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. 11-2262
Judge James E. Boasberg

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

Howard M. Radzely (D.C. Bar #437957)
Charles I. Cohen (D.C. Bar #284893)
Jonathan C. Fritts (D.C. Bar #464011)
Michael W. Steinberg (D.C. Bar #964502)
David M. Kerr (D.C. Bar #475707)
David R. Broderdorf (D.C. Bar #984847)
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-5996

Philip A. Miscimarra (Pro Hac Vice)
MORGAN, LEWIS & BOCKIUS LLP
77 West Wacker Drive, 5th Floor
Chicago, Illinois 60601
(312) 324-1000

Counsel for CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and COALITION FOR A DEMOCRATIC WORKPLACE

Robin S. Conrad (D.C. Bar #342774)
Shane B. Kawka (D.C. Bar #456402)
Rachel Brand (D.C. Bar #469106)
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

TABLE OF CONTENTS

INTRODUCTION 1
SUMMARY OF FACTS 2
I. The Parties 2
A. The Chamber 2
B. The CDW 3
C. The Board 3
II. Procedural History 4
APPLICABLE LEGAL STANDARD 7
ARGUMENT 8
I. Two Members Of The Board Issued The Final Rule Without The Statutorily Required Participation By Three Members 8
II. The Final Rule Is Contrary To Sections 3 And 9 Of The NLRA 15
A. The Final Rule Violates the NLRA by Authorizing Hearing Officers to Exclude All Evidence Regarding Election Issues Such as Voter Eligibility and Supervisor Status 18
1. The text, structure, purpose, and legislative history of the NLRA 19
2. The Final Rule violates clear congressional intent. 27
B. The Final Rule Violates Section 3(b) By Eliminating the Statutory Right to Seek Pre-Election Board Review and a Board-Ordered “Stay” of “Any Action” of Regional Directors, Including the Election 31
C. The Final Rule Creates an Election Process Similar to What Congress Rejected (Twice) and Deprives Employees of the “Fullest Freedom” in their Exercise of Protected Rights 34
III. In Its Effort To Expedite The Rulemaking Process, Two Members Of The Board Took Many Arbitrary And Capricious Actions 38
A. It Was Arbitrary and Capricious to Break From the Board’s Prior Practice Regarding Overruling Precedent and to Not Adequately Address Comments on the Issue 38
B. Acting Without Sufficient Opportunity For the Writing or Circulating a Dissent Was Arbitrary and Capricious 41
CONCLUSION 45

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

A.L.A. Schechter Poultry Corp. v. United States,
295 U.S. 495 (1935)....................44

American Bioscience, Inc. v. Thompson,
269 F.3d 1077 (D.C. Cir. 2001)....................8

American Vanguard Corp. v. Jackson,
803 F. Supp. 2d 8, 2011 WL 3606517 (D.D.C. 2011)....................9, 15

American Wildlands v. Kempthorne,
530 F.3d 991 (D.C. Cir. 2008)....................14

Angelica Healthcare Servs. Grp.,
315 NLRB 1320 (1995)....................30, 32

Avon Prods., Inc.,
262 NLRB 46 (1982)....................33

Bankamerica Corp. v. United States,
462 U.S. 122 (1983)....................38

* *Barre-National, Inc.*,
316 NLRB 877 (1995).................... *passim*

Bell Atl. Tel. Cos. v. F.C.C.,
131 F.3d 1044 (D.C. Cir. 1997)....................16, 17, 34

Bell Atl. Tel. Cos. v. FCC,
24 F.3d 1441 (D.C. Cir. 1994)....................38

Brodie v. United States Dep't of Health and Human Servs,
796 F.Supp.2d 145 (D.D.C. 2011)....................8

Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,
467 U.S. 837 (1984)....................16, 17

Citizens to Preserve Overton Park v. Volpe,
401 U.S. 402 (1971)....................40

City of Olmstead Falls v. Fed. Aviation Admin.,
292 F.3d 261 (D.C. Cir. 2002)....................8

Envtl. Def. Fund. v. Costle,
657 F.2d 275 (D.C. Cir. 1981)....................8

ETSI Pipeline Project v. Missouri,
484 U.S. 495 (1988)....................9

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000)....................9, 14

Fed. Trade Comm'n v. Bunte Bros.,
312 U.S. 349 (1941)....................38

Greater Boston Television Corp. v. FCC,
444 F.2d 841 (D.C. Cir. 1970)....................14

Greater Yellowstone Coal. v. Bosworth,
209 F. Supp. 2d 156 (D.D.C. 2002)....................8

Hacienda Resort Hotel & Casino,
355 NLRB No. 154 (2010)....................38, 39

Hammontree v. NLRB,
894 F.2d 438 (D.C. Cir. 1990)....................16, 37

Holloway v. United States,
526 U.S. 1 (1999)....................9

Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (1999)....................9

Inland Empire Dist. Council v. Millis,
325 U.S. 697 (1945)....................22, 28, 29

Int'l Hod Carriers Bldg. & Common Laborers,
135 NLRB 1153 (1962)....................35

James Madison Ltd. by Hecht v. Ludwig,
82 F.3d 1085 (D.C. Cir. 1996)....................8

Martini v. Fed. Nat'l Mortg. Ass'n,
178 F.3d 1336 (D.C. Cir. 1999)....................16

Michigan v. EPA,
268 F.3d 1075 (D.C. Cir. 2001)....................9, 12

Motor Vehicle Mfg. Ass'n v. State Farm Mutual Ins. Co.,
463 U.S. 29 (1983)....................40

Nat'l Cable & Telecomm. Ass'n v. FCC,
567 F.3d 659 (D.C. Cir. 2009)....................16

* *New Process Steel, L.P. v. NLRB*,
130 S. Ct. 2635 (2010) .... *passim*

NLRB v. Gissel Packing Co.,
395 U.S. 575 (1969)..35

NLRB v. S.W. Evans & Son,
181 F.2d 427 (3d Cir. 1950)...22, 29

North Carolina v. FERC,
730 F.2d 790 (D.C. Cir. 1984) 38

* *North Manchester Foundry, Inc.*,
328 NLRB 372 (1999) 30, 40

Northeast Hosp. Corp. v. Sebelius,
657 F.3d 1 (D.C. Cir. 2011) 16

Office of Commc'n, Inc. of United Church of Christ v. F.C.C.,
327 F.3d 1222 (D.C. Cir. 2003) 16

Potlach Forests, Inc.,
55 NLRB 255 (1944) 22

Public Service Commission v. Federal. Power Commission,
543 F.2d 757 (D.C. Cir. 1974) 14

Railway Labor Executives' Association v. National Mediation Board,
988 F.2d 133 (D.C. Cir. 1993) 37

Reytblatt v. NRC,
105 F.3d 715 (D.C. Cir. 1997) 40

Sprint Nextel Corp. v. FCC,
508 F.3d 1129 (D.C. Cir. 2007) 14

Thomas Jefferson University v. Shalala,
512 U.S. 504 (1994)...7, 16

Thompson v. Clark,
741 F.2d 401 (D.C. Cir. 1984) 40

United Techs. Corp. v. Department of Defense,
601 F.3d 557 (D.C. Cir. 2010) 7

U.S. Airways, Inc. v. National Mediation Board,
177 F.3d 985 (D.C. Cir. 1999) 7

Utica Mutual Ins. Co. v. Vincent,
375 F.2d 129 (2d Cir. 1967)....................23

FEDERAL STATUTES

Administrative Procedure Act, 5 U.S.C. §§ 551-706

5 U.S.C. § 706....................7

5 U.S.C. § 706(2)(A)....................1, 7, 16, 28, 38

5 U.S.C. § 706(2)(D)....................1, 7

* National Labor Relations Act, 29 U.S.C. §§ 151-169 .... *passim*

29 U.S.C. § 153(b) .... *passim*

29 U.S.C. § 154(a) 20, 44

29 U.S.C. § 156....................3

29 U.S.C. § 157....................35, 37

29 U.S.C. § 158(b)(7) 37

29 U.S.C. § 158(b)(7)(C) 35, 37

29 U.S.C. § 158(c) 18, 35

29 U.S.C. § 159(b) 18, 35, 37, 39

29 U.S.C. § 159(c) .... *passim*

29 U.S.C. § 159(c)(1).................... *passim*

29 U.S.C. § 159(c)(4)....................19, 23

29 U.S.C. § 401 et seq....................25

Taft-Hartley Act, 29 U.S.C. §§ 141 et seq., 61 Stat. 136 (1947), *reprinted in* 1 LMRA
Hist. at 1 et seq. (1974) 22

Wagner Act, 29 U.S.C. §§ 151 et seq., 49 Stat. 449 (1935), *reprinted in* 1 NLRA Hist.
3270 et seq. (1935)....................22

FEDERAL REGULATIONS AND RULEMAKINGS

29 C.F.R. § 101.20(c) 1, 40

29 C.F.R. § 101.21(d) 7, 32

29 C.F.R. pt. 102 .... 1, 3

29 C.F.R. § 102.23(b) 35

29 C.F.R. § 102.64(a) 6, 18

29 C.F.R. § 102.65 34

29 C.F.R. § 102.65(c) 7

29 C.F.R. § 102.66(a) 6, 18,40

29 C.F.R. § 102.66(d) 6

29 C.F.R. § 102.67 32

29 C.F.R. § 102.67(b) 6, 33

29 C.F.R. § 102.69 .... 6, 32, 33

29 C.F.R. § 102.69(b) 7

29 C.F.R. § 102.69(d)(3) 7

54 Fed. Reg. 16,336 (April 21, 1989) 42

67 Fed. Reg. 5723 (February 7, 2002) 43

71 Fed. Reg. 42,028 (July 25, 2006) 43

72 Fed. Reg. 39,904 (July 20, 2007) 43

75 Fed. Reg. 26,062 (May 11, 2010) 43

76 Fed.Reg. 36,812 (June 22, 2011) .... *passim*

76 Fed. Reg. 80,138 (December 22, 2011) .... *passim*

LEGISLATIVE MATERIALS

* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT (1949) .... *passim*

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S. 2926, 73rd Cong. (1934) 25

S. 1958, 74th Cong. (1935) 24

S. 1126, 80th Cong. (1947) 47

S. 1555, 86th Cong. (1959) (as passed by the Senate), r*eprinted in* 1 LMRDA Hist. 581...........25

S. Rep. 73-2926 (1934), *reprinted in* 1 NLRA Hist. 11 ....24, 47

S. Rep. 78-2926 (1934), *reprinted in* 1 NLRA Hist. 1200 24

S. Rep. 79-1184 (1934), *reprinted in* 1 NLRA Hist. 1101 44

S. Rep. 74-573 (1935), *reprinted in* 2 NLRA Hist. 2313-1214 ....21, 24

S. Rep. 80-105 (1947), *reprinted in* 1 LMRA Hist. 409, 415, 431..........31, 44, 45

S. Rep. 86-10 (1959), *reprinted in* 1 LMRDA Hist. 82..........25

S. Rep. 86-187 (1959), *reprinted in* 1 LMRDA Hist. 426..........23

S. Rep. 95-628 (1978)..........27, 28

H.R. 8342, 86th Cong. (1959) (as reported in the House), *reprinted in* 1 LMRDA Hist. 753-54 25

H.R. Rep. 74-1147 (1935) *reprinted in* 2 NLRA Hist. 3073..........22

H.R. Rep. 74-969 (1935)..........44

H.R. Rep. 86-741 (1959) *reprinted in* 1 LMRDA Hist. 782-83 .... *passim*

H.R. Rep. 86-1147 (1959), *reprinted in* 1 LMRDA Hist. 934 ....25, 26

H.R. Rep. 95-637 (1977)..........27

74 Cong. Rec. 8536 (1935), *reprinted in* 2 NLRA Hist. 3007 44

93 Cong. Rec. 3953 (1947), *reprinted in* 2 LMRA Hist. 1011 20

93 Cong. Rec. 7002 (1947) *reprinted in* 2 LMRA Hist. 1625 29

105 Cong. Rec. 5361 (1959), *reprinted in* 2 LMRDA Hist. 1024 36

105 Cong. Rec. 5770 (1959), *reprinted in* 2 LMRDA Hist. 1085 36

105 Cong. Rec. 16629 (1959), *reprinted in* 2 LMRDA Hist. 1714, 1871 .... 26, 37

105 Cong. Rec. A8062 (1959), *reprinted in* 2 LMRDA Hist. 1813 .... 26, 37

105 Cong. Rec. A8522 (1959), *reprinted in* 2 LMRDA Hist. 1856 27

MISCELLANEOUS

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

Plaintiffs Chamber of Commerce of the United States of America (the "Chamber") and Coalition for a Democratic Workplace (the "CDW"), by and through undersigned counsel, submit this memorandum in support of Plaintiffs' Motion for Summary Judgment.

INTRODUCTION

Plaintiffs respectfully request the Court review, set aside, and remand purported agency action under the Administrative Procedures Act (the "APA"), 5 U.S.C. § 706(2)(A)-(D). On December 16, 2011, the Chairman of Defendant National Labor Relations Board (the "Board" or "NLRB") signed a final rule instituting sweeping changes to the election process for employees to determine whether to be represented for purposes of collective bargaining with their employer. 76 Fed. Reg. 80,138, 80,189 (December 22, 2011) (to be codified at 29 C.F.R. pts. 101 and 102) (the "Final Rule"). The Final Rule is designed to expedite elections by, among other things, limiting the scope of pre-election hearings, limiting presentation of evidence at pre-election hearings, limiting post-hearing briefs, eliminating the right to request Board review of the results of pre-election hearings, and eliminating the right to seek a stay pending Board review. *Id.* at 80,141. The process of issuing the Final Rule was itself expedited, with the Final Rule signed a little over three months following the closing of the comment period during which the Board received over 65,000 comments.

The expedited rulemaking process and the election-expediting Final Rule together suffer from at least three fatal flaws, each of which require this Court to hold the Final Rule unlawful and set it aside. First, under the National Labor Relations Act, 29 U.S.C. §§ 151-169 (the "Act" or "NLRA"), absent circumstances not present here, a quorum of three members is expressly required for the Board to conduct its business. 29 U.S.C. § 153(b); *see generally New Process*

Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010). With only two members participating in issuing the final rule, there was no quorum and the final rule is thus invalid and must be set aside.

Second, the NLRA also requires the Board to investigate each petition for representation filed and hold an appropriate pre-election evidentiary hearing, subject to Board review and a possible Board-ordered "stay." 29 U.S.C. §§ 153(b), 159(c)(1). The Final Rule eviscerates the statutorily mandated pre-election hearing, and improperly eliminates the opportunity for pre-election review and a potential stay by the Board. In these respects, the Final Rule is contrary to law and must be set aside.

Third, in their efforts to expedite rulemaking, the two members of the Board that voted on the Final Rule took actions that were arbitrary and capricious. Specifically, their failure to follow the Board's established practice with respect to overruling precedent only by the affirmative vote of three members was arbitrary and capricious. Their explanation that the Final Rule does not overturn prior precedent is wrong and thus the Final Rule did not adequately address this point. In addition, contrary to the Board's own rule and prior practice, the two members of the Board failed to provide sufficient time for the third member to write and circulate what is presumed to be a dissenting opinion before acting on the Final Rule. For this reason, as well as the reasons stated above, the Final Rule should be held unlawful, set aside, and remanded to the Board.

SUMMARY OF FACTS

I. The Parties

A. The Chamber

The Chamber is the world's largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents an underlying membership

of more than three million U.S. businesses and professional organizations of every size and in every industry sector and geographic region throughout the country. An important function of the Chamber is to represent the interests of its member-employers in employment relations matters, including matters relevant to the Final Rule, before the courts, the Congress, the Executive Branch, and independent regulatory agencies of the federal government.

Many of the Chamber's members are covered by the Act and have employees who are subject to union organizing under the expedited procedure established in the Final Rule.

B. The CDW

The CDW represents millions of businesses of all sizes from every industry and every region of the country. The CDW's membership includes hundreds of employer associations as well as individual employers and other organizations.

Many of the CDW's members are covered by the Act and have employees who are subject to union organizing under the expedited procedure established in the Final Rule.

C. The Board

"The National Labor Relations Board administers the National Labor Relations Act, which, among other things, governs the formation of collective bargaining relationships between employers and groups of employees in the private sector." 76 Fed. Reg. at 80,138. At the time the Final Rule was promulgated, the Board consisted of a chairman, Mark G. Pearce, and two members, Craig Becker and Brian Hayes. Member Becker's recess appointment expired on January 3, 2012, upon the adjournment of the first session of the 112th Congress.

Section 6 of the Act authorizes the Board to promulgate "rules and regulations as may be necessary to carry out the provisions of this Act." 29 U.S.C. § 156. The Board's regulations setting forth the election procedures are codified at 29 C.F.R. part 102, subpart C.

II. Procedural History[1]

On June 21, 2011, the Board proposed sweeping changes to the procedures regarding workplace elections. The next day, a Notice of Proposed Rulemaking (the "NPRM") was published in the Federal Register, signed by then-Chairman Wilma B. Liebman. 76 Fed. Reg. 36,812, 36,847 (June 22, 2011). Among other things, the proposed rule was designed to significantly speed up the existing union election process and limit employer participation.

The NPRM included the dissenting view of Member Hayes. *Id.* at 36,829-33. Member Hayes denounced the inappropriateness of the Board's "expedited rulemaking process in order to implement an expedited representation election process." *Id.* at 36,829. "Both processes . . . share a common purpose: To stifle debate on matters that demand it, in furtherance of a belief that employers should have little or no involvement in the resolution of questions concerning representation." *Id*. Member Hayes warned that "the proposed rules will (1) shorten the time between filing of the petition and the election date, and (2) substantially limit the opportunity for full evidentiary hearing or Board review on contested issues involving, among other things, appropriate unit, voter eligibility, and election misconduct." *Id.* at 36,831.

On July 18 and 19, 2011, less than 30 days after the NPRM was published, the Board held a two-day hearing at which some 66 witnesses testified, with each witness having approximately 5 minutes to speak. Many witnesses testified against the proposed rule. The comment period regarding the proposed rule closed on September 6, 2011. The Board received more than 65,000 comments on the proposed rule, many opposing it.

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[1] Because this case is governed by LCvR 7(h)(2), such that any facts will be derived solely from the administrative record (and from judicially noticeable facts), Plaintiffs are not required to submit a LCvR 7(h)(1) Statement of Material Facts As To Which There Is No Genuine Dispute. Due to the expedited nature of this case, however, the Board has not yet provided the administrative record. Plaintiffs, therefore, were unable to cite directly to the administrative record.

Both the Chamber and the CDW filed extensive comments objecting to the proposed rule. The CDW noted, among other things, that the proposed rule is "contrary to many provisions, policies and purposes of the National Labor Relations Act." The Chamber explained, among other this, that "[t]he proposed rules purport to fix a system that is not broken" and the "propos[al] virtually eliminate[s] any meaningful pre-election investigatory hearings as required by statute."

On November 18, 2011, a little over two months after the comment period closed, the Board announced that it would hold a public meeting on November 30, 2011 during which NLRB members would vote on a resolution regarding whether to proceed to draft a modified final rule concerning election procedure changes.

On November 29, 2011, the Board Chairman released to the public the resolution to be voted on at the November 30 meeting. The resolution outlined the policy principles that the Chairman proposed to incorporate into the election procedures. The resolution provided that there needed to be subsequent action by the Board to adopt the actual text of the final rule: "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." National Labor Relations Board, Board Resolution No. 2011-1. The Board voted 2-1, with Member Hayes dissenting, to adopt the resolution released the day before and proceed with drafting a final rule.

Notwithstanding the opposition to the NPRM and criticism of the irregular and hurried rulemaking process, a final rule was drafted and on December 16, 2011 two members of the Board, Chairman Pearce and then-Member Becker, adopted the Final Rule. 76 Fed. Reg. at 80,146 & 80,189. According to the Final Rule, Member Hayes did not vote and was not given an opportunity to present what is believed to be a dissenting point of view. *Id.*

The Final Rule makes seven major substantive changes that will be addressed in this brief.[2] The first change substantially limits the scope of a pre-election hearing. *See* 29 C.F.R. § 102.64(a) ("The purpose of a hearing conducted under section 9(c) of the Act is to determine if a question of representation exists. A question of representation exists if a petition as described in section 9(c) of the Act has been filed concerning a unit appropriate for the purpose of collective bargaining.").

The second – and related – change authorizes hearing officers presiding over pre-election hearings to limit the presentation of evidence on issues of supervisory status or other issues of voter eligibility or inclusion if the hearing officer alone does not believe that such issues are "relevant to the existence of a question concerning representation." *See* 29 C.F.R. § 102.64(a); 102.66(a) ("Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted.").

The third change grants discretion to the same hearing officer to allow post-hearing briefs in only limited cases. *See* 29 C.F.R. § 102.66(d) ("Post-hearing briefs shall be filed only upon special permission of the hearing officer and within the time and addressing the subjects permitted by the hearing officer.").

Fourth, the Final Rule eliminates the right to file a request for review with the Board prior to an election. Almost all appeals, including appeals related to election conduct, will be consolidated in one appeal after the election is conducted. *See* 29 C.F.R. § 102.67(b) ("That any party may, after the election, file a request for review of a regional director's decision to direct an election within the time periods specified and as described in § 102.69." (emphasis added)).

[2] The Final Rule also makes minor formatting changes or removes some redundant language, such as eliminating part 101, subpart C from the Board's regulations, 76 Fed. Reg. at 80,177.

The fifth amendment eliminates the 25-day waiting period to conduct elections in cases where a party has filed a pre-election request for review, as pre-election requests for review will be prohibited under the fourth change, rendering this waiting period moot. *See* 29 C.F.R. § 101.21(d) (removed by Final Rule).

Sixth, the Final Rule narrows the grounds for seeking "special permission" for any possible pre-election review to "extraordinary circumstances" – which the Final Rule limits to issues that may "evade review."

> Requests to the regional director, or to the Board in appropriate cases, for special permission to appeal from a ruling of the hearing officer or the regional director, together with the appeal from such ruling, shall be filed promptly, in writing, and shall briefly state the reasons special permission should be granted and the grounds relied on for the appeal. . . . The Board will not grant a request for special permission to appeal except in extraordinary circumstances where it appears that the issue will otherwise evade review.

29 C.F.R. § 102.65(c) (emphasis added).

Finally, the seventh amendment will make Board review of any post-election disputes, a much expanded category given the evisceration of the pre-election hearing and review process, wholly discretionary. *See* 29 C.F.R. § 102.69(d)(3).

APPLICABLE LEGAL STANDARD

The Board's action is subject to review under APA section 706. *See, e.g.*, *US Airways, Inc. v. Nat'l Mediation Bd.*, 177 F.3d 985, 989 (D.C. Cir. 1999); 5 U.S.C. § 706(2)(A)-(D). While the standard of review under Section 706 is highly deferential, "[t]he APA . . . commands reviewing courts to 'hold unlawful and set aside' agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (citing 5 U.S.C. § 706(2)(A)); *see also, e.g.*, *United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 562 (D.C. Cir. 2010) (quoting 5 U.S.C. § 706(2)(A)).

The party challenging the agency's action bears the burden of proof. *See, e.g.*, *City of Olmstead Falls v. Fed. Aviation Admin.*, 292 F.3d 261, 271 (D.C. Cir. 2002).

"[W]hen a party seeks review of agency action under the APA . . . [t]he 'entire case' on review is a question of law" and may be resolved on a motion for summary judgment under Rule 56. *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001); *see also, e.g.*, *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996) (noting that a district court reviewing an agency action under the APA's arbitrary and capricious standard acts as an appellate court resolving a legal question).

Judicial review of agency decisions "is normally confined to the full administrative record before the agency at the time the decision was made." *Envtl. Def. Fund. v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981). Accordingly, the standard in Rule 56(c) generally does not apply. *See, e.g., Brodie v. United States Dep't of Health and Human Servs*, 796 F.Supp.2d 145, 150 (D.D.C. 2011). "Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Id.*

Where a plaintiff prevails on its APA claim, vacating the agency action and remanding to the agency is the standard remedy. *See, e.g.*, *Am. Bioscience,* 269 F.3d at 1084; *Greater Yellowstone Coal. v. Bosworth*, 209 F. Supp. 2d 156, 163 (D.D.C. 2002) ("As a general matter, an agency action that violates the APA must be set aside.").

ARGUMENT

I. Two Members Of The Board Issued The Final Rule Without The Statutorily Required Participation By Three Members.

"Regardless of how serious the problem an administrative agency seeks to address . . . it may not exercise its authority 'in a manner that is inconsistent with the administrative structure

that Congress enacted into law.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)); *see also, e.g., American Vanguard Corp. v. Jackson*, 803 F. Supp. 2d 8 (D.D.C. 2011) ("A basic prerequisite to any act by a federal agency is that the agency possesses actual legal authority to undertake such action."). The Board quorum requirement under the NLRA requires at least three members of the Board to participate in order for it to exercise its legal authority, except under limited circumstances not present here. *See* 29 U.S.C. § 153(b). Because only two members voted on whether to approve the Final Rule, the Board did not have legal authority to issue it. Accordingly, the rule must be vacated as contrary to law. *See, e.g.*, *Michigan v. EPA*, 268 F.3d 1075, 1087 (D.C. Cir. 2001).

"As in any case of statutory construction, [a court's] analysis begins with the language of the statute." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation omitted); *see also, e.g.*, *Holloway v. United States*, 526 U.S. 1, 6 (1999) ("[T]he language of the statutes that Congress enacts provides the most reliable evidence of its intent." (internal quotation omitted)).

The Board's quorum requirements, including the delegation procedures, are set forth in section 3(b) of the NLRA, which provides, in relevant part, as follows:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise . . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, *except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.*

29 U.S.C. § 153(b) (emphasis added).

In its recent *New Process Steel* decision, the Supreme Court described these provisions as follows:

> (1) the delegation clause; (2) the vacancy clause, which provides that "[a] vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board"; (3) the Board quorum requirement, which mandates that "three members of the Board shall, at all times, constitute a quorum of the Board"; and (4) the group quorum provision, which provides that "two members shall constitute a quorum" of any delegee group.

130 S. Ct. at 2640 (citing 29 U.S.C. § 153(b)).[3] That is, under the plain language of the statute, the Act permits the Board to take action with only two members participating under the limited circumstances where the Board "delegate[s] to any group of three or more members any or all of the powers of the Board." 29 U.S.C. § 153(b); *see also New Process Steel*, 130 S. Ct. at 2639 ("It is undisputed that the first sentence of this provision authorized the Board to delegate its powers to the three-member group . . . and the last sentence authorized two members of that group to act as a quorum of the group.").

The Supreme Court repeatedly noted in its *New Process Steel* decision that two members have authority to act on behalf of the Board only where there has been a valid delegation to at least three members: "We have no doubt that Congress intended 'to preserve the ability of two members of the Board to exercise the Board's full powers, *in limited circumstances*,' as when a two-member quorum of a properly constituted delegee group issues a decision for the Board in a particular case." *New Process Steel*, 130 S. Ct. at 2644 n.6 (emphasis added) (citation omitted). Indeed, "Congress *changed* [the quorum] requirement to a three-member quorum for the Board . . . . [I]f Congress had wanted to allow the Board to continue to operate with only two members, it could have kept the Board quorum requirement at two." *Id.* at 2644. "Furthermore, if Congress had intended to allow for a two-member Board, it is hard to imagine why it would

[3] *New Process Steel* concerned the question whether following a valid delegation of the Board's authority to three members, two members may continue to exercise that delegated authority when the Board's membership falls to only two members. *Id.* at 2638. The Court held that two members do not have such authority. *Id.*

have limited the Board's power to delegate its authority by requiring a delegee group of at least three members." *Id.*[4]

The Board itself, in its brief to the Supreme Court in *New Process Steel*, likewise recognized what the statute makes clear—two members may act only pursuant to a valid delegation to a group of three or more members. *See, e.g.*, Brief for NLRB at 12, *New Process Steel*, 130 S. Ct. 2635 (2010) (No. 08-1457) ("Congress amended the Act in 1947 by increasing the size of the Board from three to five members, by allowing the Board to delegate any or all of its powers to a group of three members, and by allowing such a delegee group to operate with a two-member quorum.").[5]

The Board not only previously recognized that only a proper delegation to three or more members allows two members to act on behalf of the Board, it makes full use of this provision when the Board only has three members and one is precluded from participating: "[W]hen the Board's membership has fallen to three members, the Board has developed a practice of designating those members as a 'group' in cases where one member will be disqualified." Office of Legal Counsel Memorandum Opinion for the Solicitor National Labor Relations Board, NLRB *New Process Steel* Br., Appendix A at 7a. Of course, if the statute permitted the Board to

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[4] Even the dissent in *New Process Steel* agreed that "the statute's plain terms permit a two-member quorum *of a properly designated three-member group* to issue orders." *New Process Steel*, 130 S. Ct. at 2645 (Kennedy, J., dissenting) (emphasis added). As Justice Kennedy explained, "Two members of the Board *could not conduct any business unless they were previously designated by the full Board* as members of a delegee group with such authority." *Id.* at 2647; *see also id.* at 2649-50 ("Congress nonetheless provided for two-member quorums to operate in extraordinary circumstances, where the Board has exercised its discretion to delegate its authority to a particular three-member group, and one member of such a group is unavailable for whatever reason.").

[5] When the NLRA was enacted in 1935, Congress established a three-member Board – of which two members constituted a quorum. *See New Process Steel*, 130 S. Ct. at 2650. Congress increased the size of the Board to five members in 1947, and increased the Act's quorum requirement to three members. *See id.* at 2638. At the same time, however, in a compromise between competing bills, "Congress preserved the Board's authority to act through a two-member quorum whenever the Board exercised its delegation authority." NLRB *New Process Steel* Br. at 25-26. Clearly, "had Congress wanted to provide for two members alone to act as the Board [absent delegation], it could have maintained the NLRA's original two-member Board quorum provision." *New Process Steel*, 130 S. Ct. at 2641.

act in all cases with two members when the Board has only three members—which it clearly does not—the Board would not have had to issue a delegation to its three members in order for two members to act.

As there was no such delegation to the then-three members of the Board, Chairman Pearce and then-Member Becker lacked authority to issue the Final Rule on December 16, 2011 without Member Hayes' participation. Accordingly, the entire rule must be struck down because it is contrary to law. *See, e.g.*, *Michigan*, 268 F.3d at 1087 ("If [an agency] lacks authority . . . , then its action is plainly contrary to law and cannot stand.").

Chairman Pearce and then-Member Becker in the Final Rule erroneously relied on the then-Board's *total membership* to claim that it can act with only two members: "The final rule has been approved by a two-member majority of the Board. The Board currently has three members, a lawful quorum under Section 3(b) of the Act." 76 Fed. Reg. at 80,146. It is clear from the plain language of the statute, however, that three members *must participate* in adopting or rejecting a final rule for the NLRB to exercise authority because there was not a valid delegation to the then-three members on the Board. Merely having three members on the Board is not sufficient to transact business by two members. As the Supreme Court held: "We thus understand the quorum provisions merely to define the number of members *who must participate in a decision*, and look to the vacancy clause to determine whether vacancies in excess of that number have any effect on an entity's authority to act." *New Process Steel*, 130 S. Ct. at 2643 (emphasis added). The Board itself has previously noted this plain feature of the statute:

> Under the general Board quorum requirement, the Board may transact business *with the participation of only three members.* In such a situation, the principle of majority rule would require that at least *two of the participating members* agree on any particular decision or course of action, but does not require unanimity among the three members.

NLRB *New Process Steel* Br. at 22 (emphases added). Indeed, the Board's position on the quorum requirement was unequivocal: "The purpose of a quorum provision is to set the minimum *participation* level required before a body could act . . . . Section 3(b)'s statement that three members constitute a quorum of the Board denotes that the Board may legally transact business when three of its members are *participating*." *Id.* at 19 (emphases added). Unsurprisingly, given the plain language of section 3(b), the Supreme Court agreed. *New Process Steel*, 130 S. Ct. at 2643.

The resolution to proceed with drafting the Final Rule, adopted on November 30, 2011 with all three members participating, clearly acknowledged that the Board was required to vote on the text of the Final Rule before it could be adopted: "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." National Labor Relations Board, Board Resolution No. 2011-1; *see also* Ben James, *NLRB Finalizes Union Election Rule*, Law360 (December 21, 2011, 1:04 PM), http://www.law360.com/topnews/articles/295420 ("Brian Hayes, has yet to cast a vote on the final rule . . . NLRB spokeswoman Nancy Cleeland told Law360 on Wednesday.").

Chairman Pearce and then-Member Becker concede, as they must, that not all three members participated in the action challenged here, issuing the Final Rule. As they explained in the Final Rule: "Member Hayes has *effectively indicated his opposition to the final rule* by voting against publication of the NPRM and voting against proceeding with the drafting of the final rule at the Board's public meeting on November 30, 2011." 76 Fed. Reg. at 80,146 (emphasis added).[6]

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[6] On January 13, 2012, Plaintiffs conferred with the Board to discuss the lack of quorum apparent in the public record. Plaintiffs requested evidence, if any, that the Board had delegated its authority or that Member Hayes had voted on the final rule. (Pl.'s Mtn. Dkt. 15 at 2.) On January 30, 2012, counsel for the Board sent counsel for the

There is no basis in law or logic to support the proposition that two members of the Board may *assume* the vote of one of its members. *Cf. Pub. Serv. Comm'n v. Fed. Power Comm'n*, 543 F.2d 757, 777 (D.C. Cir. 1974) ("[I]n each instance, what counted in the definition of agency action was the vote rather than the individual view."). Unsurprisingly, the Final Rule cites no authority for this novel "effective participation theory." And, as discussed in more detail below, *infra* Section III.B, at least one member of the Supreme Court, Justice Ginsberg, has emphasized the importance of dissents in the decisionmaking process before final action is taken. Indeed, one cannot even presume how a Justice will ultimately decide a case even after the Justice expresses their views to his or her colleagues on the bench: "On occasion—not more than four times per term I would estimate—a dissent will be so persuasive that it attracts the votes necessary to become the opinion of the Court." Hon. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 Minn.L.Rev. 1, 4 (2010).

As stated above, an agency may not exercise authority in a manner inconsistent with the requirements Congress enacted into law. *See, e.g.*, *FDA*, 529 U.S. at 125. In the final rule, Chairman Pearce and then-Member Becker asserted that they perceive no basis "for indefinitely postponing adoption of the final rule and for, in essence, permitting one member to exercise what

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Plaintiffs a December 15, 2011 Order directing the Executive Secretary to publish the Final Rule "upon approval of a final rule by a majority of the Board." An accompanying affidavit, signed on January 30, 2012, states that all three members voted on this Order and that "[d]ue to an inadvertent administrative oversight," it had not been signed on December 15. Neither document appears to be part of the Administrative Record as it existed at the time the Final Rule was issued. See *American Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008) ("Ordinarily, 'review is to be based on the full administrative record that was before the Secretary at the time he made his decision.'" (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971))).

More importantly, even if these documents are part of the administrative record, they do not demonstrate that Member Hayes voted on the final rule. Thus, there was not a quorum for the Board to *approve the final rule* and the Board lacks authority to modify, by order, the Act's quorum requirement. The December 15, 2011 Order, like the November 30, 2011 Resolution, states only that the Final Rule will be published upon approval in a subsequent vote. The undisputed evidence is that Member Hayes did not vote on whether to approve the text of the Final Rule. Approving the Final Rule is a collective act by the Board and thus requires a decision by a congressionally mandated quorum. *See , e.g.*, *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 861 (D.C. Cir. 1970) (Commissioners that entirely abstained from voting not counted towards quorum requirement); *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1131 (D.C. Cir. 2007) ("The votes were actions of the individual Commissioners, not the Commission.").

would amount to a veto over a proper exercise of the Board's rulemaking authority." 76 Fed. Reg. at 80,147. The basis, however, is the very statute that formed the Board and provides that "three members of the Board shall, at all times, constitute a quorum of the Board." 29 U.S.C. § 153(b), *see also New Process Steel*, 130 S. Ct. at 2640 ("[T]he Board quorum requirement . . . requires three participating members 'at all times' for the Board to act."). This requirement cannot be swept aside simply because two members of the Board wish to move forward with some specific action. *Cf. New Process Steel*, 130 S. Ct. at 2644 ("In sum, we find that the Board quorum requirement and the three-member delegation clause should not be read as easily surmounted technical obstacles of little to no import.").

As the Board explained in its *New Process Steel* brief at 37, "Congress granted to the full Board the discretion to vest 'any or all of the powers which it may itself exercise' in a three-member group, two members of which could exercise those powers as a quorum." The Board also explained that members might decline to exercise the power to delegate: "There may be circumstances in which Board members whose terms or appointments are expiring will decline to exercise the authority to delegate that Section 3(b) provides." *Id.*

In closing, only two members participated in the vote to approve (or not) the Final Rule. The vote, therefore, was conducted without the congressionally-mandated three member quorum. Because two members lacked the legal authority to issue the Final Rule, it must be set aside. *American Vanguard*, 803 F. Supp. 2d 8 ("[A] court may uphold agency action only where the record establishes that the official who took such action was authorized to do so.").

II. **<u>The Final Rule Is Contrary To Sections 3 And 9 Of The NLRA</u>.**

The Final Rule must also be set aside because it is inconsistent with Sections 3 and 9 of the NLRA and thus "not in accordance with the law" and "arbitrary, capricious, [and] an abuse

of discretion." 5 U.S.C. § 706(2)(A); *Thomas Jefferson Univ.*, 512 U.S. at 512. "Because this issue involves an agency's interpretation of its governing statute, *Chevron*'s familiar framework applies." *Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659, 663 (D.C. Cir. 2009) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). First, the Court asks "if the statute unambiguously forecloses the agency's interpretation." *Id.* If so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43 (footnote omitted). "If the statute is ambiguous enough to permit the agency's reading, however, [the Court] defer[s] to that interpretation so long as it is reasonable." *Nat'l Cable*, 567 F.3d at 663.

Under the first step of *Chevron*, the Court has "a duty to conduct an 'independent examination' of the statute in question looking not only 'to the particular statutory language at issue,' but also to 'the language and design of the statute as a whole.'" *Northeast Hosp. Corp. v. Sebelius*, 657 F.3d 1, 9 n.4 (D.C. Cir. 2011) (quoting *Martini v. Fed. Nat'l Mortg. Ass'n*, 178 F.3d 1336, 1345-46 (D.C. Cir. 1999)). "For this purpose the court 'must first exhaust the traditional tools of statutory construction.'" *Office of Commc'n, Inc. of United Church of Christ v. F.C.C.*, 327 F.3d 1222, 1224 (D.C. Cir. 2003) (quoting *Bell Atl. Tel. Cos. v. F.C.C.*, 131 F.3d 1044, 1047 (D.C. Cir. 1997)). "The traditional tools include examination of the statute's text, legislative history, and structure, as well as its purpose." *Bell Atl.*, 131 F.3d at 1047 (internal citation omitted) ("This inquiry using the traditional tools of construction may be characterized as a search for the plain meaning of the statute."); *see also, e.g.*, *Hammontree v. NLRB*, 894 F.2d 438, 444 (D.C. Cir. 1990) (determining clear congressional intent of NLRA by examining legislative history).

In at least three separate respects, the Final Rule creates a process for handling representation elections that is irreconcilable with the plain meaning of Sections 3 and 9. The Final Rule, therefore, must be set aside under the first step of the *Chevron* analysis. Moreover, even under the second step, the Final Rule establishes procedures so foreign to the Act's legislative history, practice, and meaning as to render it wholly unreasonable and in violation of the APA. *See, e.g.*, *Bell Atl.*, 131 F.3d at 1049 ("Pursuant to the second step of *Chevron*, we will defer to the Commission's interpretation if it is reasonable and consistent with the statutory purpose and legislative history."). Under step two, the Court considers whether the text, legislative history, and purpose "*permit* the interpretation chosen by the agency." *Id.* In this case, they clearly do not.

First, the Final Rule improperly places limitations on the pre-election hearing by authorizing hearing officers to exclude all evidence regarding fundamental election issues such as whether certain employees or groups of employees are eligible to vote in the election. This precludes any pre-election consideration of such issues by the Regional Director or the Board in violation of Sections 3(b) and 9(c)(1) of the NLRA, and improperly vests decision-making authority in hearing officers in violation of Section 9(c)(1) of the Act.

Second, the Final Rule improperly eliminates the statutory right to request *pre-election* review of Regional Director decisions, contrary to Section 3(b) of the Act, 29 U.S.C. § 153(b), which requires the opportunity to seek Board review and a Board-ordered "stay" of "any action" of Regional Directors in representation cases, including a potential Board-ordered "stay" of the election.

Third, the Final Rule violates Section 9(c)(1)'s requirement of an "appropriate" pre-election hearing by creating a "quickie election" process that strongly resembles the "prehearing

election" proposals that Congress considered and rejected in amending the Act in 1947 and 1959. The Final Rule's premise – that there should be a shorter election period than the 31-day average period that characterized NLRB elections in fiscal year 2010[7] – is squarely contradicted by legislative history indicating that Congress believed a pre-election period of at least 30 days is necessary under the Act. In this regard, the Final Rule subverts the Act's primary purpose, which is to permit employees to have sufficient time and information to "assure . . . . the *fullest* freedom in exercising the rights guaranteed by [the] Act," 29 U.S.C. § 159(b), and improperly interferes with the free speech rights protected under Section 8(c) of the Act, 29 U.S.C. § 158(c), and the United States Constitution.

A. The Final Rule Violates the NLRA by Authorizing Hearing Officers to Exclude All Evidence Regarding Election Issues Such as Voter Eligibility and Supervisory Status.

The Final Rule substantially restricts the scope of the pre-election hearing. Under the Final Rule, hearing officers presiding over pre-election hearings may exclude evidence on substantial issues related to representation elections, including supervisory status and other issues of voter eligibility or inclusion." See 29 C.F.R. § 102.64(a); 102.66(a). This contradicts the 65-year old fundamental understanding—recognized by the Supreme Court, Congress, and the Board itself—that the statutory purpose of the "appropriate hearing" is to give interested parties a full and adequate opportunity to present their objections on *all* substantial issues. By authorizing the exclusion of evidence on important election issues of voter eligibility, inclusion and supervisory status, the Final Rule fails to provide an "appropriate" pre-election hearing as required under Section 9(c)(1) of the NLRA.

[7] Gen. Counsel Mem. 11-09, at 18 (March 16, 2011), available at http://www.nlrb.gov/publications/general-counsel-memos (last visited Feb. 3, 2011).

1. The text, structure, purpose, and legislative history of the NLRA

Employing the traditional tools of statutory interpretation described above—text, structure, purpose, and legislative history—it is clear that Congress has "directly spoken to the precise issue" of what is an "appropriate" pre-election hearing.

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

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

29 U.S.C. § 159(c)(1) (emphases added). Section 9(c)(1) clearly requires "an appropriate hearing upon due notice" *before* any election because it provides the basis for the Board – or a Regional Director, subject to Board review – to determine whether and how an election can be directed. *Id.* The right to a pre-election hearing is reinforced by Section 9(c)(4), added to the Act in 1947, which only permits "the waiving of hearings *by stipulation.*" 29 U.S.C. § 159(c)(4) (emphasis added).

Congress clearly intended that the hearing officers who preside over pre-election hearings will perform only an evidence-gathering function, and *not* a decision-making function. Under Sections 4(a) and 9(c)(1) of the NLRA, Board members (or, pursuant to the delegation authority set forth in Section 3(b), Regional Directors) are *exclusively* responsible for all decision-making

in representation cases.[8] Section 9(c)(1) *prohibits hearing officers from having any decision-making authority* – indeed, they are prohibited even from making "recommendations." 29 U.S.C. § 159(c)(1) ("[A representation hearing] may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto.").[9] Moreover, "[t]he Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts." 29 U.S.C. § 154(a). The Act clearly vests *all* decision-making authority with respect to election-related issues *exclusively* in Board members (or Regional Directors by delegation).

The hearing "record" thus provides the sole basis for the following decisions: (i) all decision-making by the Regional Director or the Board about whether to direct an election; (ii) all decision-making regarding what constitutes the "appropriate bargaining unit" for purposes of the election; (iii) all decision-making regarding Board jurisdiction, the validity of the petition, and similar prerequisites to an election; (iv) all decision-making regarding voter eligibility issues, *whether* such issues require resolution before any election, and if so, *how* they should be resolved; and (v) all decision-making by the Board, if there is a pre-election request for Board review and a potential Board-ordered "stay" of the election or any other "action" taken by the Regional Director under delegated authority. 29 U.S.C. §§ 153(b), 159(c)(1).

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[8] As noted on pages 25-26, Congress in 1959 added language in Section 3(b) that authorized the Board to delegate its decision-making authority in representation cases to "regional directors," subject to the right of "any interested person" to seek Board review and a potential Board-ordered "stay" regarding "any action of a regional director." 29 U.S.C. § 153(b). However, Congress did not rescind or repeal that Act's other restrictions on hearing officers and Board attorneys as expressed in Section 9(c)(1) and Section 4(a), respectively.

[9] *See* 93 Cong. Rec. 3953 (1947), *reprinted in* 2 LMRA Hist. 1011 ("the hearing officer . . . shall make no recommendations; he shall simply pass on the hearing [record] to the Board, and the Board itself shall pass on the question of representation, and shall do so on the basis of the facts that are shown in the hearing").

Moreover, as explained *infra* in Section II.B, the NLRA requires that "any interested person" have a *pre-election* opportunity to seek Board review of "*any action* of a regional director" delegated pursuant to Section 3(b). This pre-election review is the only mechanism for the Board to order a "stay of *any action* taken by the regional director." 29 U.S.C. § 153(b) (emphasis added). For the Board to review "any action" of a Regional Director and decide *whether* to issue a "stay" of the election, *a fortiori*, there must be record evidence on the issues that are subject to review – in particular, issues of voter eligibility, inclusion and supervisory status. Furthermore, if the Regional Director decides to defer a decision on certain voter eligibility issues until after the election, there must be an evidentiary record concerning those eligibility issues in order for the Board to consider whether to review pre-election the propriety of the Regional Director's decision to defer resolution of those issues until after the election – a decision that may affect the validity of the entire election. *See Barre-National, Inc.*, 316 NLRB 877, 878 n.9 (1995) (noting that the right to present evidence a pre-election hearing is distinct from the issue of whether the Regional Director or Board makes a pre-election decision based on that evidence).[10]

The legislative history of the NLRA establishes that Congress considers the pre-election hearing to be a "sacred right." Congress enacted the NLRA, originally known as the Wagner Act, in 1935, and created the NLRB in order to establish a federal system for regulating union organizing and labor relations in almost all private sector industries in the United States.[11] At the

[10] Congress clearly attached importance to the development of an adequate record in pre-election hearings, including evidence pertaining to election issues generally. *See*, *e.g.*, S. Rep. 74-573, at 14 (1935), *reprinted in* 2 NLRA Hist. 2314 (in representation cases the "entire election procedure becomes part of the record" which provides a "guarantee against arbitrary action by the Board"); H.R. Rep. 74-1147, at 23 (1935), *reprinted in* 2 NLRA Hist. 3073 ("The hearing required to be held in any [representation] investigation provides an appropriate safeguard and opportunity to be heard.").

[11] 49 Stat. 449 (1935), 29 U.S.C. §§ 151-169, *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 (hereinafter "NLRA Hist."), at 3270 *et seq.* (1949).

time, the Act did not require the Board to hold a hearing before conducting a secret ballot election (indeed, the original Wagner Act did not require that the Board hold an election at all). *See Inland Empire Dist. Council v. Millis*, 325 U.S. 697, 707 (1945) ("[N]othing in the section purports to require a hearing before an election. Nothing in fact requires an election."). The Wagner Act required that an "appropriate hearing" be held if an election was conducted, but the Supreme Court in *Inland Empire* found that the hearing could occur *after* the election. As the Court held in its decision in the *Inland Empire* case, the statutory requirement for an "appropriate hearing" was met because the Board, in the post-election hearing, permitted evidence to be introduced on "all matters" – including the eligibility of employees whose votes would *not* have affected the outcome of the election.[12] *Id.*

Prior to the 1947 Taft-Hartley Act,[13] the Board held a number of "prehearing elections" (i.e., elections conducted before a hearing was held to determine the scope of the bargaining unit and to determine whether certain employees would be eligible to vote in the election).[14] Rules and regulations of the Board in effect at the time, however, entitled parties to a pre-election hearing if "substantial issues" were raised. *See NLRB v. S.W. Evans & Son*, 181 F.2d 427, 430 (3d Cir. 1950). The Third Circuit held that issues related to "unit, eligibility to vote, and

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[12] The evidence introduced at the post-election hearing included evidence concerning 3 employees in a certain maintenance department and 44 employees of a subsidiary railroad who had been excluded from the election. *Potlach Forests, Inc*., 55 NLRB 255, 261-62 (1944). The votes of these excluded employees would not have affected the outcome of the election. *Id.* at 255 & n.2.

[13] 61 Stat. 136 (1947), 29 U.S.C. §§ 141 *et seq*, *reprinted in* 1 Comm. on Lab. and Pub. Welfare, Subcomm. on Lab., 93d Cong., LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 (hereinafter "LMRA Hist."), at 1 *et seq.* (1974).

[14] *See, e.g.*, H.R. Rep. 86-741, at 24 (1959), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, 782 (1974) (hereinafter "LMRDA Hist.") ("During the last 19 months of the Wagner Act . . . a form of prehearing election was used by the NLRB"); S. Rep. 86-187, at 30 (1959), *reprinted in* 1 LMRDA Hist. 426 (the practice of holding prehearing elections "was tried in the last year and a half prior to passage of the Taft-Hartley Act, but it was eliminated in that [A]ct").

timeliness of the election" were "substantial issues" requiring a pre-election hearing. *Id.* at 430-31.

Congress in 1947 amended the Act to make pre-election hearings mandatory by adding Sections 9(c)(1) and (4) to the Act, 29 U.S.C. §§ 159(c)(1), (4), which require the Board to conduct the "appropriate hearing" *before* any election, and permits "the waiving of hearings" *only* "by stipulation" of all parties. *Id.*; *see also S.W. Evans*, 181 F.2d at 429 ("[T]he instant problem is hardly apt to recur, since the amended Act now makes mandatory a pre-election hearing."). "Although under the amendment the hearing must invariably precede the election, neither the language of the statute nor the committee reports indicated that any change in its nature was intended." *Utica Mutual Ins. Co. v. Vincent*, 375 F.2d 129, 133-34 (2d Cir. 1967).

The nature of the pre-election hearings, as reflected in the legislative history of the 1947 Taft-Hartley amendments, is to hear objections and collect evidence concerning all of the issues relevant to the election, including the eligibility of certain employees or groups of employees to vote in the election. As stated in the Senate Report on S. 1958, 74th Cong. (1935), which ultimately became the Taft-Hartley Act:

> Section 9(b) empowers the National Labor Relations Board to decide whether the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or other unit. Obviously, *there can be no choice of representatives and no bargaining unless units for such purposes are first determined*. And employees themselves cannot choose these units, because *the units must be determined before it can be known what employees are eligible to participate in a choice of any kind*.
>
> *This provision is similar to section 2 of 1934 amendments to the Railway Labor Act* (48 Stat. 1185), which states that –
>
> In the conduct of any election for the purpose herein indicated the Board shall designate *who may participate in the election* and establish the rules to govern the election.

S. Rep. 74-573, at 14 (1935), *reprinted in* 2 NLRA Hist. 2313 (emphases added).

Senator Taft – the principal sponsor of the 1947 amendments – likewise described the purpose of the pre-election hearing as follows:

> Section 9(c)(4): The conferees dropped from this section a provision authorizing pre- hearing elections. . . . *It is the function of hearings in representation cases* to determine whether an election may properly be held at the time; and if so, to decide questions of unit *and eligibility to vote*. During the last year the Board has tried out a device of holding the election first and then providing the hearing to which the parties were entitled by law. Since its use has been confined to an inconsequential percentage of cases, and more often than not a subsequent hearing was still necessary *and because the House conferees strenuously objected to its continuance it was omitted from the bill*.

93 Cong. Rec. 7002 (1947), *reprinted in* 2 LMRA Hist. 1625 (supplemental analysis of LMRA by Senator Taft) (emphasis added); *see also* S. Rep. 78-2926, at 12026 (Senate debates, June 16, 1934) , *reprinted in* 1 NLRA Hist. 1200 ("The Board shall decide whether *eligibility to participate* in a choice of representatives shall be determined on the basis of employer unit, plant unit, or other appropriate unit.") (emphasis added); S. Rep. 73-2926, at 19 (1934), *reprinted in* 1 NLRA Hist. 11 (characterizing S. 2926's reference to "eligibility to participate," quoted above, as determining the "appropriate unit").

Thus, Congress intended that issues of voter eligibility and inclusion would *not* be litigated separately from issues concerning the appropriateness of the bargaining unit, as the Final Rule seeks to accomplish. *See* 76 Fed. Reg. at 80,164 (stating that "while the regional director must determine that a proper petition has been filed in an appropriate unit … the hearing officer need not permit introduction of evidence relevant only to disputes concerning the eligibility and inclusion of individuals").

In the 1959 amendments enacted as part of the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act,[15] Congress again *rejected* proposals to permit the Board to conduct pre-hearing elections. *See* H.R. Rep. 86-741, at 24-25 (1959), *reprinted in* 1 LMRDA Hist. 782-83.[16] It is also clear that Congress *rejected* the 1959 pre-hearing election proposals based on Conference Committee opponents who regarded the pre-hearing election proposals as improperly effectuating "quickie elections," and who insisted on leaving unchanged the conventional role played by pre-election hearings.

As an *alternative* to scaling back pre-election hearings, Congress adopted the language in Section 3(b) authorizing the Board to delegate its election responsibilities to Regional Directors, subject to each party's right to seek pre-election Board review regarding "any action" by Regional Directors, including the right to seek a Board-ordered "stay" of any election.[17] Representative Graham Barden – Chairman of the House Committee on Education and Labor, and the ranking House conferee[18] – described the Conference Report as follows:

> There is one addition and that is this. The conferees adopted a provision that there should be *some consideration given to expediting the handling of some of the representation cases*.

[15] 73 Stat. 541 (1959), 29 U.S.C. §§ 401 *et seq*., *reprinted in* 1 LMRDA Hist. 1 *et seq.*

[16] The 1959 pre-election arrangement was not a transient proposal that appeared in a single bill or that was merely offered as an amendment. Rather, the proposed pre-hearing election arrangement – rejected by Congress – was contained in the initial "20-point program" that President Eisenhower transmitted to Congress. *See* S. Rep. 86-10, at 3 (1959), *reprinted in* 1 LMRDA Hist. 82 ("In order to speed up the orderly processes of election procedures, to permit the Board under proper safeguards to conduct representation elections without holding a prior hearing where no substantial objection to an election is made."). The pre-hearing election arrangement was incorporated into multiple other bills (some requiring at least 45 days before any pre-hearing election, others requiring at least 30 days), including the version passed by the Senate. *See*, *e.g.*, S. 1555, 86th Cong. § 705 (as passed by the Senate on April 25, 1959), *reprinted in* 1 LMRDA Hist. 581; H.R. 8342, 86th Cong. § 704 (as reported in the House, July 30, 1959), *reprinted in* 1 LMRDA Hist. 753-54; S. 1555, 86th Cong. § 705 (as reported in the Senate, March 25, 1959), *reprinted in* 1 LMRDA Hist. 395-96.

[17] 29 U.S.C. § 153(b). *See* pages 31-32.

[18] *See* H.R. Rep. 86-741, at 76 (1959), *reprinted in* 1 LMRDA Hist. 834 ("Statement of Hon. Graham A. Barden, Chairman, Committee on Education and Labor"); H.R. Rep. 86-1147, at 42 (1959), *reprinted in* 1 LMRDA Hist. 946 (identifying Representative Barden as the ranking Conference Committee Manager on the Part of the House).

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

105 Cong. Rec. 16629 (1959), *reprinted in* 2 LMRDA Hist. 1714 (emphasis added), *describing* H.R. Rep. 86-1147, at 1 (1959), *reprinted in* 1 LMRDA Hist. 934 (conference report). Chairman Barden expressed opposition to any "so-called quickie election," and stated: "*The right to a hearing is a sacred right*. . . ." 105 Cong. Rec. A8062 (1959), *reprinted in* 2 LMRDA Hist. 1813 (emphasis added).

Senator Goldwater likewise described the new provision authorizing delegation of the Board's election authority to Regional Directors (subject to the right to seek Board review and a potential Board-ordered stay) as a Conference Committee substitution that was adopted because of opposition by other conferees to any change in pre-election hearing procedures:

> The Board is authorized to delegate to its regional directors its [election] powers under section 9 . . . , except that upon the filing of a request therefor with the Board by any interested person – anyone who is or might be concretely affected by the proceedings – the Board may review any action of a regional director delegated to him under this provision, but such a review shall not, unless specifically ordered by the Board, operate to halt any action taken by the regional director.
>
> . . .
>
> This authority to delegate to the regional directors is designed, as indicated, to speed the work of the Board. *In a sense it replaces the provision for pre-hearing elections* contained both in the Senate bill as reported and as passed, and *which both in committee and on the Senate floor was opposed by some members of the minority*. . . .

105 Cong. Rec. A8522 (1959), *reprinted in* 2 LMRDA Hist. 1856 (emphasis added).

Congress in 1978 again signaled the requirement, under existing law, that pre-election hearings address *all* election issues, including issues of voter eligibility. The proposed Labor Law Reform Act of 1978 would have implemented shortened pre-election periods *without hearings on substantive unit and voter eligibility issues*, with elections taking place between 21 and 30 days after the petition was filed, and with *post-election* hearings "[w]henever challenged ballots [were] sufficient in number to affect the outcome of the election." S. Rep. 95-628, at 50-51 (1978). In support of the legislation, Board Chairman John Fanning – who served on the Board for nearly 25 years (from 1957 to 1982)[19] – explained that, absent a consent agreement, the Act required the Board to "*hold a hearing [and] issue a decision resolving all issues raised and litigated at the hearing* and *then* direct and conduct the election." S. Rep. 95-628, at 21-22 (1978); H.R. Rep. 95-637, at 34 (1977). Then-Chairman Fanning indicated that, if a pre-election hearing were held pursuant to the proposed legislation, the Board (much like the current Final Rule) could "separate out issues which must be resolved prior to the election, such as unit questions, and issues which it is appropriate to decide after the election, such as eligibility questions." *Id*. The 1978 Labor Law Reform legislation ultimately failed to pass. Additional Congressional attempts to reform federal labor law, including changes designed to expedite or gut election procedures, occurred in the early 1990s, as well as in 2009 and 2010. These attempts failed, and the same statutory construct established by Congress in 1947 and 1959 remains in effect today.

2. The Final Rule violates clear congressional intent

Based on this analysis of the text, scope, purpose, and legislative history of the NLRA, it

[19] *See* http://www.nlrb.gov/who-we-are/board/board-members-1935.

is clear that Congress has directly spoken on what function the pre-election hearing must serve: To determine whether an election may be held and provide a full and adequate opportunity to present evidence on all issues related to the election, including the scope of the unit and the eligibility of individual employees or groups of employees to vote in the election. By authorizing hearing officers to reject evidence on these issues at the pre-election hearing, the Final Rule deprives "the record of such hearing," making it useless for all decision-making required under Sections 3 and 9 except on the narrow issue of whether an election of some kind is required under the Act.[20] *See*, *e.g.*, 76 Fed. Reg. at 80,141, 80,162 (giving hearing officers "authority to limit the presentation of evidence to that . . . which is relevant to the existence of a questions concerning representation," and to exclude evidence "concerning the eligibility or inclusion or voters"). Significantly, the Final Rule suggests that evidence pertaining to voter eligibility should be excluded from the pre-election hearing, even if the relevant issues affect a substantial portion of the bargaining unit.[21]

For several independent reasons, this severe curtailment of the pre-election hearing is "not in accordance" with the Act. *See* 5 U.S.C. § 706(2)(A). First, it is contrary to the requirement in Section 9(c)(1) that in all cases, absent stipulation otherwise, an "appropriate hearing" must be conducted prior to the election. The "appropriate hearing," as described by the Supreme Court in *Inland Empire* and Congress in the legislative history of the 1947 Taft-Hartley

[20] The explanation that "hearing officers have this same authority to limit parties' participation in the hearing under the current rules," 76 Fed. Reg. at 80,166, is disingenuous. There is a clear distinction between limiting cumulative evidence on issues such as voter eligibility and rejecting such evidence altogether.

[21] The Board's proposed election rule would have excluded evidence regarding voter eligibility or inclusion only if it affected less than 20% of the potential bargaining unit. *See* 76 Fed.Reg. 36,812, 36,824 (June 22, 2011) (explaining that so-called "20-percent rule" was a "reasonable balance of the public's and parties' interest in prompt resolution of questions concerning representation and employees' interest in knowing precisely who will be in the unit should they choose to be represented"). The final rule, however, eliminates any "20-percent rule" and provides for the exclusion of evidence from pre-election hearings regarding voter eligibility or inclusion even if the evidence relates to more than 20% (and potentially a majority) of individuals encompassed by the election petition. *See* 76 Fed.Reg. at 80,162.

amendments must include the "full and adequate opportunity" to present evidence on *all* issues related to the election and disputed by the parties: "We think the statutory purpose rather is to provide for a hearing in which interested parties shall have full and adequate opportunity to present their objections." *Inland Empire*, 325 U.S. at 708; *see also Evans*, 181 F.2d at 430 (parties entitled to pre-election hearing to present substantial issues related to the election).

It is worth emphasizing that the Final Rule's preamble relegates the entire 1947 legislative history to a footnote. *See* 76 Fed.Reg. at 80,165 n.116. Although Senator Taft, the principal sponsor of the Taft-Hartley amendments, explicitly stated that the mandatory pre-election hearing was designed "to determine whether an election may properly be held at the time, and if so, to decide questions of unit and eligibility to vote," the Board dismisses this legislative history as the statement of a "single legislator" (even though Senator Taft was the bill's principal sponsor) and the Board asserts that the phrase "eligibility to vote" pertained to a "general eligibility formula" and not eligibility or inclusion of specific individuals or groups of individuals in the election. *Id*. (quoting 93 Cong. Rec. 7002 (1947) (emphasis added)). This description of the 1947 legislative history, and the effort to discount statements by the principal sponsor of the legislation, is completely lacking in support, and is contradicted by the additional legislative history discussed above, which clearly refutes the Board's narrow and dismissive reading of Senator Taft's authoritative statement concerning the purpose of the 1947 Taft-Hartley amendments.

There is also no basis for the Final Rule's dismissive treatment of the 1959 legislative history. The Final Rule's preamble asserts that "the legislative history of the LMRDA offers no guidance on why the [1959 pre-hearing election] provision was rejected." 76 Fed. Reg. at 80,151. This assertion is plainly incorrect. There is abundant legislative history which makes

clear that, notwithstanding the arguments in favor of increased "efficiency" and expediting the election process, there was significant opposition to the pre-hearing election proposals on the grounds that they constituted a means of effectuating "quickie elections." *See* Section II.A.1.

Even the Board itself has previously recognized that Section 9(c)(1) protects the right to introduce evidence on issues of voter eligibility and inclusion at the pre-election hearing. *See Angelica Healthcare Servs. Grp.*, 315 NLRB 1320 (1995); *Barre-National, Inc.*, 316 NLRB 877 (1995); *North Manchester Foundry, Inc.*, 328 NLRB 372 (1999). All of the participating Board members in those cases – a total of four Republicans *and* three Democrats – held that Section 9(c) of the Act, not just the Board's then-existing regulations, require the Board to permit employers to present evidence in support of their positions at a pre-election hearing.[22] For example, in *Barre-National*, the Regional Director instructed the hearing officer to refuse to allow the employer to present evidence at a hearing regarding the supervisory status of a group of employees that constituted 8 to 9 percent of the potential bargaining unit. 316 NLRB at 877. Instead, the Regional Director permitted only an offer of proof by the employer and – similar to what the Final Rule would accomplish – permitted the employees to vote subject to challenge, leaving the evidence gathering and resolution of the supervisory issue to the post-election challenge procedure. The Board held that the Regional Director erred by refusing to allow the employer to present this evidence, stating that the pre-election hearing "did not meet the requirements *of the Act* and the Board's Rules and Statements of Procedure." *Id.* at 878 (emphasis added); *see also North Manchester Foundry*, 328 NLRB at 372-73 (holding that pre-election hearing "did not meet the requirements of the Act, or of the Board's Rules" because the

[22] The Final Rule's illogical attempt to distinguish these cases is also arbitrary and capricious, as described in Section III.A.

hearing officer "precluded the employer from presenting witnesses and introducing evidence in support of its contention that certain individuals were not eligible voters" (emphasis added)).

Second, authorizing hearing officers to exclude evidence on fundamental election-related issues – such as who can and cannot vote, and whether particular potential voters are supervisors excluded from the Act's coverage – places the hearing officer in the role of decision-maker, since the exclusion of such issues and evidence precludes *any* pre-election review by the Regional Director *or* the Board. Such decision-making usurps the authority that has been vested *exclusively* in the Board or its Regional Directors (pursuant to the delegation under Section 3(b)). Under Section 9(c)(1), the hearing officer's role must be "confined to presiding at the hearing" *without* making decisions or recommendations regarding substantive issues, including the determination of when they should be resolved. *See, e.g.*, S. Rep. 80-105, at 25 (1947), *reprinted in* 1 LMRA Hist. 431.

Third, by authorizing hearing officers to exclude from the "record" *all* evidence concerning voter eligibility, supervisory status, and other election issues, the Final Rule undermines the statutory right, established in Section 3(b), to request pre-election Board review and a potential Board-ordered "stay" of "any action" by a Regional Director. The Board cannot effectively decide whether issues of voter eligibility require pre-election resolution, how they should be resolved, or whether there should be a "stay" of the election pending resolution of such matters, without an adequate hearing "record" including evidence presented by all parties that reasonably bears on those issues.

B. The Final Rule Violates Section 3(b) By Eliminating the Statutory Right to Seek Pre-Election Board Review and a Board-Ordered "Stay" of "Any Action" of Regional Directors, Including the Election.

The Final Rule also extinguishes the statutory right to seek pre-election Board review or

to seek a stay of "any action" by a Regional Director. *See, e.g.*, 76 Fed. Reg. at 80,141 ("the Board has decided to amend §§ 102.67 and 102.69 to eliminate the parties' right to file a pre-election request for review of a regional director's decision and direction of election, and instead to defer all requests for Board review until after the election" and "to eliminate the recommendation in § 101.21(d) . . . along with all of Part 101, Subpart C . . . that the regional director should ordinarily not schedule an election sooner than 25 days after the decision and direction of election in order to give the Board an opportunity to rule on a pre-election request for review").

These provisions conflict with the plain meaning of Section 3(b) of the Act. Section 3(b) permits the Board to "delegate to its regional directors" the Board's responsibilities in representation cases, but is conditioned on the right of "any interested person" to seek Board review and a potential Board-ordered "stay" of "any action":

> The Board is . . . authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, *except that upon the filing of a request therefor with the Board by any interested person*, the Board may review *any action of a regional director delegated to him under this paragraph*, but such a 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) (emphasis added).

By adding language to Section 3(b) referencing a potential stay of "any action" by Regional Directors, Congress *broadened* the scope of Board review that could be requested and clearly preserved the right to request a Board-ordered "stay" of the election. In representation cases, the most important "action" by a Regional Director that might warrant a Board-ordered "stay" is the direction of an election despite unresolved questions that can profoundly affect the

results of the election (*e.g.*, questions regarding the eligibility of large numbers of employees to vote in the election). In the past, the Board has determined that a stay of the election is warranted in such circumstances. *See, e.g.*, *Angelica Healthcare,*, 315 NLRB at 1320 (granting review and staying election where Regional Director failed to take evidence in pre-election hearing); *Avon Prods., Inc.*, 262 NLRB 46, 48-49 (1982) (explaining that the Board should have stayed the election based on the request for review because the eligibility issue affected 22% of the unit).

Although phrased in the negative (*i.e.*, Board review shall not operate as a stay "unless specifically ordered by the Board"), Section 3(b) clearly contemplates that the Board, after reviewing the pre-election record, in some cases *will* exercise its discretion to order a stay. The Final Rule improperly eliminates every party's right *to even seek* pre-election Board review (and a potential "stay" of the election) merely because such requests are often denied. While the Board may be selective in granting requests for review, the Board does not have the authority to eliminate the right to seek pre-election review, which is mandatory under Section 3(b) of the Act.

The Final Rule purports to leave open the possibility that parties in an "extraordinary" situation may still seek "special permission" to appeal a Regional Director's ruling to the Board, though this would also be subject to a "new, narrower standard." 76 Fed. Reg. at 80,162 (citing amended § 102.65). This narrow opportunity to seek "special permission" to appeal does not satisfy Section 3(b), for several reasons.

First, it is clear that the Final Rule, in violation of Section 3(b) of the NLRA, intends to *eliminate* the right to seek pre-election Board review. *See, e.g.*, 76 Fed. Reg. at 80,141 ("the Board has decided . . . to eliminate the parties' right to file a pre-election request for review of a regional director's decision and direction of election, and instead to defer all requests for Board

review until after the election"); *id.* at 80,172 (final rule "adopts" proposals "to eliminate the pre-election request-for-review procedure" and to eliminate "the 25-day waiting period" whose stated purpose is "eliminated by the elimination of the pre-election request for review"); *id.* at 80,173 ("elimination of the pre-election request for review will . . . reduce the number of disputes reaching the Board").

Second, the "special permission" provision is limited to "extraordinary circumstances" where "it appears that the issue will otherwise evade review." 76 Fed. Reg. at 80,142, 80,162, 80,184; *see also id.* at 80,163 (applying to "special permission" requests the "general rule" that "interlocutory appeals are not favored"); *id.* at 80,177 ("limiting" this form of "interlocutory appeal will reduce the cost of participating in representation proceedings").

Third, the Final Rule indicates that requests for "special permission" to appeal are highly disfavored and would never be granted except as to an "extraordinary" issue that was *impossible* to review in a post-election appeal. *Id.* at 80,163. This type of narrow, isolated review is qualitatively different from what Section 3(b) requires: a right to seek Board review regarding "*any* action" by Regional Directors in representation cases. 29 U.S.C. § 153(b) (emphasis added). For these reasons, the Final Rule should be set aside. *See Bell Atl.*, 131 F.3d at 1047 ("If this search [using the traditional tools of construction] yields a clear result, then Congress has expressed its intention as to the question, and deference is not appropriate.").

C. The Final Rule Creates an Election Process Similar to What Congress Rejected (Twice) and Deprives Employees of the "Fullest Freedom" in their Exercise of Protected Rights.

The Final Rule eliminates the 25-day waiting period that currently exists in order to provide the Board an opportunity to rule on a pre-election request for review prior to the election. *See* 76 Fed.Reg. at 80,141. To justify this change, the Final Rule asserts that pre-

election litigation – which the Board previously deemed mandatory under the Act – is now "unnecessary" and detracts from "efficiency" or causes too much "delay."[23] Based on the structure, purpose, and legislative history of the NLRA, however, Congress has directly spoken to the precise issue of the balance between administrative efficiency, on the one hand, and assuring employees the "fullest freedom" in exercising their rights under the Act, on the other.

The NLRA gives employees the right "to bargain collectively through representatives of their own choosing . . . and to refrain from . . . such activity." 29 U.S.C. § 157. Section 9(b) of the Act provides that "[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the Act], the unit appropriate for the purposes of collective bargaining." 29 U.S.C. § 159(b). The "fullest freedom" requirement is reinforced by the protection of free speech rights for employees (and employers and unions) in Section 8(c). *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).[24]

Congress in 1959 knew how to shorten the pre-election period by eliminating pre-election hearings, and it did so by enacting Section 8(b)(7)(C). 29 U.S.C. § 158(b)(7)(C). This expedited election procedure applies when a union engages in so-called "recognitional picketing," and an employer files a Section 8(b)(7)(C) unfair labor practice charge as a result. *See Int'l Hod Carriers Bldg. & Common Laborers*, 135 NLRB 1153, 1154, 1157 (1962). Under the Board's implementing regulations for Section 8(b)(7), "the Director may, *without a prior hearing*, direct

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[23] *See, e.g.*, 76 Fed. Reg. at 80,138 (current rules cause "inefficiency, abuse of the process, and delay"); *id*. at 80,149 (Final Rule permits parties to exercise their rights "more efficiently and with less burden and expense"); *id*. at 80,150 (combining pre-election disputes with post-election disputes will "more efficiently" resolve them); *id*. at 80,162 (changes are intended "to ensure that the pre-election hearing is conducted efficiently and is no longer than necessary"); *id*. at 80,138 ("The amendments are intended to eliminate unnecessary litigation [and] delay").

[24] Section 8(c) protects the "expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form" provided there is no "threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). Consistent with Section 8(c), the Supreme Court has held that "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *Gissel Packing Co.*, 395 U.S. at 617.

that an election be held in an appropriate unit of employees" and "fix[] the basis of eligibility of voters . . . ." 29 C.F.R. § 102. 23(b) (emphasis added). The Board has explained that in 1959, while creating the Section 8(b)(7) election process, "Congress rejected efforts to amend the provisions of Section 9(c) of the Act so as to dispense generally with preelection hearings." *Int'l Hod Carriers*, 135 NLRB at 1157. The Final Rule, however, would effectively implement an expedited procedure akin to the Section 8(b)(7)(C) process for all Section 9(c) cases.

Based on the legislative history of the 1959 amendments to the Act, it is clear Congress believed that an election period of at least 30 days was necessary to adequately assure employees the "fullest freedom" in exercising their right to choose whether they wish to be represented by a union. As explained by then Senator John F. Kennedy Jr., who chaired the Conference Committee, even in the context of eliminating pre-election hearings, a 30-day period before any election was a necessary "safeguard against rushing employees into an election where they are unfamiliar with the issues." 105 Cong. Rec. 5361 (1959), *reprinted in* 2 LMRDA Hist. 1024 (emphasis added). Senator Kennedy stated "there should be at least a 30-day interval between the request for an election and the holding of the election" and he opposed an amendment that failed to provide "at least 30 days in which both parties can present their viewpoints." 105 Cong. Rec. 5770 (1959), *reprinted in* 2 LMRDA Hist. 1085 (statement of Sen. Kennedy) (emphasis added); *see also* H.R. Rep. 86-741, at 25 (1959), *reprinted in* 1 LMRDA Hist. 783 (minimum 30-day pre-election period was designed to "guard[] against 'quickie' elections").

Notably, the Board's own procedures, consistent with what Congress intended, have required pre-election periods to be longer than 30 days (absent stipulation by the parties).[25] And

[25] Under Board procedures changed by the Final Rule, at least 7 days were required before the pre-election hearing (76 Fed. Reg. at 80,139); an additional 7 days elapsed before the filing of post-hearing briefs (*id.* at 80,140); and Regional Directors were instructed not to schedule an election sooner than 25 days after directing an election (*id.*). These rules caused the pre-election period, after the filing of a petition, to be at least 39 days (again, excluding

in fiscal year 2010, counting all elections (stipulated and disputed), the average pre-election period—without the Final Rule changes--had already been reduced to *31 days*.[26] The rejection of the 1959 pre-hearing election proposals based on opposition to "quicky elections" – even though those proposals guaranteed a minimum 30-day pre-election period – reveals that Congress believed employees needed at least 30 days after the filing of a petition in order to have "fullest freedom" when voting in an election. In short, this legislative history squarely refutes the Final Rule's premise that the existing election period must be shortened to something less than 30 days. Congress in 1959 specifically rejected proposals to expedite the Board's pre-election procedures to this degree, based on concerns that elections would take place *too quickly* to satisfy the Act's primary objective of giving employees "the fullest freedom in exercising the rights guaranteed by [the] Act." 29 U.S.C. § 159(b); 105 Cong. Rec. 16629 (1959), *reprinted in* 2 LMRDA Hist. 1871; 105 Cong. Rec. A8062 (1959), *reprinted in* 2 LMRDA Hist. 1813; H.R. Rep. 86-741, at 25 (1959), *reprinted in* 1 LMRDA Hist. 783. Depriving employees the fullest freedom, in the name of efficiency, is contrary to clear congressional intent. *See Hammontree*, 894 F.2d at 441 (rejecting the Board's argument that in light of "competing" objectives it has discretion to disregard one of Congress' goals).

An administrative agency "may not serve as surrogate legislator," and that is exactly the role the Final Rule does by eviscerating pre-election hearings in an effort to "reform" federal labor law through regulatory change. *Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 988 F.2d

situations where the parties voluntarily agreed to a shorter pre-election period).

[26] Gen. Counsel Mem. 11-09, at 18 (March 16, 2011), cited in 76 Fed. Reg. at 36,831 n.75 (Member Hayes, dissenting). The Board has reported that, in 1960, the median average number of days from the filing of a petition to the direction of an election was *82 days*. *See* 76 Fed.Reg. 36,812, 36,814 n.16 (June 22, 2011) (NLRB proposed election rule). By comparison, over the past decade, elections have occurred within a median time of *38 days* after the filing of a petition (*id*. at 36,814), and in fiscal year 2010 (as noted in the text), the average time from petition to an election was *31 days*. Gen. Counsel Mem. 11-09, at 18 (March 16, 2011), *cited in* 76 Fed. Reg. at 36,831 n.75 (Member Hayes, dissenting).

133, 141, n.10 (D.C. Cir. 1993). Even if the Final Rule did not violate Sections 3 and 9 of the Act, which they do, the analysis and legislative history cited above, which is dismissed in the Final Rule, shows that the two members' interpretation of the NLRA is unreasonable. Over the past decades, there have been numerous failed attempts by labor unions and legislators to condense the Board's pre-election timeframe. Congress' rejection of these attempts and the absence of any effort by the NLRB for over 65 years to overhaul the representation procedures without prior legislative action undermines the current action by the two members to do what has never been done. *See Bankamerica Corp. v. United States*, 462 U.S. 122, 131 (1983) ("[T]he government's failure for over 60 years to exercise the power it now claims . . . strongly suggests that it did not read the statute as granting such power."); *Fed. Trade Comm'n v. Bunte Bros.*, 312 U.S. 349, 352 (1941) ("[T]he want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred."). For all of the above reasons, this Court should set aside the entire Final Rule on the basis that it is "not in accordance with the law." 5 U.S.C. § 706(2)(A).[27]

III. In Its Effort To Expedite The Rulemaking Process, Two Members Of The Board Took Many Arbitrary And Capricious Actions.

The Final Rule was not only issued without authority and is inconsistent with the NLRA, it also violates the APA because it is arbitrary and capricious in at least the following three ways: a) the two members broke from the Board's prior practice regarding overruling precedent; b) the two members failed to adequately address comments regarding their overruling precedent; and c) the two members did not allow a sufficient opportunity for writing or circulating a dissent.

[27] Where, as here, "there is substantial doubt that the agency would have adopted the same disposition regarding the unchallenged portion if the challenged portion were subtracted, partial affirmance is improper." *North Carolina v. FERC*, 730 F.2d 790, 796 (D.C. Cir. 1984); *see also Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1447 (D.C. Cir. 1994).

A. <u>It Was Arbitrary and Capricious to Break From the Board's Prior Practice Regarding Overruling Precedent and to Not Adequately Address Comments on the Issue.</u>

"It is the tradition of the Board that the power to overrule precedent will be exercised only by a three-member majority of the Board." *Hacienda Resort Hotel & Casino*, 355 NLRB No. 154, at *3 & n.1 (2010) (collecting cases), *decision vacated on other grounds by Local Jt. Exec. Bd. of Las Vegas v. NLRB*, 657 F.3d 865 (9th Cir. 2011). The Final Rule plainly overrules existing Board precedent. Doing so with approval from only two members of the Board is an arbitrary and capricious departure from the Board's prior practice. Moreover, by incorrectly asserting that their actions do not overrule precedent, the two members failed to adequately address relevant comments.

The Final Rule gives three reasons for why it is not applying this prior practice to the issuance of the Final Rule. Each one, however, is either illogical or blatantly incorrect. <u>First</u>, the preamble asserts that the Final Rule does not reverse any prior Board decisions. 76 Fed. Reg. at 80,165. This is simply incorrect. In *Barre-National, Inc.*, the Board held that the Regional Director erred by refusing to allow the employer to present evidence prior to the election, stating that the pre-election hearing "did not meet the requirements *of the Act* and the Board's Rules and Statements of Procedure." 316 NLRB at 878 (emphasis added). The Regional Director had permitted only an offer of proof by the employer and, just like the Final Rule provides, permitted the employees to vote subject to challenge, leaving resolution of the supervisory issue to the post-election challenge procedure. The Board held that Section 9(c) requires the Board to permit employers to present evidence in support of their positions at a pre-election hearing.

The Final Rule's preamble argues that *Barre-National's* holding rested solely on the Board's existing regulations, not an interpretation of Section 9(c). 76 Fed. Reg. at 80,165. "Because of the use of the conjunctive 'and' and rather than the disjunctive 'or' and the fact that

nothing in Section 9(c) of the Act can possibly be understood to give parties a right to litigate questions of individual eligibility or inclusion prior to an election, *Barre-National* cannot be read to rest on a construction of the Act, but only on the Board's reading of §§ 102.66(a) and 101.20(c)." *Id.* This parsing of the Board's holding in *Barre-National* is illogical, and, in any event, it is expressly contradicted by the Board's holding in *North Manchester* four years later. In that case, the Board stated that "[i]n *Barre-National*, the Board held that the preelection hearing *did not meet the requirements of the Act, or* of the Board's rules and Statements of Procedure . . . ." 328 NLRB at 372-73 (emphasis added). Under the rationale in the Final Rule's preamble, the use of the disjunctive "or" in *North Manchester* refutes its claim that *Barre-National's* holding rested solely on regulatory interpretation, not an interpretation of Section 9(c)'s "appropriate hearing" mandate.

The Final Rule, by severely limiting the presentation of evidence and deferring all requests for Board hearings and review until after the election, boldly reverses these prior Board decisions. 76 Fed. Reg. at 80,141. This problem was raised in comments on the proposed rule and, by erroneously denying that the Final Rule overrules these decisions, the two members failed to adequately address these comments. *See Reytblatt v. NRC*, 105 F.3d 715, 722 (D.C. Cir. 1997) ("An agency need not address every comment, but it must respond in a reasoned manner to those that raise significant problems."). The two members' decision to issue the Final Rule despite the Board's practice in such circumstances, therefore, "was not 'based on a consideration of the relevant factors.'" *Thompson v. Clark*, 741 F.2d 401, 409 (D.C. Cir. 1984) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)). Accordingly, on this basis alone, the Final Rule should be set aside as arbitrary and capricious. *Id.; see also Motor Vehicle Mfg. Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, the

agency rule would be arbitrary and capricious if the agency has . . . offered an explanation for its decision that runs counter to the evidence before the agency.").

Second, the two members claim that three members are required to overrule prior decisions only in adjudication, not rulemaking. 76 Fed. Reg. at 80,146. This, however, is a distinction without a difference. The two members admit the Board has traditionally used case adjudication to alter or amend its representation case procedures: "[T]he Board has interpreted and occasionally altered or created its representation case procedures through adjudication." 76 Fed. Reg. at 80,138. Thus, rulemaking is simply a different means to the same end. Indeed, two members prevented from overruling precedent by case adjudication could, under this illogical position, initiate rulemaking procedures to circumvent the three-member requirement.

Third, the two members claim that "the final rule is purely procedural." *Id.* at 80,146. This again is incorrect. The sweeping changes in the elections procedures clearly impact 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 Section 8(c).

The two members, therefore, offer no meaningful explanation for their departure from the Board's traditional practice of requiring the approval of three members to overrule precedent and disingenuously claims they did not overrule precedent. The Final Rule is thus arbitrary and capricious and must be held unlawful and set aside.

B. Acting Without Sufficient Opportunity For the Writing or Circulating a Dissent Was Arbitrary and Capricious.

As stated in Section I, *supra,* because Member Hayes did not participate in the vote on whether to adopt the Final Rule, the Board was without authority to act. But had Congress authorized Chairman Pearce and then-Member Becker to act on behalf of the Board, the Final Rule would still fail because it was arbitrary and capricious to issue it without providing Member

Hayes a sufficient opportunity to write and circulate what the other members must have expected would have been a dissenting opinion before the Final Rule was promulgated.

Historically, the Board has recognized that dissenting opinions are valuable and should be incorporated in the Board's deliberative process. For example, pursuant to the Executive Secretary's Memorandum No. 01-1 (January 19, 2001), an adjudicated case may issue without a dissent only "if 90 days have passed following the circulation of a majority-approved draft without action by the remaining Board Member or Members." 76 Fed. Reg. at 80,146 The two members who issued the Final Rule argued that the Executive Secretary's mandate does not address the internal process of rulemaking. *Id.* As explained above, however, this distinction is specious because the Board admits that "[i]n its 76-year history, the Board—which has interpreted and administered the National Labor Relations Act primarily through adjudication—has engaged in notice-and-comment rulemaking only rarely." 76 Fed. Reg. at 80,146." Indeed, the practice applies with greater force in a broad rulemaking, which is applicable to the entire regulated community, than in an individual case, which may be based on individual facts.

Furthermore, there are no "rulemaking procedures." And when the Board has engaged in notice-and-comment rulemaking in the past, the dissenter has voted and issued the dissent with the rule. In 1989, for example, a member dissenting from a rule establishing health care bargaining units was given the opportunity to participate and his opinion was published with the final rule. 54 Fed. Reg. 16,336, 16,347 (April 21, 1989). Indeed, at the notice stage in this rulemaking, Member Hayes issued a dissent that was published with the proposed rule. 76 Fed. Reg. 36,829-33.

The Board's historical position that dissenting opinions are a valuable part of the deliberative process is well supported. Dissenting opinions improve decision-making and

strengthen final decisions. Justice Ruth Bader Ginsberg discussed the "in-house" utility of dissenting opinions in an address to the Harvard Club of Washington, D.C.:

> My experience teaches that there is nothing better than an impressive dissent to lead the author of the majority opinion to refine and clarify her initial circulation. An illustration: the Virginia Military Institute (VMI) case, decided by the Court in 1996, held that VMI's denial of admission to women violated the Fourteenth Amendment's Equal Protection Clause. I was assigned to write the Court's opinion. The final draft, released to the public, was ever so much better than my first, second, and at least a dozen more drafts, thanks to Justice Scalia's attention-grabbing dissent.

Hon. Ruth Bader Ginsburg, *The Role of Dissenting Opinions,* 95 Minn.L.Rev. 1, 3 (2010) (footnote omitted). Indeed, according to Justice Ginsberg "[o]n occasion—not more than four times per term I would estimate—a dissent will be so persuasive that it attracts the votes necessary to become the opinion of the Court." *Id.* at 4.

Other agencies also clearly give dissenters the ability to participate in the deliberative process when issuing final rules. *See, e.g.*, 75 Fed. Reg. 26,062, 26,083 (May 11, 2010) (dissent from Representation Election Procedure Final Rule issued by the National Mediation Board); 72 Fed. Reg. 39,904, 40,046 (July 20, 2007) (Attachment A to Federal Energy Regulatory Commission Final Rule: Commissioner Moeller dissenting in part); 71 Fed. Reg. 42,028 (July 25, 2006) ("The [Consumer Product Safety] Commission voted 2-1 to issue the final interpretative rule, Commissioner Thomas Moore dissenting."); 67 Fed. Reg. 5723 (February 7, 2002) ("[T]he proposed rule is adopted by the majority of the [Railroad Retirement Board], Management Member dissenting.").[28] The Board's historical treatment of dissenters is thus consistent with other agencies, as well as courts.

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[28] *See* Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. Rev. 411, 431 n.102 (2010). The two members of the Board who issued the Final Rule cite this law review article for the proposition that "[t]he APA does not address the possibility of dissents in agency rulemakings, and agencies seem to have widely different practices in this regard." 76 Fed. Reg. at 80,146 n.26. In none of these examples, however, did an agency preclude a

In the two members' haste to issue the Final Rule, however, they did not follow the Board's established procedure. Member Hayes, therefore, was not given sufficient time to share his opinion with the two other members before the rule was adopted by those two members. And allowing for a dissent up to 90 days *after* issuing the Final Rule provides no benefit to the deliberative process. The rule has already been voted on and is final. The two members reduced any dissenting opinion to simply an opportunity for a member to express a point of view, as opposed to a way of participating in the deliberative process. 76 Fed. Reg. at 80,146.

The Final Rule's issuance without the normal deliberative process is especially objectionable because Congress in 1935 created the Board to function as a "quasi-judicial" agency, and this was regarded as central to NLRA's constitutionality.[29] Moreover, Congress in 1947 amended the Act to force the Board to function even more like the courts regarding areas where disagreements existed among Board members.[30] For example, Congress prohibited the Board from employing any attorneys for the purposes of "reviewing transcripts of hearings or preparing drafts of opinions." 29 U.S.C. § 154(a). The Senate report on S. 1126 criticized the practice of delegating the preparation of draft opinions because it produced decisions that failed to truly represent the considered opinions of Board members:

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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.

[29] Then Secretary of Labor Frances Perkins advocated making the Board "more judicial in character" and "as much as possible like a Court," H.R. Rep. 74-969, at 10 (1935), *reprinted in* 2 NLRA Hist. 2919 (letter from Secretary of Labor Frances Perkins), and the Senate stressed "the emphasis . . . place[d] on the strictly judicial aspect of the work of the Board." S. Rep. 79-1184, at 3 (1934), *reprinted in* 1 NLRA Hist. 1101 (emphasis added). Shortly before the NLRA was adopted, the National Industrial Recovery Act ("NIRA") was declared unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Based on similar constitutionality concerns about the Wagner Act, Congress specifically designed the Board to be "a quasi-judicial body, which acts upon formal complaint, after due notice and hearing." 74 Cong. Rec. 8536 (1935), *reprinted in* 2 NLRA Hist. 3007 (statement of Rep. Connery).

[30] *See* S. Rep. 80-105, at 3 (1947), *reprinted in* 1 LMRDA Hist. 409 (describing amendments designed to make Board members more responsible "performing their judicial functions").

> Consequently, unless there is a dissent which one of the majority members sees fit to answer, both the decision and the form in which it appears are virtually a product of the corporate personality of this legal section. In other words, the Board, instead of acting like an appellate court where the divergent views of the different justices may be reflected in each decision, tends to dispose of cases in an institutional fashion.

S. Rep. 80-105, at 9 (1947), *reprinted in* 1 LMRA Hist. 415.

When Board decisions fail to reflect the divergent views of its members, according to the Senate Report, "the congressional purpose in having the act administered by a Board of several members rather than a single administrator has been frustrated." *Id.*

The two members have failed to provide any logical reason for abandoning the Board's prior position that dissenting opinions are a valuable part of its deliberative process. Instead, they simply rely on their own *ipse dixit*: "[I]ntramural debate between or among agency officials" is not an important part of rulemaking. 76 Fed. Reg. at 80,147. The two members clearly gave no weight to the importance of the dissent, traditionally recognized by the Board's practice and procedures. This departure from the agency's well-established practice and procedure is arbitrary and capricious, and the Final Rule should be set aside for this reason even if the two members had authority to issue the Final Rule, which they plainly did not.

CONCLUSION

Two members of the NLRB issued the Final Rule without the statutorily required quorum; the Final Rule is also inconsistent with the NLRA; and many of the two members' actions, taken in part to expedite the rulemaking process, were arbitrary and capricious. For all of the foregoing reasons, the Chamber and CDW respectfully submit that the Court should grant their motion for summary judgment, hold that the Final Rule is unlawful, and set it aside.

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Respectfully submitted,

/s/ Howard M. Radzely

MORGAN, LEWIS & BOCKIUS LLP
Howard M. Radzely (D.C. Bar #437957)
Charles I. Cohen (D.C. Bar #284893)
Jonathan C. Fritts (D.C. Bar #464011)
Michael W. Steinberg (D.C. Bar #964502)
David M. Kerr (D.C. Bar #475707)
David R. Broderdorf (D.C. Bar #984847)
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-5996

Philip A. Miscimarra (Pro Hac Vice)
MORGAN, LEWIS & BOCKIUS LLP
77 West Wacker Drive, 5th Floor
Chicago, Illinois 60601
(312) 324-1000

Counsel for CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and COALITION FOR A DEMOCRATIC WORKPLACE

Robin S. Conrad (D.C. Bar #342774)
Shane B. Kawka (D.C. Bar #456402)
Rachel Brand (D.C. Bar #469106)
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA