("[T]he act of a majority of the quorum is the act of the body."); *see FTC v. Flotill Prods., Inc.* 389 U.S. 179, 185 n.9 (1967) ("[The] NLRB ha[s] express authority to act through a majority of a quorum.").

Yet the Board did more. On December 15, 2011, as the third Board Member, Member Hayes, had not yet voted or circulated any dissent in the System, the Chairman's Chief Counsel sent an email asking whether Member Hayes wished to include any dissenting statement in the Final Rule. Hayes at ¶ 9. Member Hayes indicated that he did not, because he could add a dissent at a later date, and could say whatever he needed to say in a single statement. Hayes at ¶ 9.

Moreover, all this occurred after the Board had held two prior votes, one establishing the substance of the Final Rule (in Resolution 2011-01 of November 30th, Adm. Rec. 00112309-10) and a second authorizing its actual publication and "constitut[ing] the final action of the Board in this matter" (in the Final Board Order of December 15th, Adm. Rec. 00112314-15).[2] All three

2 The Chamber argues that the facts about the Board's voting must be excluded from the record because they, in the Chamber's words, did not "exist[] at the time the Final Rule was issued." Chamber at 13-14 n.6. This is not only untrue—the vote was clearly taken before the Rule issued, and the Solicitor relied upon that vote to send the Rule to the Federal Register—the argument is flatly inconsistent with the Chamber's own attempts to cite blogs on the internet to "prove" that the vote was *not* held. Chamber at 13 (citing law360.com). The Chamber does not contest the authority of the Executive Secretary to sign the order *nunc pro tunc*, an authority which reaches back to the common law. *See* Black's on Judgments §§ 126, 130-131 (2d. ed. 1903). The Order and Affidavits by the Executive Secretary and Member Hayes are appropriately considered a part of the Administrative Record in this case.

In any event, whether technically in the Administrative Record or not, this Court can consider these materials because the Chamber is disputing "the procedural validity of the [Board's] action." *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989). As the D.C. Circuit has found, in

Members voted on the Resolution and the Final Order. By themselves, the votes on these two actions show that a quorum participated in the decision whether to approve the substance of the Final Rule, similar to the procedure of the FCC. *See* NLRB Memo. Supp. SJ at 43 n.25.[3] There is no formalistic requirement of a subsequent vote on the specific text of the Final Rule. Only those who voted in favor of the substance of the Rule need to approve the final text; the disapproval of the others is reflected in the prior vote. Here, as with many of the Board's procedures, the Board went above and beyond these requirements, holding a vote in the Judicial Case Management System at which a quorum was again present.

To support its argument that all three members must cast votes, the Chamber relies primarily on vague dictum in *New Process Steel, LP v. NLRB*. 130 S.Ct. 2635, 2642-43 (2010).

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cases that allege procedural defects in the agency action "it may sometimes be appropriate to resort to extra-record information to enable judicial review to become effective." *Id.*; *see also Franks v. Salazar*, 751 F. Supp. 2d 62, 68 (D.D.C. 2010) ("the *Esch* exceptions are more appropriately applied in actions contesting the procedural validity of agency decisions."). Of course, NLRB deliberations are extraordinarily sensitive and confidential. Therefore, the Affidavits by Member Hayes (Exh. 1 attached) and the Executive Secretary (Adm. Rec. 00112320) are designed to protect the confidentiality of Board deliberations to the extent possible, while establishing the facts about the procedure in dispute here. All the facts proven in those documents occurred before the Final Rule was issued.

The Chamber cannot defend itself against what truly happened in this case by claiming that the facts cannot be placed in the administrative record by the Board, when the Chamber itself has raised the issue.

3 And, in fact, Member Hayes took full advantage of those opportunities. In his statement at the public meeting of Nov. 30, 2011, Adm. Rec. 00112300, he noted that the proposal "fails to address the concerns I expressed in June of this year when I dissented from the Notice of Proposed Rule-making;"; Adm. Rec. 00112302, "For these and other reasons the substance and effect of the Rule remains for me as unacceptable now as it was in June."; Adm. Rec. 00112303, "I have believed for some time that the final proposal would largely mirror the June proposal and that I would be unable to support it for the reasons I set forth in my prior dissent"; Adm. Rec. 00112306, "…my view remains that this is a fundamentally flawed rule and is the product of a fundamentally flawed process." The Chamber's brief in many ways tracks Member Hayes' statement.

Chamber at 10-15.[4] But in *New Process*, the Board only had two Members, and so the Court never actually decided what, if anything, three Members would have to *do* to constitute a quorum. The Court stated, in passing, that "a quorum is the number of members of a larger body that must participate for the valid transaction of business." But, in that very passage, the Court quoted from dictionaries that defined "quorum" as the "minimum number of members . . . *who must be present* for a deliberative assembly to legally transact business" and as the "fixed number of members of any body . . . *whose presence is necessary* for the proper or valid transaction of business." 130 S.Ct. at 2642 (emphasis added; quoting, among others, Black's and Oxford English Dictionaries). Thus, the Court was only restating the long-established notion that the quorum must be present in order for the Board to take action.

The Chamber then cites two entirely inapposite cases. *Greater Boston Television Corp. v. FCC*, 444 F.2d. 841, 861 (D.C. Cir. 1970) (Commission "may act…by the vote of a majority of those present"); *Sprint Nextel Corp v. FCC*, 508 F.3d 1129, 1131-1132 (D.C. Cir. 2007) ("The Commission…acts by majority vote [and therefore the 2-2 vote did] not result in Commission action."). In those cases, again, the issue in *Ballin* was not presented because a quorum *actually cast votes*. The Chamber's misreading would bring these cases into direct conflict with *Ballin*.

With nothing to distinguish *Ballin* and *Braniff*, all that remains of the Chamber's and AHA's argument is simple disagreement about the propriety of issuing the Rule in this manner. Under *Vermont Yankee*, 435 U.S. at 524, such disagreement is not a basis for challenging the

[4] The Chamber also claims that the Final Order contemplates that three Members would have to vote on the final text. Chamber at 14 n.6. This is not true: the Order only states that the Rule will be published "upon approval by *a majority* of the Board." This was a deliberate choice on the Board's part. The Judicial Case Management System has limitations: it contemplates the circulation of dissents contemporaneously with the vote. Hayes at ¶ 6, 11. The Board's Final Order was designed to avoid this shortcoming by providing for issuance when the System showed that the Final Rule was "approved" by the majority, without waiting for the dissent to also be circulated in the System.

rulemaking procedure. *See* NLRB Memo Supp SJ at 34-35.

B. Nothing requires the Board to wait indefinitely for a dissent prior to publishing the Rule.

The Chamber claims that the Board "preclude[d] a dissenter from participating in the deliberative process by issuing the final rule before the dissent had an opportunity to participate, vote and draft a dissent." Chamber at 44 n.28 (emphasis omitted), 41-45; AHA at 33. But Member Hayes had an opportunity to participate and draft a dissent—and in fact did participate, and chose not to publish a contemporaneous dissent. Hayes at ¶ 9. The law does not require the Board to wait any particular period of time for a dissent, so the Board's action was within its discretion under *Vermont Yankee*.

Consider a very recent example from the D.C. Circuit involving the National Mediation Board's rulemaking of May 11, 2010. 75 Fed. Reg. 26062. The NMB majority, according to a letter written by the dissenter to members of Congress, at first refused to allow her to publish a dissent, and then gave the dissenter precisely *24 hours in which to consider the proposed rule and prepare her dissent*—which she did. *See Air Trans. Assoc. of Am., Inc. v. NMB*, 663 F.3d 476, 487-88 (D.C. Cir. 2011). If she had not met this timeline, the majority would have published without her views. *Id.* The rule was challenged, but this Court refused to even open discovery on the issue. *Id.* The D.C. Circuit affirmed, stating that, although the letter "reflects serious intra-agency discord," and the majority's "treatment of their colleague fell well short of ideal," it did not meet the standard of a "strong showing of bad faith or improper behavior" and therefore was not enough to permit further inquiry. *Id.*

Here, the Board's procedure was far more accommodating. The draft Final Rule was circulated by email to all Board Members on December 9, 2011, and the Members were informed that they would have approximately one week to deliberate—and, it follows, draft

separate statements—before the Final Rule would be published. Hayes at ¶ 4. The Board *also* gave Board Members an *additional three months* to circulate and publish any separate statements that they wished after the Final Rule. "Order to Publish the Final Rule" Adm. Rec. 00112314-15. If, as the D.C. Circuit held, the 24 hours provided by the NMB fell short of "improper behavior," then the Board's procedure in this rulemaking was more than adequate. *Air Trans. Assoc*., 633 F.3d at 488.

In an effort to prove the contrary, the Chamber cites: (1) a non-binding internal guidance memorandum about adjudication, written by the Executive Secretary of the Board (comparable to the clerk of the court); (2) a speech given by Justice Ginsberg in which she describes her personal views about the occasional helpfulness of dissents in Supreme Court adjudication; (3) the sparse historical practice of Board rulemaking; (4) a handful of Federal Register citations in which dissents were published; and (5) miscellaneous statements in legislative history. Chamber at 42-45.

Missing from this list is the only thing that matters under *Vermont Yankee*: any *law* or *binding regulation* that imposes a mandatory waiting period for dissents before rules can be published. 435 U.S. at 524-525. Instead, the Chamber is asking this Court to impose a mandatory waiting period, *ex nihilo*, on policy grounds alone.

(1) Regarding the memorandum of the Executive Secretary, the Chamber concedes that, by its own terms, this guidance memo applies only to adjudication and not rulemaking. Chamber at 42 (memo applies to "an adjudicated case"). As ES-01-01 states, in adjudications the Board *usually* waits 90 days for a dissent but may proceed more quickly for good cause. Adm. Rec. 00112346-47. That the Chamber feels that the policy underlying this "practice" "applies with greater force" to rulemaking is of no consequence. Chamber at 42. The Chamber does not

discuss the differences between rulemaking and adjudicatory procedure, which are particularly significant in this case. The Board Members had extensive opportunities to hear the public's views and to share their own views with each other. This included a public, hour-long face-to-face discussion among the three Members about the Rule. 76 Fed. Reg. at 80147 ("The notice and comment rulemaking process . . . is distinct from adjudication in its iterative nature (a proposed rule, followed by a final rule) and the high degree of public participation it involves . . . . [It includes] both full public participation and extensive internal deliberations by the Members of the Board."); Adm. Rec. *Audio Recording of Board Meeting 11-30-11.mp3*, e.g., at 52:30-54:00 (discussing the process); Adm. Rec. 00112289-308 (written statements of Board Members). Nor does the Chamber acknowledge that the impending loss of a quorum could be good cause to issue the Rule in a timely fashion. NLRB Memo Supp. SJ at 42 (discussing *Consol. Alum. Corp. v. TVA*, 462 F. Supp. 464, 476 (M.D. Tenn. 1978)).

(2) The Honorable Ruth Bader Ginsburg's speeches reflecting her personal views on the value of dissents (in adjudication, it should be noted, not rulemaking), do not have the force of law. Chamber at 14, 43. And, in fact, as the Board previously explained, the *Supreme Court itself* has, in a very significant case, issued the majority opinion before the dissent was available for publication. NLRB Memo Supp. SJ at 41 n. 24 (discussing *SEC v. Chenery Corp.*, 332 U.S. 194, 209 (1947)).

(3) & (4) That the Board published a contemporaneous dissent in the 1989 health care rulemaking does not establish any requirement to do so. Chamber at 42; AHA at 4 n 1. It simply shows that the Board *can* issue dissents in this way, not that it must. The same is true for the Chamber's Federal Register cites to dissents by other agencies. Chamber at 43.

(5) The legislative history is similarly unavailing. Chamber at 44-45. The history proves

only that the Board is, in part, quasi-judicial. That is not disputed. But the important question is how Congress chose to actually embody that fact in the statute. The only statutory language the Chamber cites is from Section 4(a), 29 U.S.C. § 154(a), which provides that opinion drafting should be done by "legal assistants" assigned to specific Board Members. The Chamber does not contend that the Board did anything that violated this provision. The Chamber argues only that the general policy favors Board Member control of the views they choose to express; nothing in the text or history suggests that Board Members *must* file dissents whenever they disagree, or describes *when* those dissents must be drafted. In sum, the Board did nothing contrary to the Act.

C. The Board appropriately considered and responded to all significant comments, even though this is not required for procedural rules under the APA.

The AHA argues that the rulemaking process was arbitrary and capricious, claiming—without support—that the analysis of the comments was inadequate, and complaining that the Board used the "novelty" of computers in its review process. AHA at 33.[5] The software is hardly novel: it simply identified similar or duplicate comments so that they could be reviewed together. Aside from that, the review process was what it always has been: agency staff read every unique comment and analyzed its contents to assist the Board members in preparing the Rule. Paper or electrons, it does not make any difference to the process, and the AHA has nothing other than pure incredulity to support its claim that four months was not enough time to consider the comments. In fact, the Board's efficiency is amply explained by the fact that, of the 65,000 some odd comments submitted, "[m]ore than 90 percent were duplicates, near duplicates, devoid of analysis, or irrelevant." 76 Fed. Reg. at 80145 n.19.

The AHA further claims that the Board gave no adequate reason for making any changes

5 The Chamber has abandoned the argument about the sufficiency of the Board's review of the comments raised in their First Amended Complaint ¶ 30, as discussed below at n.21.

to its representation processes, citing the track record of past improvements in the timeliness of the election procedures. AHA at 31. But the Board specifically discussed this long history of improvements, and highlighted how the proposals would enshrine some of those best practices in the regulations, while providing further incremental improvements by targeting certain remaining sources of unnecessary delay. 76 Fed. Reg. at 36813-18; *see also* 76 Fed. Reg. at 80148-50, 80155 (discussing the need to continue to improve the Board process).

If, as the Board has amply shown, certain litigation procedures are costly, slow, and unnecessary, what further reasons can be required for eliminating them? As discussed at length below, *infra* at 21-27, for more than 75 years Congress and the Board have been continuously concerned with ensuring the Board's processes are efficient and timely. *See also* NLRB Memo Supp SJ at 9-12. Where the Board has patiently, repeatedly, and in great detail discussed how these amendments will permit regional directors to better control the litigation and prevent needless delay, the minimal requirements of reasonableness have been satisfied.[6] 76 Fed. Reg. at 36816-28; 76 Fed. Reg. at 80158-75.

In any event, the Board was not required to address all the comments. The requirement to consider the comments flows from 5 U.S.C. § 553, which does not apply to a procedural rule like this one. NLRB Memo Supp. SJ at 36. Curiously, the AHA appears to concede that the basic underlying regulations, promulgated in 1936, as well as the many subsequent amendments, were all purely procedural rules. *See* AHA at 3 ("The Board has never before engaged in substantive

6 Contrary to AHA's characterization (at 32-33) of the Bronfenbrenner study (Adm. Rec. 00034679 et seq.), the Board did not rely on the Bronfenbrenner study to support the labor organizations' position that shortening the time between petition and election would decrease unfair labor practices. Indeed, the Board specifically stated that "it did not adopt [this] position." 76 Fed. Reg. at 80159. Rather, the Board relied on the study to show that more timely elections do not seriously impact the opportunity of employers to engage in election speech because employers virtually always know about the organizing drive well in advance of the petition. 76 Fed. Reg. at 80152-53 (discussing "Employer Pre-Petition Knowledge").

rulemaking with respect to its election procedure."). Yet the AHA then immediately declares, without support, that these amendments to those very rules *are* substantive. *Id.* This is a circle that cannot be squared: if the Board's regulations were procedural, then the amendments to those regulations are by necessity also procedural.

The Chamber's response (at 41) is little more than the conclusory statement that the Rule is not procedural because it "clearly impact[s] the parties' substantive rights, including employees' right to the 'fullest freedom' in exercising their rights under the Act and an employer's right to engage in free speech under 8(c)." But, under this theory, any time irrelevant evidence is excluded in any adjudicatory or administrative proceeding, it is a substantive rule because it impacts the "fullest freedom" to litigate whatever one chooses.

This is not the traditional meaning of "substantive" and "procedural." The more appropriate inquiry is whether the Rule governs the way the case is presented, litigated, and processed before the agency. NLRB Memo Supp SJ at 36. Here the Rule is clearly procedural. Indeed, if anything, Board *representation* procedures are more emphatically *procedural* than almost any other analogue in administrative law. As Congress has emphasized, "An election is the mere determination of a preliminary fact, and in itself *has no substantial effect upon the rights of either employers or employees.*" S. Rep. No. 573, 74th Cong., 1st Sess., p. 14, reprinted in 2 NLRB, *Legislative History of the National Labor Relations Act*, 1935, at 2314 (1935) (Leg. Hist.) (emphasis added); *see also* H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 6-7, 2 Leg. Hist. at 3052-54 (same). The subsequent unfair labor practice proceeding, if any, is the first moment at which any substantive rights are in play.

In sum, the Board's rulemaking procedure here amply meets the minimal requirements of *Vermont Yankee*, and must be affirmed.

II. The Chamber cannot show that the statute speaks to the "precise question at issue" under *Chevron*, or that the Rule is beyond the Board's discretion under *A.J. Tower*.

Turning to the amendments themselves, only three aspects of the amendments appear to be seriously disputed. Chamber at 17-18. First, the amendments permit the exclusion of evidence about voter eligibility disputes that need not, and will not, be decided before the election, and the Chamber and AHA contend that this conflicts with Section 9(c). Chamber at 18-20; AHA at 9-10. Second, the amendments push the "request for review" process to after the election, while permitting immediate pre-election "special permission to appeal" only under limited circumstances, and the Chamber argues that this conflicts with Section 3(b). Chamber at 31-34. Third, many of the changes to the pre-election process improve the efficiency and timeliness of Board procedures, and the Chamber claims that these amendments conflict with Section 9(b). Chamber at 34-37.

A. The hearing officer can exclude evidence about voter eligibility issues since, under Section 9(c), parties have *never* had a right to *decision* on voter eligibility issues.

The Chamber concedes, as it must, that the statutory purpose of the "pre-election evidentiary hearing [is] to determine if a question concerning representation exists. . . . [T]he Board shall direct that a secret ballot election be held if, upon the record of that hearing, a question concerning representation exists." First Am. Complaint at 38. As amended, Board Rule 29 C.F.R. 102.66(a) will state: "Any party shall have the right . . . to introduce [evidence] into the record . . . so long as such . . . evidence supports its contentions and *is relevant to the existence of a question of representation* . . . ." 76 Fed. Reg. at 80185. Thus, it cannot be disputed that, by its terms, 102.66(a) simply limits the rights of parties to introduce evidence about *irrelevant* matters.

And it is well established that the regional director has always had discretion to resolve

voter eligibility questions through the election-day challenge procedure, where the litigation and decision occur post-election instead of pre-election. The Supreme Court expressly approved the challenge process in 1946, in *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 333-34, stating that the Board's challenge process is valid, and is "simply a justifiable and reasonable adjustment of the democratic process." *See also, e.g., Bituma Corp. v. NLRB*, 23 F.3d 1432, 1436 (8th Cir. 1994) ("[D]eferring the question of voter eligibility until after the election is accepted NLRB practice . . . ."); 76 Fed. Reg. at 80165-66 (discussing cases). Thus, the amendment does not change what can be litigated. It permits exclusion of evidence about issues that, under existing law, do not have to be decided anyway.

But the Chamber claims that, nonetheless, the parties have a right to litigate "their objections on *all* substantial issues" *before the election*, regardless of whether those "objections"[7] will actually be decided by the regional director at that time.[8] Chamber at 18; *see* AHA at 10 ("[I]ndividual eligibility issues must be addressed at a pre-election hearing."). Nothing cited by either the Chamber or the AHA even purports to show that such issues are relevant to the existence of a question concerning representation. And, as demonstrated, *that* is

7 The Chamber appears to actually be referring to voter eligibility *challenges* not election objections. *See A.J. Tower*, 329 U.S. at 334 ("Objections and challenges are two different things in electoral parlance.").

8 The term "substantial issues" relied upon so heavily by the Chamber actually comes from the Board's *1945 regulations*, discussed in *NLRB v. S.W. Evans & Son*, 181 F.2d 427 (3d Cir. 1950). Chamber at 22-23, 29. In that case, the Board eliminated a pre-election hearing, notwithstanding that these regulations required such a hearing when there were "substantial issues." *See* 10 Fed. Reg. 14498 *et seq.* (November 28, 1945). In *S.W. Evans*, the Third Circuit decided only the question of whether the Board had violated *its own regulations* as they then existed and expressly *did not* interpret the "appropriate hearing" requirement of the Wagner Act. 181 F.2d at 429-430**.** By relying upon this "substantial issues" language so heavily, the Chamber is essentially inviting this Court to enshrine the Board's 1945 regulations in the statute. This is not permissible.

the statutory purpose of the pre-election hearing and the only question that the hearing *must* address.

The Chamber argues that the amendment limiting irrelevant evidence is in conflict with two phrases of Section 9(c)(1). First, the Chamber argues that it conflicts with the limitation on hearing officer authority to "make any recommendations." Chamber at 19-20, 31. Second, the Chamber and AHA contend that it conflicts with the requirement to "provide for an appropriate hearing upon due notice." Chamber at 18-19, 28-30; AHA at 5, 10-17. These claims lack merit.

1. The Chamber misunderstands well-established Board procedure regarding the hearing officer's role and the contents of the record on review.

a. The hearing officer's role is unchanged by the amendments.

The Chamber's concern with the exclusion of evidence is predicated on a fundamental misunderstanding of current practice and procedure. The Board considered and rejected the argument that hearing officers would be given any new or improper role under the amendments. The hearing officer's role is still the very limited and "traditional one of admitting only evidence relevant to the matter at issue." 76 Fed. Reg. at 80164 (focusing the amendment on relevance, rather than summary judgment); 76 Fed. Reg. at 80166. The Board stated that "[t]he hearing officer may limit the presentation of evidence based on relevance but cannot render a decision or make any form of recommendation. Thus, the final rule is fully consistent with Section 9(c)(1)." 76 Fed. Reg. at 80166. The Rule is, therefore, a straightforward application of the principles embodied in current practice.

The Chamber admits that the hearing officer has the power to exclude irrelevant evidence, noting that he can "limit[] cumulative evidence on issues." Chamber at 28 n.20. And the hearing officer has always done that and more; as the Hearing Officer's Guide states:

> Exhibits are not admissible unless relevant and material, even though no party objects to their receipt. Even if no party objects to an exhibit, the hearing officer

> should inquire about the relevancy of the document and what it is intended to show. *The hearing officer can exercise his or her discretion and determine whether the documents are material and relevant to the issues for hearing.*[9]

Adm. Rec. 00112641 (emphasis added). This includes prohibiting litigation of issues that should instead be resolved by challenges. For example, the hearing officer routinely excludes evidence about the eligibility to vote of striking employees: "Voting eligibility of strikers and strike replacements are not generally litigated at a pre-election hearing. They are more commonly disposed of through challenged ballot procedures." Adm. Rec. 00112635. As the Board noted in *Mariah, Inc.*, 322 NLRB 586, n.1 (1996) (citations omitted):

> It is beyond cavil that the role of the hearing officer is to ensure a record that is both complete and concise. Here, the hearing officer, consistent with this duty, exercised her authority to exclude irrelevant evidence and to permit the Employer to make an offer of proof. Our consideration of that offer establishes the correctness of the hearing officer's decision to exclude the testimony. Thus, with particular respect to the issue of strikers, we note the Board's decision in *Universal Mfg. Co.*, 197 NLRB 618 (1972) [that] the issue of striker eligibility is best left to a postelection proceeding.

see 76 Fed. Reg. 80166 (citing *Mariah*). The amendments call for using precisely the same approach with other voter eligibility questions that will be resolved by challenge.

This point should be stressed. The hearing officer already had the authority to exclude evidence about some *voter eligibility issues that are better resolved by challenges*. The

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9 The Hearing Officer's Guide was noted in the Rule as a source of important information about Board practice. 76 Fed. Reg. 80167 n.121. It was last published in 2003, long before these amendments were contemplated. Adm. Rec. 00112594. *See also* Hearing Officer's Guide, Adm. Rec. 00112595 ("The hearing officer must ensure that the . . . record is free of cumulative or irrelevant testimony"); Adm. Rec. 00112597 ("The hearing officer has the authority to seek stipulations, *confine the taking of evidence to relevant disputed issues* and exclude irrelevant and cumulative material.") (emphasis added); Adm. Rec. 00112613 ("The hearing officer should guide, direct and control the hearing, excluding irrelevant and cumulative material and not allowing the record to be cluttered with evidence submitted 'for what it's worth.'"); Adm. Rec. 00112613 ("The hearing officer's role is to guide, direct and control the presentation of evidence at the hearing. . . . While the record must be complete, it is also the duty of the hearing officer to keep the record as short as is commensurate with its being complete.").

amendment here simply reflects the Board's reasonable judgment that the authority to exclude such evidence *may* be used *whenever* the issues will be resolved by challenges instead of pre-election.

And any party can ask for regional director review—on the spot—of any such exclusion by the hearing officer. "The hearing officer should recess the hearing long enough for the preparation of the request." Adm. Rec. 00112639. Nothing in the Rule changes this. In fact, the Board expressly recognized that "the relation between hearing officers and regional director is, in practice, more informal . . . with hearing officers not infrequently seeking advice from the regional director during a hearing." 76 Fed. Reg. at 80163. Thus, the Board specially protected the right to seek the regional director's views during the hearing. *Id.* Indeed, there is no reason to doubt that, in many cases, hearing officers will continue to *sua sponte* recess the hearing when difficult issues arise in order to consult with the regional director. *See, e.g.*, Adm. Rec. 00112635-36. Furthermore, even after the hearing officer closes the hearing the regional director can always order it to be reopened and more evidence taken if she finds that something was left out or improperly excluded. 76 Fed. Reg. at 80166. Similarly, regarding briefing, after the hearing the parties can always appeal to the regional director to present briefs, or the regional director can *sua sponte* ask for briefs. 76 Fed. Reg. at 80185 (102.67(a), regional director decision may be upon "submission of briefs, or further hearing, as he may deem proper"). Thus, the hearing officer's role is perfectly consistent with past practice and the statute.

b. When evidence is excluded, the record is still adequate for review.

The Chamber and the AHA also argue that the record will be inadequate because, they claim, the evidence that was excluded at the hearing will not be available for the regional director, Board, or ultimately the courts on review. Chamber at 20-21, 28, 31; AHA at 6-7, 28. Specifically, the Chamber contends that the record will be inadequate to decide whether the

evidence should have been heard and the issue decided pre-election. Chamber at 21. This is incorrect in two ways. First, appellate courts have long reviewed evidentiary exclusions on the record—with no need to actually hear all the evidence in order to rule on the propriety of the exclusion—and, for just as long, have accorded trial courts broad discretion to manage the timing and presentation of such evidence. *See, e.g., Phila. & Trenton R. Co. v. Stimpson*, 39 U.S. 448, 463 (1840) (Story, J.).

Second, the evidence *will* be available for review. The Chamber's contrary view arises from a fundamental misunderstanding of Board procedure. The Board makes a detailed record of the exclusion of evidence. Section 102.68 of the Board's rules, which is not amended, requires that all motions—including rejected motions to introduce evidence—become a part of the record on review. 76 Fed. Reg. at 80166. Moreover, the Board's longstanding practice—which, again, is in no way changed by the rule—is still more generous:

> Although the issues listed above are not litigable, the hearing officer may permit brief offers of proof on the record, indicating the evidence a party would present. The offer of proof may also be in writing and can be placed in the record as an exhibit. The hearing officer should receive the offer of proof, but state that "the evidence proffered is rejected." The matter is then in the record for the reviewing authority to decide if the hearing officer's ruling was proper.

Hearing Officer Guide, Adm. Rec. 00112635; *see Mariah, Inc.*, 322 NLRB at 586 n.1.[10] Similarly, "[i]f the hearing officer determines that the documents are not relevant and should be excluded, the offering party may request that they be placed in the rejected exhibits file." *Id.* at 00112641. These procedures have always created a record adequate for review. Nothing in the amendments would change them.

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10 Of course, this procedure is not mandatory. But, if the Hearing Officer did not use this procedure in a particular case the parties would be free to argue that the record was inadequate as applied. See NLRB Memo Supp SJ at 27-29. *Cf. Inland Empire*, 325 U.S. 697 (reviewing the exclusion of evidence based upon the subsequent litigation).

2. This is an "appropriate hearing."

The Chamber and the AHA claim that limiting the litigation to the issues that must actually be decided will result in an "inappropriate" hearing in violation of 9(c). For support, the Chamber and the AHA rely upon three sources: 1) statements made, primarily by individual congressmen, many years after the 1935 Act, *see* Chamber at 22-30; AHA at 11-15; 2) the Board's prior decision in *Barre-National* and related cases, *see* Chamber at 30; AHA at 15-17; and 3) a pure policy argument about the importance of supervisory issues to some parties, *see* AHA at 17-28. None are apposite. The hearing provided by the amendments is "appropriate" under 9(c).

a. The extrinsic material cited by the Chamber is not persuasive.

i. Post-enactment material is not relevant.

The interpretation of "appropriate hearing" offered by the Chamber and AHA is built primarily—not on the statute itself—but upon extrinsic statements by individual legislators that were made decades after the relevant statutory provisions were enacted. The purpose of the judicial inquiry at *Chevron* Step 1 is to determine whether the *statute* speaks to "the precise question at issue," that is, whether the statute directly *conflicts* with the regulation. *Chevron USA Inc. v. Nat'l Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). See NLRB Memo. Supp. SJ at 8 (discussing *Chevron*). Although extrinsic material can sometimes play a role in this inquiry, great care must be exercised to ensure that it is clear and authoritative on the intent of the enacting Congress, truly relevant to the textual question, and is being considered in context rather than in selective bits and pieces:

> As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms. Not all extrinsic materials are reliable sources of insight into legislative understandings,

> however, and legislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in "'looking over a crowd and picking out your friends.'" *See* Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983). Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists— both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.

Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568-69 (2005); *cf. id.* at 572 (Stevens, J., dissenting) ("I believe that we as judges are more, rather than less, constrained when we make ourselves accountable to *all reliable* evidence of legislative intent." (emphasis added)).

The legislative history relied upon by the Chamber and AHA is largely commentary on proposed provisions that were never enacted, including many statements of individual legislators and even witnesses. This is essentially an invitation to judicially amend the Act through *failure* to amend the Act, sometimes in contradictory ways. Consider, for example, that the Chamber argues simultaneously that a rejected *time* limit proposed in 1959 must be read *into* the statute, while rejected *litigation* changes in the *very same provision* must be read *out* of the statute. *Compare* Chamber at 36 *with id.* at 25 & n.16. This is not a proper use of extrinsic material.

"The Supreme Court has specifically held that statements made in the context of a later amendment to a statute that does not amend the portion of the statute at issue in the case, 'are in no sense part of the legislative history.'" *Huffman v. OPM*, 263 F.3d 1341, 1354 (Fed. Cir. 2001) (citation omitted). "[P]ost-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage." *Reg. Rail Reorg. Act Cases*, 419 U.S. 102, 132 (1974). Thus, in *Huffman*, the court wholly rejected strong language from House and Senate reports because the reports were just opining on the meaning of

the *existing* statutory term "any disclosure," and made no amendment to that particular term. 263 F.3d at 1353-54.

Relatedly, ''failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 169–70 (2001) (internal citation and quotation marks omitted). "[S]everal equally tenable inferences may be drawn from [congressional] inaction" *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994) (internal citation and quotation marks omitted); *see also Zuber v. Allen*, 396 U.S. 168, 185-86 n.21 (1969) ("Congressional inaction frequently betokens unawareness, preoccupation, or paralysis."); *Girouard v. United States*, 328 U.S. 61, 69 (1946) ("It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."); *Helvering v. Hallock*, 309 U.S. 106, 119-120 (1940). And floor debates, individual statements, and other such items are generally among the least persuasive material because they reflect only "at best the understanding of individual Congressmen" and can be made for a variety of purposes. *Zuber v. Allen*, 396 U.S. at 186; *see Garcia v. United States*, 469 U.S. 70, 76 (1984).

ii. The 1935 statutory language "an appropriate hearing" and the relevant history demonstrate that Congress chose those words specifically to grant the Board broad discretion to manage the procedure and to facilitate timely elections.

Here, the statutory language "an appropriate hearing" comes directly from the Wagner Act of 1935, and has not been changed since. *See* Chamber at 22-23; NLRB Memo Supp. SJ at 13 n.10. Therefore, it is only the intent of the 1935 Congress which is relevant. The Chamber correctly concedes this point: "neither the language of the statute nor the committee reports [from 1947] indicated that any change in [the] nature [of the "appropriate hearing"] was intended." *Utica Mutual Ins. Co. v. Vincent*, 375 F.2d 129, 133-34 (2d. Cir. 1967) (quoted by

Chamber at 23). Thus, under *Huffman*, all the subsequent history is irrelevant. 263 F.3d at 1354.

And the Supreme Court has *already reviewed all the relevant history* and has expressly held that the whole point of the term "an appropriate hearing" in the 1935 Act is to "*confer[] broad discretion upon the Board as to the hearing [required].*" *Inland Empire Council v. Millis*, 325 U.S. 697, 706-710 (1945) (emphasis added).

> [U]nder Public Resolution 44, which preceded § 9 (c), the right of judicial hearing was provided. The legislative reports cited above show that this resulted in preventing a single certification after nearly a year of the resolution's operation and that one purpose of adopting the different provisions of the Wagner Act was *to avoid these consequences*.
>
> In doing so Congress accomplished its purpose *not only* by denying the right of judicial review at that stage *but also by conferring broad discretion upon the Board as to the hearing* which § 9 (c) required before certification.

325 U.S. at 708 (emphases added).[11] Thus, the Board's investigation is "informal" and the language "appropriate hearing" is broad and general, designed to give "great latitude" to the Board. *Id.*at 706-708. As Supreme Court stated, the purpose of this "latitude" was to help the Board keep its process timely, efficient, and free of the unnecessary litigation that bogged down the former process.

Turning directly to the 1935 history itself, the reports leave no doubt as to the design of Congress to remedy the weakness and inefficiency contained in the Act's predecessors, such as the National Industrial Recovery Act (Act of June 16, 1933, c. 90, 48 Stat. 195, 15 U. S. C. 701 et seq.) The House Committee Report (H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 6-7, 2 Leg. Hist. 3052-54) states:

> Public Resolution 44 has not proved much more satisfactory even in its provisions which had some virtue over the preexisting law, namely, the provisions for elections. . . . The weakness of this procedure [was] that under the provision for

11 Public Resolution 44 (approved June 19, 1934, c. 677, 48 Stat. 1183), comprised the National Industrial Act's enforcement machinery. *See* 1 Legis. Hist. 1255B-1256.

> review of election orders *employers have a means of holding up the election for months by an application to the circuit court of appeals*. . . .
>
> *The ability of employers to block elections has been productive of a large measure of industrial strife*. When an employee organization has built up its membership to a point where it is entitled to be recognized as the representative of the employees for collective bargaining, and the employer refuses to accord such recognition, the union, *unless an election can promptly be held to determine the choice of representation*, runs the risk of impairment of strength by attrition and delay while the case is dragging on through the courts, or else is forced to call a strike to achieve recognition by its own economic power. *Such strikes have been called when election orders of the National Labor Relations Board have been held up* by court review.

The same report further states:

> Where there are contending factions of doubtful or unknown strength, or the representation claims of the only organized group in the bargaining unit are challenged, there exists that potentiality of strife which the bill is designed to eliminate by the establishment of this machinery for *prompt, governmentally supervised elections.*

Id. at 22-23, 2 Leg. Hist. 3073 (emphasis added). Congress had foremost in its mind the intention to make representation proceedings more efficient so that elections could be held in a timely manner, with the ultimate goal of promoting collective bargaining and furthering the flow of commerce.

These concerns of the 1935 Congress are precisely the ones which animated the adoption of the present rule. 76 Fed. Reg. at 80138 ("The amendments are intended to eliminate unnecessary litigation, delay, and duplicative regulations."); at 80140-42 (The amendments are designed to "to further the Act's policy of expeditiously resolving questions concerning representation and to better ensure that employees' votes may be recorded accurately, efficiently and speedily." (quotation marks omitted)). And the legislative history of related provisions in the Act is in accord. Congress did not intend to require the Board to definitively resolve the eligibility of every single potential voter, let alone *require litigation* of such issues when, in the Board's view, *they would likely never need to be decided.*

For example, in what would become Section 9(b), Congress consistently referred to the "eligibility" decisions required of the Board as concerning the "appropriate unit"—it was not thinking about particularized questions of individual voter status. The earliest version of that provision, Senate Bill 2926, Section 207, provided: "The Board shall decide whether *eligibility to participate* in elections shall be determined on the *basis of employer unit, craft unit, plant unit, or other appropriate grouping*." 1 Leg. Hist. at 11. This language indicates that when Congress referred to "eligibility" in 1935, it meant simply a determination of the appropriate unit for the election.

Significantly, as Congress further deliberated on the issue, Congress *rejected* the language "eligibility to participate" in favor of the more precise "unit appropriate" language now found in 9(b). Thus, the final version enacted by Congress, stated that the Board shall decide whether "the *unit appropriate* for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof," and made no mention whatsoever of voter eligibility. 29 U.S.C. § 159(b). Yet the Chamber relies on Senate reports concerning the *rejected version* of 9(b) to suggest that the Board is required to decide all voter eligibility questions. But, understood in this context, it becomes clear that the report simply repeats what is plain from 9(b) itself, which is that the Board should address the appropriate unit for the election: "*the units* must be determined before it can be known what employees are eligible to participate in a choice of any kind." S. Rep. 573 on S. 1958 at 14, 2 Leg. Hist. at 2313 (Chamber at 23).

In sum, consistent with the purpose of the 1935 Congress in using the term "appropriate hearing," these amendments were promulgated for the purpose of facilitating "prompt, governmentally supervised elections" by limiting unnecessary and undue litigation delay.

iii. Even if it were relevant, the Chamber and AHA misunderstand Senator Taft's 1947 statement.

The crux of the Chamber's and AHA's argument regarding the "appropriate hearing" is a brief statement from Senator Taft in 1947, which they discuss at length. Chamber at 24, 29; AHA at 11-15. In addition to being wholly irrelevant to the purpose of the 1935 Congress in using this language, the Chamber's and AHA's interpretation of the statement is itself incorrect.

The statement selected by the Chamber and AHA was a "Supplementary Analysis of the Labor Bill as Passed" placed in the record by Senator Taft. 93 Cong. Rec. 7000 (June, 12, 1947). Adm. Rec. 00114401. In the relevant part of this analysis the Senator was discussing an *unenacted provision*, but in the process he also noted in passing his opinion about the meaning of the *existing requirements* of the Wagner Act. *See Huffman*, 263 F.3d at 1353-54 (such statements are "in no sense part of the legislative history"). He states:

> [T]he function of hearings . . . [is] to determine whether an election may properly be held at the time; and if so, to decide questions of unit and eligibility to vote.

Adm. Rec. 00114403. The Chamber and AHA apparently claim that this must be understood as mandating that the Board *hear and decide* all voter eligibility questions pre-election. After all, they argue, Senator Taft said "to *decide* questions of unit *and* eligibility to vote." Suffice to say, if the Chamber's and AHA's parsing were accepted, Senator Taft would have been completely ignoring the Board's established challenge procedure. Indeed, his statement would have been inconsistent with Supreme Court precedent interpreting 9(c). Just the year before, the Supreme Court in *A.J. Tower* expressly upheld the authority of the Board to resolve voter eligibility through the election-day challenge procedure. 329 U.S. at 330-35. Again, nothing in the 1947 amendments changed that, and the courts have repeatedly reaffirmed the challenge process ever since. See, e.g. *Bituma*, 23 F.3d at 1436 (8th Cir. 1994). If the Chamber's reading of Taft's statement were true, by necessary implication, the Board would have to wholly abolish the challenge procedure, and instead inquire fully about each possible voting employee by name, and

approve a final voter list, before directing the election.

But there is a more reasonable reading of Senator Taft's statement that would render it accurate: He was generally describing the "function," not the requirements, of hearings, and did not mean to suggest that the Board *must* resolve all such issues pre-election in every case. And his mention of "unit and eligibility to vote" accurately reflects the reality that "[b]ecause the representation election is held only within the approved unit" (*Local 1325, Retail Clerks Intern. Ass'n v. NLRB*, 414 F.2d 1194, 1199, (D.C. Cir. 1969)), the designation of an appropriate unit largely determines who will vote in the election. Indeed, the definition of the unit, together with other voting eligibility formulae (such as the payroll periods for eligibility) necessarily identifies the core group of eligible voters. *See, e.g.*, *NLRB v. Hondo Drilling, Company*, 428 F.2d 943 (5th Cir. 1970). Accordingly, as the Board recognized, Senator Taft's remarks are fully consistent with the new Rule. *See* 76 Fed. Reg. at 80165 n.116.

Simply put, the Chamber and AHA misinterpret Senator Taft. And, in any event, his statement—twelve years after the fact—sheds no reliable light on the intent of Congress in the Wagner Act.

iv. Failed attempts, in 1959 and 1978, to entirely abolish the pre-election hearing are beside the point

Next, the Chamber relies on still later extrinsic material, this time from 1959. Chamber at 25-26. In 1959, like in 1935, Congress was faced with the problem of very slow Board representation case processing which resulted in a backlog—thereby forcing the Board to decline jurisdiction over small employers. *See Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 141 (1971); *see also* 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 421-422 (1959) (S. Rep. No. 86-187, at 25-26 (1959)) ("the principal reason stated by the Board for its refusal to exercise its full jurisdiction is that it already has a

backlog and could not handle more cases"); *id.* at 425-26 (S. Rep. No. 86-187 at 29-30) (delay caused by "time-consuming hearings . . . on many no-issues cases. In addition, hearings also are held in election cases where the contentions are made for the purpose of delay or are, in fact, insubstantial").

The ultimate solution to this backlog issue was that Congress amended 3(b) to give the Board authority to delegate its powers in representation cases to the regional directors; and as explained previously, the amendments at issue in this case are designed to fully effectuate this provision. *See* NLRB Memo. Supp. S.J. at 9-12. But, before settling on this provision, the House and Senate considered a variety of other possible solutions. One such possibility, which was passed in the Senate but not in the ultimate House bill, would have *completely eliminated the pre-election hearing* in certain cases. *History of the LMRDA* at 581 (S. 1555, § 705, as passed Senate).

Of course, that this provision was not ultimately adopted sheds no light on the intent of the 1935 Congress in using the term "appropriate hearing." It only shows what is undisputed from the text itself, that the Board remains required by Section 9 to hold "an appropriate hearing with due notice" before the election.

And *the parties still get such a hearing*: under both prior rules and the amendments, there are no elections prior to hearings in litigated cases. In this context, bare assertions that the amendments will institute "quickie elections," Chamber at 25-26, or violate the "sacred right" to a hearing, Chamber at 21, 26, or "essentially eviscerate . . . a meaningful pre-election hearing," AHA at 5, are little more than question begging, and the extrinsic material from 1959 does nothing to advance the Chamber's and AHA's argument.

The same is true of the 1978 history, in which Congress considered again the problem of

election procedures that were too slow. This time, however, unlike in 1935 and 1959, Congress was unable to come to any agreement about the solution, and so no changes to the Act were made. Again, the Chamber scours the extrinsic material to find a casual misstatement of existing law by a single *witness*, Board Chairman Fanning. Chamber at 27. Simply put, as the cases abundantly establish, the Board has never been required to "issue a decision resolving all issues raised and litigated" pre-election. *See* S. Rep. 95-628, at 21-22 (1978); H.R. Rep. 95-637, at 34 (1977). Instead, as shown, the Board has regularly addressed some of those issues by directing that the employees in dispute vote under challenge. Again, an isolated and inaccurate statement of existing law by a witness during hearings on a failed enactment cannot be said to have altered the 1935 Act in any way. *Exxon v. Allapattah*, 545 U.S. at 568-69; *Reg. Rail Reorg. Act Cases*, 419 U.S. at 132.

b. The Board's treatment of *Barre-National* in the Rule was correct.

In attacking this amendment the Chamber makes two related points regarding the Board's decision in *Barre-National, Inc.*, 316 NLRB 877 (1995). First, the Chamber makes the *procedural* argument that the Board's Rule improperly "overruled" *Barre-National* without three affirmative votes. Second, the Chamber and AHA make the substantive claim that the Board's prior interpretation of the statute in *Barre-National*—and not the Rule's interpretation—is the correct one. Chamber at 39-40; AHA at 15-17. Both points are without merit.

i. The Board only needs a majority for rulemaking.

On the procedural point, the Chamber claims (at 39) that the amendment was inconsistent with a Board procedural "tradition" in adjudications of requiring three affirmative votes to "overrule" precedent. *See Local Joint Exec. Bd. of Las Vegas v. NLRB*, 657 F.3d 865, 872 (9th Cir. 2011). But, by law, the Board needs only a simple majority to act, *Flotill*, 389 U.S. at 185 n.9, and under *Vermont Yankee* nothing more can be required by the courts. 435 U.S. at 524-25.

In any event, the "tradition" of requiring three "yes" votes makes no sense for rulemaking. 76 Fed. Reg. at 80165. In addressing this, the Chamber does little more than declare that it is a "distinction without a difference" because the *end result* is the same, *i.e.*, the Board can make rules either in adjudication or rulemaking. Chamber at 41.

But it is the *process* that is relevant here, and the process is completely different. The whole point of the tradition is to provide stability to an *adjudicatory process* for making rules that could threaten confusion of the law. NLRB Memo Supp. SJ at 40-41 (discussing 76 Fed. Reg. at 80145-46). The Chamber makes no mention of this purpose—stability of adjudicatory precedent—which flows directly from the fact that "[u]nlike other federal agencies, the NLRB promulgates nearly all of its legal rules through adjudication *rather than rulemaking*." *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 657 F.3d 865, 872 (9th Cir. 2011); *see also* Samuel Estreicher, "Policy Oscillation at the National Labor Relations Board: A Plea for Rulemaking," 37 Admin. L. Rev 163 (1985), Adm. Rec. 00114015 et seq. (explaining in detail how "overruling" past cases through the rulemaking process would lead to greater certainty and consistency in the law). Thus, where the Board *does* utilize rulemaking, the basic purpose of the tradition is inapplicable.[12]

12 In any event, the Chamber and AHA's analysis of *Barre-National* is wrong. *Barre-National* rested upon the existing regulations at the time. 76 Fed. Reg. 80165 NLRB Memo Supp. SJ at 15, 40-41 n.22. The Chamber contends emphatically that *Barre-National* was an interpretation of the statute itself, and rests its entire argument on the description of *Barre-National* in a later Board decision *North Manchester Foundry, Inc.* Chamber at 39-40. Although *North Manchester* may have been imprecise in its description of *Barre-National*, there is no indication that *North Manchester* was intended to make any change to the rationale of *Barre-National*. See 328 NLRB 372, 372-73 (1999). The AHA further claims that the view articulated in the concurrence and/or dissent of *Barre-National* demonstrates that the majority was relying on the statute itself, not the rule. AHA at 15-17. But the views of a minority of the Board about what the majority meant are not authoritative. Moreover, to the extent there is any uncertainty on this point, the Board is entitled to *Auer* deference in interpreting the rationale for *Barre-National*. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) ("plainly erroneous" deference).

ii. The Board is allowed to change its mind.

Turning to the substantive argument, the AHA and the Chamber claim that, because the Board in *Barre-National* previously gave parties a right to fully litigate issues that would not be decided, that right cannot now be taken away. AHA at 15-17; Chamber at 30. Again, however, even assuming that *Barre-National* rested on the statute, the Board carefully explained why its prior interpretation was incorrect, and why the Board does not view the statute to require the irrelevant litigation that *Barre-National* mandated. 76 Fed. Reg. at 80165-66 (explaining how *Barre-National* is not "administratively rational" or required by the Act).

Moreover, the Board is allowed to change its mind. The D.C. Circuit recently reiterated that "the APA allows an agency to adopt an interpretation of its governing statute that differs from a previous interpretation and that such a change is subject to no heightened scrutiny." *ATA v. NMB,* 663 F.3d at 484 (citing *FCC v. Fox Television Studios, Inc.*, 129 S.Ct. 1800, 1810 (2009)). The court proceeded to find that "for purposes of APA review, the fact that the new rule reflects a change in policy matters not at all. [T]he Board 'articulated a rational connection between the facts found and the choice made.'" *Id.* (quoting *City of Portland v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007). So too here, *Barre-National* is entirely irrelevant to whether the *current* statutory interpretation of the Board is reasonable.

c. The AHA's policy arguments were fully considered, discussed, and rejected by the Board.

It is undisputed that supervisory questions are sometimes important to the parties, and that they often involve a difficult and fact-sensitive inquiry. The Board fully discussed this point in the Rule. 76 Fed. Reg. at 80167-68. Yet the AHA goes to great lengths to establish this point, in an apparent effort to convince the Court to weigh these substantive interests itself, and find the Board's Rule impermissible on policy grounds alone. AHA at 18-28. This is not appropriate.

First, as a factual matter, AHA is simply incorrect in claiming that the rule "prohibit[s] analysis of [the supervisory status] of large portions of potential units." AHA at 23. The Rule does not *prohibit* the regional director from deciding supervisory issues, large or small. Indeed, "the final rule leaves the hearing officer and regional director with discretion, respectively, to permit introduction of evidence and to rule pre-election if the eligibility questions involve a large percentage of the unit." 76 Fed. Reg. at 80170.[13] To the extent the AHA's argument is based on speculation that this discretion will be exercised too much evidence, this claim is inappropriate for facial challenge. *See* NLRB Memo Supp SJ at 27-29.

Next, the AHA claims, on the one hand, that the fact intensive nature of supervisory issues supports requiring *litigation* of those issues pre-election, while, on the other hand, apparently conceding, as it must, that not all supervisory issues can be "completely resolved" pre-election. *Compare* AHA at 11 ("Congress intended for the pre-election hearing at a minimum to address, if not decide, issues regarding voting eligibility.") *with* AHA at 21 ("Even if, as noted in the Final Rule, all of the uncertainty regarding supervisory status cannot be completely resolved . . ."). In practice, that intensive factual analysis is one of the reasons that—for decades—regional directors have utilized the challenge procedure to resolve those issues,

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13 Similarly, the AHA is simply wrong to suggest (at 27) that "if the employer believes that the unit . . . is overly narrow or a fractured unit . . . the employer may be prohibited from addressing the issue." To the contrary, the Rule changes nothing about the *unit* issues that employers can raise. If the employer presents a colorable argument that the unit is not appropriate, that issue will usually be litigated *and decided* before the election can be directed. 76 Fed. Reg. at 80164 ("[T]he regional director must determine that a proper petition has been filed in an appropriate unit."); *cf. Sears, Roebuck & Co. v. NLRB*, 957 F.2d 52, 54-56 (2d Cir. 1992) (upholding a regional director decision to defer unit issues under certain circumstances).

Thus, the AHA lacks any foundation for claiming (at 28) that the Rule will impair the "development of coherent standards" under *Specialty Healthcare*, 357 NLRB No. 174. Because the "appropriate unit" is still litigated, there will be ample opportunity to develop the standard of appropriateness.

particularly when only a handful of the potential voters are at stake, and in all likelihood the issues would be mooted by the election.[14] Thus, to also defer *litigation* of these issues, when they would not be decided anyway, and where they are so fact-intensive, is a simple matter of common sense. 76 Fed. Reg. at 80167-68.

In an effort to show "practical problems," the AHA poses a hypothetical scenario in which 100 out of 500 employees were disputed supervisors. The Board is, of course, aware that this same hypothetical was presented in the AHA's comment. Adm. Rec. 00033575-76. In response to comments like this, the Board noted that *even under the current rules*, the regional director may *still* defer all of those issues to the challenge process. 76 Fed. Reg. at 80168. And the election result could still moot some or even all of the supervisory issues.[15]

So, what does the right to *litigate* the issues get the employer in this context? Nothing but delay. If, after the election, the supervisory issues are mooted by the result, but the employer still desires the final resolution of these issues by the Board, it can get it by following the procedure

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14 The AHA relies upon *NLRB v. Parsons School of Design*, 793 F.2d 503 (2d Cir. 1986) and related cases, discussed at 76 Fed. Reg. at 80168-69, to argue that the Board's authority to use the challenge procedure is "narrow and limited." AHA at 14; *see id.* at 24-25. But, as the Second Circuit has subsequently explained, the holding in *Parsons* did not ultimately turn on *how many challenges* were used, but on the fact that the *notice of election was misleading*. *See Sears*, 957 F.2d at 54-59 (the problem in these cases was that "the election notice from the NLRB to the employees described a bargaining unit different from the one ultimately established and did not alert employees to the possibility of change"). Nothing in the Rule will change the regional director's discretion to craft a fair notice of election, and regional directors routinely inform employees in that notice of the unit that would be certified. In any event, again, this is a discretionary rule, and cannot be attacked at this time on the basis of rank speculation about, not only how many issues will be deferred in the exercise of regional director discretion, but also how the regional director will address the deferred issues in the notice of election. *See* NLRB Memo. Supp. SJ at 28-32.

15 In fact, the practical problems cited by the AHA are an inherent part of any system that involves case-by-case application of the law. *See* NLRB Memo Supp. SJ at 16-17; *cf.* Art. III, U.S. Const.

specifically designed for that purpose—filing a unit clarification petition. 76 Fed. Reg. at 80169; *see Smith Steel Workers v. AO Smith Corp.*, 420 F.2d 1, 9 (7th Cir. 1969) ("[T]he unit clarification procedure . . . provides a method for clarifying the correct course of conduct for the various parties with the minimal disruption of orderly bargaining and the conduct of business . . ."). But again, in most cases, the parties were concerned about eligibility primarily because the contested individuals could conceivably be the deciding votes in the result. Once it is clear that they will not be the deciding votes, these issues are easily resolved post-election by agreement of the parties, with the pressure of the election behind them. NLRB Memo Supp. SJ at 3 n.3.

In sum, if the AHA disagrees with the balance of interests struck by the Board, its recourse is to Congress, not the courts. The Board explained its views, and that is all that can be required under *A.J. Tower* and the APA. 329 U.S. at 330-35; *Pension Ben. Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 653-55 (1990) (discussing *Vermont Yankee* and the APA); *see* NLRB Memo. Supp. SJ at 8-9, 34-35.

B. The "special permission to appeal" procedure satisfies Section 3(b).

The Chamber complains that the Rule "extinguishes the statutory right to seek pre-election Board review or to seek a stay of 'any action' by a Regional Director." Chamber at 31-32. This argument misinterprets 3(b). But before addressing this point, the relevant amendments are briefly recapitulated.

Under the former rules, parties would file a request for Board review of the direction of election within 14 days of that decision, but review would only be granted when there was a "substantial question of law or policy." Former 102.67(c). The Board has now eliminated this pre-election procedure. But strikingly little was actually lost thereby, because the Board *replaced* it with a new procedure, under which review will be granted pre-election in "extraordinary circumstances" (new 102.5(c)) and post-election where there is a "substantial question of law or

policy" (new 102.67(c)).[16]

Thus, the question for this Court is whether Section 3(b) speaks to the precise question of *both* 1) *when* in the process Board review must be entertained, *and* 2) *the standard* the Board must apply in choosing whether to accept review at any particular time in the process. The statute speaks to neither. Nothing in the statute requires Board review *before the election*; and even if it did, under the amendments the parties can still seek pre-election Board review and/or a stay by seeking special permission to appeal.

1. The Chamber misreads the plain text of 3(b).

First, the statute does not speak to *when* review must be entertained. The Chamber argues that 3(b) implicitly suggests the right to request review *before* the next step taken by the Regional Director, *i.e.*, before the election. Chamber at 33. This is incorrect: nothing in 3(b) mandates *immediate*, rather than final, Board review. Section 3(b) of the NLRA provides in part:

> The Board is [] authorized to delegate to its regional directors its powers [] to determine [issues arising in representation proceedings], except that upon the filing of a request therefore with the Board by any interested person, the Board *may* review any action of a regional director delegated to him [], but such review *shall not*, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.

29 U.S.C. § 153(b) (emphases added).

That the Board "may review any action" of a Regional Director does not mean that the Board *must decide* requests for review at any particular point in time. Nothing requires the Board to accept, grant or deny a request for review within a certain number of days of the regional director's action, or imposes any other time limit on review. In addition, the stay phrase grants the Board greater, not less, latitude; the Board *may* review a ruling pre-election, or *may* review a

[16] The standard for post-election review in the new procedure is identical to the standard for pre-election review in the former procedure.

ruling post-election, and in either case, the proceedings are not stayed unless ordered by the Board. To the contrary, the stay language of the statute expressly contemplates that the Board's failure to rule on a request for review for months would have *no impact* on the ongoing regional election proceeding. Nothing in the text of 3(b) prevents the Regional Director from continuing to process the election proceeding to completion while a request for review is pending.

Indeed, even under the former rules the Board did not always decide requests for review before the election, and the election was held while the request was still pending. 76 Fed. Reg. at 80172 (citing *VFL Tech. Corp.*, 329 NLRB 458, 458 (1999)).[17] The Chamber does not suggest that this procedure was in conflict with the statute.

Since, under the former rules, the Board could defer the request for review until after the election in each particular case, it can also address the issue categorically by rule, delineating the kinds of cases in which review at a particular point in the case would be appropriate or inappropriate. *See Am. Hosp. Assn.*, 499 U.S. at 606, 610-613. In a prior rulemaking, for example, the Board issued a rule describing in detail the specific units that should be used in hospitals. *Id.* The AHA attacked that rule, claiming that the Board could not issue a blanket rule on units, but was required to make a decision about units on a case-by-case basis. The Supreme Court held otherwise, stating that "the decision-maker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority." *Id.* at 612.

The Rule's decision to provide for final review in most cases—instead of interlocutory review—makes eminent sense. The final judgment rule is omnipresent in administrative and judicial procedure for good reason: as Justice Story stated in a related context, "causes should not

17 The former rules required impounding ballots in such cases (*see* former 102.67(b)), but nothing in 3(b) even arguably requires impounding ballots pending review.

come up here in fragments, upon successive appeals. It would occasion very great delays, and oppressive expenses." *Canter v. Am. Ins. Co.*, 28 U.S. 307, 318 (1830); *see Forgay v. Conrad*, 47 U.S. 201 (1848) ("In limiting the right of appeal to final decrees, it was obviously the object of the law to save the unnecessary expense and delay of repeated appeals in the same suit; and to have the whole case and every matter in controversy in it decided in a single appeal.").[18] The proposed rule applies the common-sense policy of the final judgment rule to election proceedings, consolidating the issues in the case for review except where, as discussed below, a collateral issue that would otherwise evade review may be the subject of an interlocutory special appeal. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) and its progeny.

In short, Section 3(b) reads not as a limitation on the Board's authority to regulate elections, but as a grant of permission for the Board to choose how to administratively organize its elections and investigations. It would turn the text and purpose on its head to read 3(b) as the Chamber suggests.

2. The amendments permit the parties to request Board review of any action by the regional director at any time.

In any event, even assuming that the Chamber's view of 3(b) is correct such that the regional director's decision must be subject to an *immediate* request for review, the "special permission to appeal" procedure would satisfy 3(b) by permitting the parties to request Board review (and a stay) of any regional director action—including subpoenas, evidentiary

18 The final judgment rule was adopted by the common law English courts from at least the 1300s, and in America was enshrined in the Judiciary Act of 1789 and retained in every subsequent revision of the judicial code. *See* C. M. Crick, *The Final Judgment Rule as a Basis for Appeal*, 41 Yale L. J. 539, 539-552 (1932); *see also* T.D. Frank, *Requiem for the Final Judgment Rule*, 45 Texas L. R. 292, 292-93 (1966) ("[The rule] effectuates, in general, an efficient utilization of judicial manpower and permits the initial stage of the litigation to operate in a smooth, orderly fashion without disrupting appeals.").

determinations, and the direction of election.[19] Thus:

> [T]he final rule *does not eliminate any party's right to request review*. The rule simply eliminates the *obligation* to request review pre-election in order to preserve an issue, and permits any issue that would previously have been raised pre-election to be raised through a single, more efficient, post-election request for review. Moreover, if a party believes that pre-election review is essential to reserve an issue for review, *it can file a request for special permission to appeal*.

76 Fed. Reg. at 80172 (emphasis added).

The Supreme Court has expressly held that such special permission to appeal gives the parties the opportunity to get the Board's ruling on the matter. *See NLRB v. Duval Jewelry Co. of Miami, Inc.*, 357 U.S. 1, 7 (1958). Thus, under the Rules too, "one who is aggrieved by the ruling of the regional director or hearing officer can get the Board's ruling" by seeking special permission to appeal. *Id*. The Chamber's response is simply to reiterate that the Board "intends to eliminate the right to seek pre-election Board review." Chamber at 33. But the language cited from the Rule is all related to the "request for review" procedure, and says nothing about the right to seek special permission to appeal.

Nothing in 3(b) even arguably speaks to the standard the Board is to apply in granting or denying review—whether pre-election or post-election. It says, again, that the Board "may" grant review, without imposing any limit on this discretion. As the Supreme Court has explained, "Congress has made a clear choice; and the fact that the Board has only discretionary review of the determination of the regional director creates no possible infirmity within the range of our imagination." *Magnesium Casting Co.*, 401 U.S. at 142; *see* NLRB Memo Supp SJ at 9-12.

And, again, under the *American Hospital Association* case discussed above, the Board

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19 The attack on the amendment eliminating the 25 day waiting period as somehow dependent upon the pre-election request for review (Chamber at 32) is misplaced. The Board very clearly explained that it *would have removed this limit notwithstanding the changes to the review procedure* because it did not serve its intended purpose *even under the former rules*. 76 Fed. Reg. at 80140 n.8; at 80173. As such, the Chamber's efforts to link these amendments fails.

was well within its authority to describe by rulemaking the circumstances in which such review would be granted. Indeed, the Chamber appears to concede that the Board "may be selective in granting requests for review," and nothing in 3(b) forecloses the particular standards adopted here. Chamber at 33. As the Board pointed out, "extraordinary circumstances" is not the same as "no circumstances," and, as a matter of common sense, pre-election review serves no purpose in the ordinary case, where final review is more than adequate. 76 Fed. Reg. at 80163.

In fact, the parties generally gain nothing from pre-election review. If the election were improper, the Board can simply invalidate the results after the election, and, where appropriate, order the election to be rerun properly. *See* NLRB Memo Supp SJ at 30-31. This is the only remedy for post-election objections, and it is fully adequate in this context as well. The employer suffers no irreparable harm. If there were problems with the use of supervisors, the issue can still be decided and the election rerun if necessary; if there was too little evidence in the record for a decision on some important issue, the hearing can be reopened and then the election rerun if necessary; if there was too much uncertainty about the unit, the unit can be clarified and the election rerun if necessary; if the election was in any other way unfair, it can be rerun; in fact, the whole parade of horribles raised by the AHA (at 18-30) is cured by simply rerunning the election *whenever the problem actually arises*. *See* NLRB Memo. Supp. SJ at 31 (no harm in waiting for an as-applied challenge). The Board reasonably concluded that, in most cases, post-election review is the more efficient method for addressing the matter than to preemptively disrupt the election process on the off chance that the regional director might have erred. 76 Fed. Reg. at 80172 n.140 (discussing the low reversal rate).

In this context, the new procedure for Board review is as generous as the old. Indeed, the former procedure was likely *more burdensome* to the parties, because it mandated that, unless a

request for review was filed within two weeks of the direction of election, *the issues would be forever waived by the parties*. *See* former 102.67(b) (requiring the request within 14 days). Meanwhile, the issues that would be raised in a pre-election request were very often mooted by the results of the election itself, so the parties were burdened with the obligation to engage in protective interlocutory litigation to preserve the issues *just in case* they were not moot. So, needless litigation was *actually required* by the former Rules in many cases. The Board eliminated this wasteful procedure. Under the new Rules, failure to seek pre-election special permission to appeal will not result in waiver. 76 Fed. Reg. 80162.

In sum, the special permission procedure is adequate, and the new Rules are a clear net benefit for the parties and the Board.

C. The Chamber and the AHA cite to nothing that imposes any sort of time limit on Board elections.

The Chamber (at 34-38) argues that Section 9(b) forecloses the Board from "expediting elections" and, specifically, from holding elections in less than 30 days. The sole textual hook for this interpretation is the words "fullest freedom:"[20]

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

29 U.S.C. § 159(b). The reference to "fullest freedom" is most reasonably read as concerning the *substance* of the Board's decision, and instructs that the Board should consider *which* unit is conducive to the "fullest freedom" to exercise employee rights—it says nothing about requiring the Board to wait for any particular period of time between petition and election. *See Carpenters*

20 See also AHA at 28. The Chamber (at 18, 35) makes, at most, passing reference to 8(c), but, for the reasons previously explained, that provision is not in conflict with this Rule. NLRB Mem. Supp. SJ at 25-27.

Local U. No. 1846 v. Pratt-Farnsworth, 690 F. 2d 489, 507 (5th Cir. 1982) (discussing "fullest freedom," and stating that "the primary motivation of the Board in making an independent unit determination in a single employer case is to protect the rights under section 7").

The Chamber then turns—again—to irrelevant post-enactment extrinsic material, and argues that, in *failing* to amend the statute to impose time limits on Board elections, Congress was *actually amending* the statute to impose those time limits. Chamber at 35-38. This defies law and logic.

In considering the issue in 1959, some versions of the bill included *no* speed limit, and Congress never reached an agreement on whether to have such a limit, and, if so, how long that limit should be. *See* 2 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act, 1959, at 1908-09; *comparing* H.R. 8342, § 704, as reported (mandating 30-day waiting period to conduct election after filing of petition); *and* S. 1555, § 705, as passed Senate (45-day waiting period before Board may conduct election); *and* S. 748, § 508, as referred (allowing Board to conduct election before hearing without imposing time limit); *and* S. 505, as referred (no relevant amendment at all); *and* 29 U.S.C. § 153(b) (enabling delegation to regional directors without imposing any time limit on elections). "[P]erhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency." *See Chevron*, 467 U.S. at 865.

So too, in 1978, Congress considered a very different proposal, which *mandated* that many elections be held *within* 30 days in some cases. The proposal would have created three tiered timetables for elections, with simple elections between 21 and 30 days, complex elections in "not more than 75 days," and, for cases in between, all other elections in "not more than 45 days" (or 50 days, in some versions). *See, e.g.*, 124 Cong. Rec. 7652-54 (side-by-side

comparison of House and Senate versions of this proposal, accompanied by analysis and criticism by Senator Jesse Helms).

But Congress could not agree to this either. In fact, the list of times Congress has *failed* to impose one or another timeline for election procedures is long—*see* "National Labor Relations Fair Elections Act" H.R.4800 (1990), 101st Cong, 2d Session; H.R. 503, 102nd Cong., 1st Session (1991); H.R. 689, 103rd Cong., 1st Session (1993); "Labor Relations Representative Amendment Act" S. 1529, 103rd Cong., 1st Session (1993); S. 778, 104th Cong., 1st Session (1995); "Employee Free Choice Act" H.R. 1409, Sec. 2, 111th Cong., 1st Session (2009)—and it continues to grow to this day. *Cf.* DeMint Amendment SA 1590 (introduced February 14, 2012).

The bottom line: Ultimately, Congress has never agreed to set any kind of time limit on the election date, and so there is no such time limit in the statute. Thus, the Board remains free to set a date that is, in its judgment, fair. Under these amendments, the regional director will be able to do just that, considering the facts of the particular case. Indeed, it is the Chamber that is trying to act as "surrogate legislator," and choosing *one* of the failed amendments to the Act and arguing that this Court should essentially convert it into statutory text. *See* Chamber at 37-38. This should not be permitted.

IV. The Chamber is not entitled to complete vacatur

Finally, the Chamber has waived or abandoned many of the allegations raised in the First Amended Complaint[21] and has done little to attack, aside from perhaps a superficial mention,

21 The following issues in the First Amended Complaint have been waived or abandoned: constitutional and statutory "free speech" arguments in ¶¶ 22, 45, 46, 47, 49 and Prayer for Relief 3; constitutional due process arguments in ¶ 44 and Prayer for Relief 3; arguments regarding the procedure of the proposed rule, public hearing, and public meeting, and "logical outgrowth" of the meeting, in ¶¶ 19, 23, 26, 27, 53, 55, 56; arguments about the sufficiency of the Board's review of the comments in ¶¶ 30; and the entirety of Count 3 concerning the Regulatory Flexibility Act, ¶¶ 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, and part of Prayer for Relief 2.

many of the amendments. *See, e.g.*, *Deirmenjian v. Deutsche Bank, AG*, No. CV 06-00774, 2010 WL 3034060, at *7 (C.D. Cal. July 30, 2010) (citing cases) ("[T]he onus is upon the Parties to formulate arguments; grounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned."). The Chamber also does not challenge the post-election review procedures in its complaint or motion. The 25-day waiting period also does not appear to be challenged directly, except to suggest that it *could* result in elections in less than 30 days, or that it is somehow a necessary corollary to the changes to the request for review procedure for directions of election. *See supra*. As the Board made clear, each of the amendments, including the 25-day period, is independently justified. 76 Fed. Reg. at 80140 n.8

Yet the remedy the Chamber seeks is complete vacatur of *all* the amendments. Complaint at prayer for relief #5. In the absence of some problem or problems that actually impact all of the amendments, that would not be the appropriate remedy. *Davis County Solid Waste Mgmt v. EPA*, 108 F.3d 1454 (D.C. Cir. 1997). Indeed, each of these amendments is severable because they each "address discrete sources of inefficiency in the rules, and it is clear that the amendments will serve their functions whether adopted in whole or in part, together or one at a time. For this reason as well, each of the amendments in this final rule would be adopted by the Board independently of the others." 76 Fed. Reg. at 80140 n.8.

CONCLUSION

For all the foregoing reasons, this Court should deny the Chamber's motion, and should grant the Board's motion.

RESPECTFULLY SUBMITTED,

ERIC G. MOSKOWITZ
Assistant General Counsel
for Special Litigation
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
Phone: (202) 273-2930
Fax: (202) 273-1799
E-mail: Eric.Moskowitz@nlrb.gov
D.C. Bar No. 184614

ABBY PROPIS SIMMS
Deputy Assistant General Counsel
Special Litigation Branch
Phone: (202) 273-2934
E-mail: Abby.Simms@nlrb.gov
D.C. Bar No. 913640

s/ Joel F. Dillard
JOEL F. DILLARD
DAWN L. GOLDSTEIN
Attorney
Special Litigation Branch
Phone: (202) 273-3775
E-mail: Joel.Dillard@nlrb.gov
Dawn.Goldstein@nlrb.gov

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Dated: February 28, 2012
Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the Board's Opposition, Exhibit, and Proposed Order were filed electronically on the 28th day of February, 2012, in accordance with the Court's Electronic Filing Guidelines. Notice of this filing will be sent to all parties by operation of the Court's Electronic Filing System. Parties may access this filing through the Court's Filing System.

/s/ Joel F. Dillard
Joel F. Dillard

EXHIBIT 1

I, Brian E. Hayes, hereby state as follows:

1) I am currently a Member of the National Labor Relations Board. I was sworn in as a Member of the Board on June 29, 2010 to a term that ends on December 16, 2012.

2) On June 22, 2011, the National Labor Relations Board published a Notice of Proposed Rulemaking (NPRM) (76 FR 36812), proposing to amend its rules and regulations governing the filing and processing of petitions relating to the representation of employees for purposes of collective bargaining with their employer. I voted against publication of this NPRM.

3) On November 30, 2011, I attended a public meeting of the National Labor Relations Board, the announced purpose of which was to vote on how to proceed in this rulemaking proceeding. At the meeting, the Chairman of the Board proposed Board Resolution No. 2011-1, which provided for the drafting, circulation and publication of a final rule containing eight elements from the original NPRM. The Resolution also provided that no final rule "shall be published until it has been circulated among the members of the Board and approved by a majority of the Board." I voted against Board Resolution No. 2011-1.

4) In the late afternoon of Friday, December 9, 2011, a draft of the Final Rule, consisting of 180 pages, was circulated by email to me and others by the Chairman of the Board. Chairman Pearce stated that he intended to request a Board vote on the document as soon as it was place in final form, which he anticipated would be on Wednesday, Thursday, or Friday of the next week.

5) In the early evening of Monday, December 12, 2011, a revised draft of the Final Rule was circulated by email to me and others, with the explanation that the draft would soon be circulated in the Board's intranet Judicial Case Management System (JCMS). A comparison of the revised draft to the December 9 draft was also attached.

6) On Tuesday, December 13, 2011, a draft Final Rule consisting of 190 pages, was circulated in JCMS. JCMS is the ordinary procedure for circulating and revising draft decisions, rules, and other documents, and for voting---generally either "approved" or "noted" with an attached dissent or concurrence. The case or rule is moved to issuance when votes are recorded for all Board Members as to the final versions of all circulated documents. This is the procedure that was followed with respect to the Board's notice-posting rule.

7) On Wednesday, December 14, 2011, a draft Board procedural Order on this rulemaking was circulated by email from the Chairman to me and others. That Order, as revised, gave direction to the Solicitor to publish the Final Rule "immediately upon approval of a final rule by a majority of the Board." The Order also provided for subsequent publication in the

Federal Register "at such time as they are finally approved following circulation through the Board's usual procedures" any separate dissenting statement by a Board Member serving on the date of the Final Rule's publication as well as any concurring statement by a Board Member serving on that date, subject to the proviso that a dissent must be circulated no less than 30 days prior to the effective date of the Final Rule (April 30, 2012), that a concurrence must be circulated no less than 15 days prior to the effective date, that any separate statements must be submitted for publication no later than 5 business days prior to the effective date, and that any separate dissent or concurrence "shall represent the personal statement of the Member and shall in no way alter the Board's approval of the final rule or the final rule itself."

8) On December 14, 2011, a majority consisting of Chairman Pearce and Member Becker approved the Order, as revised, by e-mail. On Thursday, December 15, 2011, I voted against this Order by email, noting in addition to other reasons for my opposition that the President had just announced two Board Member nominations and that a third nomination was also pending. My email stated that "With the prospect of a full Board to address these proposed rule changes I believe there is even less justification for proceeding on a divided 2-1 basis."

9) In the late afternoon of December 15, modifications of the draft Final Rule were circulated in JCMS. The modified draft, consisting of 202 pages with revisions noted, was also sent by email from the Chairman's Chief Counsel Kent Hirozawa to my Chief Counsel Jim Murphy, with a "cc" to me and others. The email asked whether I wished to include any dissenting statement in the Final Rule. Later that same day, I authorized my Chief Counsel to advise that I would not attach any statement to the Final Rule and that, as long as I had the assurance of adding a dissent, I could say whatever I needed to say in one document.

10) On December 16, further modifications of the draft Final Rule were circulated in JCMS. The draft, consisting of 207 pages with revisions noted, was approved in JCMS by Chairman Pearce and Member Becker. As approved, the rule was forwarded that day by the Solicitor for publication in the Federal Register.

11) The JCMS process automatically calls for an electronic vote when drafts are circulated. As stated above, such a vote would either indicate that the draft was "approved" or "noted," accompanied by circulation of a separate statement in the latter event. In situations where a particular Board Member has not voted and immediate action is desired, the Executive Secretary or Solicitor may convey, by phone or e-mail, a request to act . After I voted against the procedural Order on December 15 and indicated that I would not attach a personal statement to the Final Rule, I gave no thought to whether further action was required of me. I was not asked

by email or phone to record a final vote in JCMS before or after the Final Rule was modified, approved by Chairman Pearce and Member Becker, and forwarded by the Solicitor for publication on December 16. In retrospect, I believe that my colleagues viewed their approval of the procedural Order of December 15 providing for subsequent issuance of personal statements as obviating the need for any further action by me. To this date, I have not circulated a statement with respect to the Final Rule.

12) On December 22, 2011, the Board published its Final Rule titled Representation-Case Procedures at 76 Fed. Reg. 80138.

I have read this statement consisting of 3 pages, including this page, I fully understand its contents, and I certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on February 23, 2012

Brian E. Hayes

Member, National Labor Relations Board

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, and COALITION FOR A DEMOCRATIC WORKPLACE, Plaintiffs, v. NATIONAL LABOR RELATIONS BOARD, Defendant	)	Case No. 11-cv-2262 Judge James E. Boasberg

[PROPOSED] ORDER

Upon consideration of Plaintiffs' Motion for Summary Judgment, Defendant's Motion for Summary Judgment, their respective Oppositions, Exhibits, and the administrative record in the case, it is hereby,

ORDERED that Plaintiffs' Motion for Summary Judgment is DENIED, and it is further

ORDERED that Defendant's Motion for Summary Judgment is GRANTED, and it is further

ORDERED that judgment be entered in favor of Defendants.

Dated:_____ _____
UNITED STATES DISTRICT JUDGE